IN THE SUPREME COURT OF FIJI

[CIVIL APPELLATE JURISDICTION]

CIVIL PETITION No: CBV 0012/18
(On Appeal From Court of Appeal No: ABU 104/16)

BETWEEN	**:**	**KAMINIELI VOLAU TUNISAU**
		Petitioner
AND	**:**	**1. THE MINISTER FOR WORKS & INFRASTRUCTURE**
		2. THE ATTORNEY GENERAL OF FIJI
		3. THE NATIVE LAND TRUST BOARD
		Respondents
Coram	**:**	**Hon. Mr. Justice Suresh Chandra, Judge of the Supreme Court** **Hon. Mr. Justice Priyantha Jayawardena, Judge of the Supreme Court** **Hon. Mr. Justice Quentin Loh, Judge of the Supreme Court**
Counsel	**:**	**Mr. Fa, for the Petitioner** **Ms. Motofaga, for the 1st and 2nd Respondent** **Ms. Komaitai, for the 3rd Respondent**
Date of Hearing	**:**	**22 August 2019**
Date of Judgment	**:**	**30 August 2019**

JUDGMENT

Suresh Chandra, J

1. I have had the advantage of reading the judgment of Justice Jayawardena in draft and I agree with the reasoning and conclusion reached. I also concur with the orders proposed.

Quentin Loh, J

2. I have had the advantage of reading the judgment of Justice Jayawardena in draft and I agree with the reasoning and conclusion reached. I also concur with the orders proposed.

Priyantha Jayawardena, J

3. This is an appeal seeking special leave to appeal to the Supreme Court of Fiji from the judgment of the Court of Appeal dated 1st of June, 2018. It relates to the striking out a Writ of Summons filed in the High Court and dismissing the action with costs which was later affirmed by the Court of Appeal.

FACTUAL MATRIX

Writ of Summons filed in the High Court

4. The Petitioner had filed an action in the High Court by way of a Writ of Summons in his personal capacity as a member of the Mataqali Navurevure of the Yavusa Matanikutu, of Tamavua village in the Province of Naitasiri, and for and on behalf of the people of Yavusa Matanikutu of Tamavua village and Yavusa Nayavumata of Suvavou village, Lami.

5. In his Statement of Claim filed in the High Court, the Petitioner had stated that;

   i. He is registered in the Register of Native Lands as a member of the Mataqali Navurevure of the Yavusa Matanikutu of Tamavua village in the province of Naitasiri,
   ii. The Mataqali Navurevure together with seven (7) other Mataqali's comprises the Yavusa Matanikutu of Tamavua village. The Yavusa Matanikutu together with the Yavusa Nayavumata of Savavou village own substantial areas of native land in areas around Suva, in particular, Tamavua Wailoa, Namadi and Cunningham,
   iii. At all material times and since time immemorial, the Petitioner and his ancestors have controlled, occupied and owned collectively and in accordance

with their custom and tradition, native land amounting to eight hundred and five (805) acres which is situated in and or around Tamavua, Wailoku and Savura areas in the province of Naitasiri,

iv. Out of the 805 acres of native land owned by the Petitioner, the 1st and 2nd Respondent sometime in or about 1957 took possession of 11 acres, 3 roods and 24 perches (hereinafter referred to as the "Land") and made substantial developments by constructing a water treatment plant and related facilities.

Cause of Action against the 1st And 2nd Respondents

6. Since on or about 1957, the 1st and 2nd Respondents have been in unlawful occupation of the Petitioner native land without a lease or license, and have not paid for the use and occupation of the said native land. Thus, the Petitioner has been deprived of rental income from the said land.

Cause of Action against the 3rd Respondent

7. The 3rd respondent is by law vested with the powers of control and administration of all native land in Fiji, including native land belonging to the Petitioner and the 3rd Respondent, and has acted unlawfully and in breach of the Native Land Trust Act in failing to administer the Petitioner native land for his benefit.

Prayer

8. The Petitioner in his Statement of Claim prayed for *inter-alia* the following reliefs;

i. A declaration that the 1st and 2nd Respondents are in illegal occupation of his native land amounting to 11 acres, 3 roods and 24 perches on which the Suva Water Treatment Plant and related facilities were constructed, and have been in unlawful occupation of the same since on or about 1957,

ii. Damages against the 1st and 2nd Respondents in the sum of five million Fijian dollars (FJ$ 5,000,000.00) as rent for the occupation and use of the Petitioner's native land since on or about 1957,

iii. A declaration that the 3rd Respondents has acted in breach of its duties under the Native Land Trust Act to administer the Petitioner's native land for the benefit of the Petitioner, and

iv. A declaration that the 1st and 2nd Respondents are trespassers on the Petitioner's native land and the said trespass continues till to date.

1st Statement of Defence

9. The Respondents filed the Statement of Defence on the 29th of March, 2006 and *inter-alia* denied the averments contained in the Statement of Claim, and requested the Petitioner to prove the facts alleged in the said Statement of Claim.

2nd Statement of Defence

10. Thereafter, the Respondents filed another Statement of Defence on the 25th of April, 2006 and stated *inter-alia* that;

    i. the 1st and 2nd Respondents occupy the land comprising of an area of 11 acres, 3 roods and 24 perches,

    ii. the said land was owned by the Yavusas Matanikutu of Tamavua and Nayavumata of Suvavou,

    iii. the said land was compulsorily acquired under the Crown Acquisition of Lands Ordinance and therefore, denied that they are in unlawful occupation of the land under reference, and

    iv. the Petitioner has no cause of action against the Respondents.

Reply to the Statement of Defence

11. Thereafter, the Petitioner filed a reply to the Respondents' statement of defence and denied the averments contained therein except the admissions stated in the said statement of defence.

Minutes of the pre-trial conference dated 16th of April, 2008

12. **"A. AGREED FACTS**

i. The plaintiff is a member of the Mataqali Navurevure of the Yavusa Matanikutu of Tamavua village in the province of Naitasiri.
ii. The plaintiff is registered in the Register of Native Lands – Vila ni Kawa Bula as a member of the Yavusa Matanikutu of Tamavua village in the province of Naitasiri.
iii. The 3rd defendant is by Law, vested with the powers of control and administration of all native lands in Fiji, including native land belonging to the plaintiff.
iv. The 1st and 2nd defendants are in occupation of a portion of native land amounting to 11 acres, 3 roods and 24 perches.**"**

13. **"B. AGREED ISSUES**

i. Whether the 1st and 2nd defendants have been in unlawful occupation of the plaintiff's native land since on or about 1957 and continue to do so until today?
ii. Whether the 3rd defendant has acted unlawfully and in breach of the Native Land Trust Act in failing to administer the plaintiff's native land for its benefit?
iii. If the answers to 1 & 2 above are affirmative, then whether as a result of the defendant's action, the plaintiff's has been deprived of substantial income and has suffered loss and damages?

iv. Whether the 2nd Defendant had acquired the Land in issue through compulsory acquisition? "

Amended Minutes of the pre-trial conference dated 17th of March, 2009

14. **A. AGREED FACTS**

At the second pre-trial Conference whilst the parties did not change the agreed facts, the parties made changes to the agreed issues and the amended issues are as follows;

15. **"B. AGREED ISSUES**

i. Whether the 1st and 2nd defendants have been in unlawful occupation of the plaintiff's native land since on or about 1957 and continue to do so until today ?
ii. Whether the 3rd defendant has acted unlawfully and in breach of the Native Land Trust Act in failing to administer the plaintiff's native land for its benefit ?
iii. If the answers to either 1 or 2 above is in the affirmative, whether the plaintiff has been deprived of substantial income and has suffered loss and damages ?
iv. Whether the 2nd defendant had ***purportedly*** acquired the land in issue through compulsory acquisition ?
v. Whether the ***purported*** compulsory acquisition of the land in issue was carried out in accordance with the law?" **[*Emphasis added*]"**

JUDGEMENT OF THE HIGH COURT

16. After an *inter-parte* trial, the High Court delivered the judgment on the 15th of July, 2016 and *inter-alia* held that;
    i. If the Respondents intend to take up the position that the action of the Petitioner is barred by a provision of the Statute of Limitation it must be specifically pleaded.
    ii. However, the Respondents raised the defence of prescription only in their written submission which was filed after the case was closed.

iii. For the reasons aforementioned, the preliminary objection raised by the Respondents to the maintainability of the action on the ground that it is time barred must necessarily fail.

iv. The Petitioner for the first time sought to challenge the legality of the acquisition of the land in question at the second pre-trial conference held on 7th March, 2009 where he amended issue Nos. 4 and 5 stated above.

v. In the Statement of Claim, nothing is stated about the acquisition of the land by the Governor under and in terms of the Crown Acquisition of Lands Ordinance.

vi. The Petitioner having ample opportunity to amend the pleadings by including an averment challenging the legality of the acquisition, sought to raise it for the first time at the second pre-trial conference which is not permitted by law.

vii. The Petitioner is not entitled in law to bring in a new cause of action by amending the minutes of the pre-trial conference without amending the Statement of Claim, even with the consent of the other parties.

viii. The Petitioner is not entitled in law to challenge the legality of the acquisition of the land in the proceedings before the High Court which was raised as an issue in the second pre-trial conference without amending the Statement of Claim.

ix. Section 4 (1) of the Crown Acquisition of Lands Ordinance provides that, it shall be lawful for the Governor to acquire lands without compensation which is the property of a Mataqali or a division of a Mataqali which may be deemed necessary to acquire for any of the purposes mentioned therein. The section also provides that the land to be so acquired shall not exceed one twentieth part of the whole of the land belonging to the Mataqali or a division of a Mataqali to whom the land acquired belongs.

x. From the gazette notification No. 2 of 1960 produced at the trial, it appears that this land has been acquired by the Governor, acting under the powers conferred upon him by the Crown Acquisition of Lands Ordinance.

xi. When the authority to acquire lands is conferred upon by the statute, the acquiring officer does not have to obtain the consent of any other institution or authority. Therefore, the 3rd Respondent had no authority to object to the official acts done by the Governor even if it wanted to.

xii. Although in the gazette notification published by the Director of Lands on behalf of the Governor, there was a requirement that the persons claiming to have any interest in the land to make their claims within three months from the date of the notice which was 24th December, 1959**,** there was no evidence that the Petitioner's predecessors in title of the land or any other person who claimed to have title in the land, have made any such claim.

xiii. The Petitioner who brought the instant action and the official witnesses were not able to inform the court what transpired at the time the land was acquired.

xiv. The Petitioner failed to prove that the 1st and 2nd Respondents are in unlawful occupation of the land under reference and the 3rd Respondent has acted in breach of the Native Land Trust Act by failing to administer the Petitioner Native Land for its benefit.

xv. Since the Petitioner has failed to establish the claim, the question of damages does not arise for consideration.

xvi. In any event, the Petitioner has not been able to establish the amount of damages claimed. In the instant case there is no evidence on the quantum of damages claimed.

xvii. In these circumstances, it cannot be held that the 1st and 2nd Respondents are in illegal and/or unlawful occupation of the said land as claimed in the Statement of Claim filed by the Petitioner.

17. Accordingly, the High Court ordered the Writ of Summons of the Petitioner dated 16th of September, 2005 to be struck out and the action was dismissed.

APPEAL BEFORE THE COURT OF APPEAL

18. Being aggrieved by the said judgment of the High Court the Petitioner appealed to the Court of Appeal.
19. In its appeal the Petitioner pleaded *inter-alia* the following grounds;

i. the learned Judge had erred in law in failing to hold that the 1st and 2nd Respondents do not have a certificate of title or a lease or license over the land in question that entitles them in law to occupy the land in question.

ii. the learned judge had erred in law in holding that the land in question had been compulsorily acquired by the State pursuant to section 4(1) of the Crown Lands Acquisition Ordinance, when the evidence at the trial established that the land to date remains native land registered in the name of the Yavusa Matanikutu of Tamavua village and the Yavusa Nayavumata of Suvavou in Lami as owners of the said land under customary native title and tenure.

iii. the learned judge had erred in Law by holding that the Petitioner intended to raise a new cause of action by amending the minutes of the second pre-trial conference to introduce the following issues:

iv. Whether the 2nd Respondent had purportedly acquired the Land in issue through compulsory acquisition?

v. Whether the 2nd Respondent had carried out the purported compulsory acquisition of the land in issue in accordance with the law?

vi. the learned judge had erred in law in holding that the land had been compulsorily acquired by the State pursuant to section 4 (1) of the Crown Lands Acquisition Ordinance, when in fact the 1st Respondent does not have a title to the land registered in the name of the State or its authorized representative but rather the title to the land in question is to this date registered in the name of the Yavusa Matanikutu of Tamavua and the Yavusa Nayavumata of Suvavou as the owners of the land.

vii. the learned judge had erred in law in failing to award the Petitioner damages as the Petitioner had established at the trial that they are the owners of the land in question, as the land to this date is registered in the names of the Yavusa Matanikutu of Tamavua Village and the Yavusa Nayavumata of Suvavou Lami and they have not given consent or permission to any of the Respondents to build a water treatment plant on their land and they have not been compensated for the unlawful use of their land since on or about 1957,

viii. the learned judge erred in law in holding that the land in question was acquired by the Government under Section 4 of the Crown Acquisition of Land Ordinance when in fact the section of the said Act was not applicable for compulsory acquisition for the land in question.

ix. the learned Judge erred in law in failing to hold that section 4(1) of the Crown Acquisition of Land Ordinance does not apply to the compulsory acquisition of Native Land without payment ~~of~~ to build a water treatment plant as is the case for the land in question.

x. the learned judge erred in law in failing to hold that there is no title over the land in question that is registered under the Land Transfer Act.

xi. The learned judge erred in law in failing to hold that, it is illegal and unlawful for the 1st Respondent to occupy any Native Land held under customary land tenure by its Fijian owners without a lease or license as in the present case.

20. The Court of Appeal inter-alia held that;

> *"In paragraph 17 of the judgment the learned Judge had reproduced the two new issues the appellant had issued as issues No. 4 & 5. The issue raised is whether the acquisition was carried out in accordance with the law. This issue could be raised only on admitting the acquisition. It is only after admitting the acquisition that the appellant could attack the validity. What the appellant says is that, although he admits that there was an acquisition the appellant cannot accept it as it is not lawful. For whatever the reason the appellant was not allowed to attack the validity of the acquisition".*
>
> *"…….. The appellant states, the public purpose defined above (referring to section 4 (1) does not include a "Water Treatment Plant". This being the case the acquisition of the plaintiff's land could not have taken place under the above section, namely for a public purposes".*
>
> *"The learned Judge held that (paragraph 23) the appellants are not entitled in law to challenge the legality of the acquisition of the land in these proceedings. While*

accepting that the land was acquired by the 1st respondent, what the appellant seeks now is to challenge the legality of the acquisition. In ***Kilowen Fiji Ltd v Director Lands*** *[2017] FJCA 101 (14 September 2017) the Court of Appeal cited the Case of* ***O'Reilly v Mackman*** *[1983] 2 AC 237 (HL) as to what constitute public law issue. The House of Lords held that,* ***"Since all the remedies for the infringement of rights protected by public law could be obtained on an application for judicial review, as a general rule it would be contrary to public policy and an abuse of the process of the Court for a plaintiff complaining of public authority's infringement of his public law rights to seek redress by ordinary action*** *(emphasis added)……."*

"The submissions by the learned counsel for the appellant revolve around the legality of the acquisition. There is no dispute as to the ownership of this land as far the Register of Lands is concerned. As shown to date as far as the Register of Lands is concerned, the appellant might be shown as the owner. However once the acquisition was admitted the failure to register the land in question, the 1st and the 2nd respondents could not have invested a right in the appellant to maintain that he was still the owner. Further the validity of the acquisition cannot be challenged by way of Writ of Summons. It could be attacked only through judicial review. The procedure to follow is different.

Thus with the acquisition, what is material is, the appellant's ownership stood wiped out. There is no dispute with regard to the publication of the acquisition in the gazette. The fact of publication through the gazette stood as primary proof of the legality of the acquisition by reason of section 4 of the Interpretation Act 1967, which states, "Every Act shall be published in the Gazette, shall be a public Act and shall be judicial noticed". Furthermore, the 1st and the 2nd respondents had been placed in occupation by, presumably by State authorities from, as way back in the year 1957.

Once published in the gazette the land in question ceased to be native land. Moreover, the Crown Lands Act on which learned counsel for the appellant relied stands on a different footing to the Crown Lands Acquisition Ordinance under which the land in question had been acquired……..".

PETITION TO THE SUPREME COURT

Grounds of appeal

21. The Petitioner filed a petition of appeal in the Supreme Court and inter-alia pleaded that the Court of Appeal erred in law;
    i. by applying the case of ***O'Reilly v Mackman*** **[1983] 2 AC 237** which was decided under the public law when the Petitioner was seeking to protect his property rights which is a private law matter.
    ii. in holding that the Petitioner's case challenges the acquisition of land, when in fact the issue of the acquisition of land was raised by the Respondent whilst the Petitioner had sought declarations that the land in question was their native land despite the fact that the State has been in occupation of the land unlawfully for at least 57 years.
    iii. in failing to address the central issue in the appeal before it, when it was to make a determination on whether the High Court had acted correctly by striking out the Petitioner's Statement of Claim on the alleged basis that the Petitioner had failed to challenge the legality of the alleged acquisition in its pleadings.
    iv. in dismissing the Petitioner's appeal on the ground that the Petitioner can challenge the acquisition of the land in question only by judicial review.
    v. in holding that the Petitioner's land was acquired by the State under the Crown Lands Acquisition Act when no evidence was provided to the court that such an acquisition had in fact occurred.
    vi. in holding that the Petitioner had accepted that, the land in question had been acquired by the State when in fact the very purpose of the Petitioner's case was

that there was no such acquisition, as it was still the registered owner of the land under customary law.

Far Reaching Question of Law

22. The petition filed in the Supreme Court stated that the grounds of appeal raised by the Petitioner raises far reaching questions of law. They are set out below:

    i. "Whether the principle in O'Reilly v Mackman is now extended to apply to a party who is seeking the enforcement of his private rights and seeking private law remedies?
    ii. Whether the State is permitted to claim land and utilize the same as its own without having a legal title to the land in its name?
    iii. Whether the Court is permitted to strike out a Statement of Claim when the parties in their pre-trial conference minutes had agreed in writing to the issues for determination of the court, on the alleged basis that the agreed issues were not pleaded in the Pleadings?"

A Matter of Great General or Public Importance

23. The State has the power under the Crown Acquisition of Land Act, to acquire the private property of citizens for public purposes such as roads, hospitals and public facilities. Further, the State must document all land acquired under the State Acquisition of Land Act. Failure to follow the necessary steps by the State in this regard will result in substantial damages to the State.

24. The Petitioner submitted that;
    a) The judgment of the Court of Appeal is based on the application of the principle pronounced by the House of Lords in the case of ***O'Reilly v Mackman*** **[1983] 2 AC 237** where it held that;

"since all the remedies for the infringement of rights protected by public law could be obtained on an application for judicial review as a general rule, it would be contrary to public policy and an abuse of the process of the court for a Plaintiff complaining of a public authority's infringement of his public law rights to seek redress by ordinary action"

b) The Court of Appeal in its judgment has extended the application of the abovementioned principle to the appeal filed in the Court of Appeal where the private law rights of the Petitioner was the subject matter of the appeal. The Petitioner further submitted that the extension by the Court of Appeal of the principle set out in ***O'Reilly v Mackman*** to the Petitioner private law rights is contrary to law.

c) The Court of Appeal did not consider the core issues where the High Court erred in law in holding;

"The Plaintiff having ample opportunity to amend the pleadings by including an averment challenging the legality of the acquisitions, sought to raise it for the first time in the amended minutes of the pre-trial conference which is not permitted by law. Since I have already discussed Order 18 and Order 20 of the High Court Rules 1988, I do not wish to reproduce those rules over again. For these reasons the court is of the opinion that the plaintiffs are not entitled in law to challenge the legality of the acquisition of the land in these proceedings."

d) The Court of Appeal failed to address the issues which were in the appeal filed by the Petitioner.

e) The Court of Appeal erred in law by applying the case of **O'Reilly v Mackman** and deciding that the Petitioner's case should be dismissed as it sought to enforce its public law right and seek remedies in public law, when the Petitioner was

seeking to protect his private property that had been taken over by the State without payment of compensation and consent and was not seeking a remedy in public law as alleged by the court of appeal.

25. Further, the judgment of the case of ***O'Reilly v Mackman*** has no application to the instant appeal.

26. The Court of Appeal erred in law in holding that the Petitioner's case was to challenge the acquisition of land, when in fact the issue of the acquisition of land was raised by the Respondent whilst the Petitioner had sought declarations that the land in question was their native land.

27. Moreover, the Petitioner submitted that the grounds of Appeal referred to in the petition to the Supreme Court set out the grounds on which the Court of Appeal and High Court erred in law and thus, satisfies the requirements of Section 7(3) (a) to (c) of the Supreme Court Act entitling the Petitioner for a grant of special leave to appeal.

28. The Petitioner submitted that the instant appeal fulfills the criteria set out in section 7(3) of the Supreme Court Act 1998 to obtain special leave to appeal from the Supreme Court.

29. In support of the aforementioned position, it was submitted that the instant appeal consists of far reaching questions of law to be determined in respect of the rights of the Lands owned by the native people of the need to register the lands acquired by State.

30. Further, the decision in the instant appeal will have an impact on the public and is of great general or public importance to the rights and entitlements of claimants and their rights pertaining to entitlement for interests.

31. It was also submitted that the Petitioner by reason of the foregoing has suffered substantial and grave injustice and the issues raised in the appeal are far reaching questions of law.

Submissions of the Respondents

32. The Respondents inter-alia submitted that;

i. the Respondents proved that the Governor had acquired the land for public a purpose namely to establish a water treatment plant and related facilities without payment of compensation under section 4 of the Crown Acquisition of Lands Ordinance [Cap 140] and had published the acquisition order in the Royal Gazette No. 2 of 1960,

ii. no one has submitted a claim within a period of 3 months from the date of the said publication of the Gazette notification and now it is not possible to claim damages or compensation for the acquisition,

iii. the process and procedures of compulsory acquisition leading up to the publication of the Gazette notification is an issue false within public law.

iv. the Petitioner challenged the legality of the compulsory acquisition by amending the issues 4 and 5 at the second pre-trial conference and therefore, the Petitioner is now estopped in contesting it now,

v. the Petitioner's submissions in the Court of Appeal was based on the legality of the acquisition and that the land was acquired for a Water Treatment Plant which was not a public purpose defined under section 4(1) of the Ordinance,

vi. therefore, the Court of Appeal was correct in applying the principles set out in the said case of ***O'Reilly v Mackman,***

vii. the Court of Appeal was correct in not allowing the Petitioner to challenge the process leading to the acquisition, as it was not pleaded,

viii. once the acquisition order is published in the Gazette under section 4 of the said Ordinance, the land in question ceased to be a native land and the Petitioner's ownership of the land gets wiped out. Furthermore, the 1st and the 2nd Respondents had been placed in occupation of the land by State authorities as far back as in the year 1957,

ix. the Respondents further submitted that the appeal was not of great or general importance,

x. therefore, the Petitioner is not entitled to proceed with the instant appeal. Accordingly, the appeal should be dismissed, and

xi. the appeal does not meet the criteria set out in section 7(3) of the Supreme Court Act No. 14 of 1998.

Submissions made at the Hearing before the Supreme Court

33. The Petitioner inter-alia submitted that;

i. the Respondents failed to produce a Certificate of Title to the land under reference,
ii. the amended issues recorded at the pre-trial were with the consent of the parties,
iii. the burden of proof of the acquisition of the land was with the Respondents,
iv. the State did not provide evidence of the acquisition,
v. the Gazette which contained the acquisition order was a draft,
vi. the State has not registered the land as a State Land,
vii. the lands acquired under the Crown Acquisition of Lands Ordinance should be registered as State Land under the said Ordinance,
viii. the Petitioner proved the title to the land under reference,
ix. The Petitioner had established at the trial that they are the owners of the land in question as the land to this date is registered in the names of the Yavusa Matanikutu of Tamavua Village and the Yavusa Nayavumata of Suvavou Lami and they have not given consent or permission to any of the Respondents to build a water treatment plant on their land and they have not been compensated for the unlawful use of their land since on or about 1957,
x. High Court dismissed the case on the preliminary issue of the legality of raising new issues at the second pre-trial conference, and
xi. the Court of Appeal on its own raised the issue, whether the subject matter of the appeal false within the realm of public law during the course of the hearing.

34. the Respondents inter-alia submitted that;

i. the Gazette is not a draft but an acquisition order published under the Crown Acquisition of Lands Ordinance.
ii. section 9 and 11 of the Crown Acquisition of Lands Ordinance should be read together,
iii. section 11 of the said Ordinance has no application to the instant appeal as no one lodged a claim within 3 months as required by the Gazette published under the said Ordinance,

iv. The Land Transfer Act, 1971 has no application to the instant appeal as it came into operation only in 1971,

v. The said Gazette was published for the purpose of giving notice of the acquisition to the public,

vi. in the year 1960 there was no requirement to register a land as a State land after an acquisition,

vii. both the High Court and Court of Appeal were correct in dismissing the case of the Petitioner,

viii. the Petitioner failed to satisfy the threshold of section Section 7(3) of the Supreme Court Act of 1998, and Special Leave should not be granted.

CONSIDERATION OF GRANTING OF SPECIAL LEAVE

Criteria for Granting of Special Leave

35. The Appellant is seeking for Special Leave in terms and under section 98(4) of theConstitution of the Republic of Fiji read with Section 7(3) of the Supreme Court Act of 1998. Section 7(3) of the Supreme Court Act states;

> "In relation to a civil matter (including a matter involving a constitutional question) the Supreme Court must not grant special leave to appeal unless the case raises -
>
> a) A far reaching question of law;
> b) A matter of great general or public importance;
> c) A matter that is otherwise of substantial general interest to the administration of civil justice."

36. The aforesaid section has been considered by the Supreme Court in several appeals such as **Bulu v. Housing Authority [2005] FJSC 1** and **Chand v. Fiji Times Ltd [2011] FJSC 2** where it was held that an appeal would not be entertained except where the issues involved in an appeal relates to an issue of public interest, some important question of law,

or affecting property of considerable amount, or where the case is otherwise of some public importance or of a very substantial character.

37. The Petitioner submitted that the grounds of appeal raised in the instant appeal contains far-reaching questions of law and matters of great public importance.

38. The Respondents submitted that the grounds of appeal set out in the petition of appeal do not satisfy the stringent criteria set out in Section 7(3) of the Supreme Court Act 1998. It was further submitted that the questions of law involved in this appeal do not affect the public or even a class of the public and the questions of law raised in the instant appeal are specific to the parties to this appeal.

39. In the circumstances, it is necessary to consider whether the issues urged in the instant appeal meet the threshold set out in the aforementioned section 7(3) of the Supreme Court Act.

40. Hence, the court should consider the nature of the issues involved between the parties and the questions of law involved in the appeal and the importance of such questions of law.

41. The criteria laid down in section 7(3) of the Supreme Court Act 1998 in order to obtain special leave shows that special leave to appeal from the Supreme Court cannot be obtained as a matter of course but after fulfilling the stringent criteria set out in the Act.

Is There a Matter of Great General or Public Importance ?

42. The Petitioner in his petition stated that;

> *"The State has the power under the Crown Acquisition of Land Act, to acquire private property of citizens for public purposes such as roads, hospitals and public facilities. Further, the State must document all land acquired under the*

State Acquisition of Land Act. Failure to follow the necessary steps by the State in this regard will result in substantial damages to the State."

Was it a Necessary Requirement to Register the Lands 1940 by the State under Section 4 of the Crown Acquisition of Lands Ordinance, 1940 in the Name of the State, to have State Ownership ?

43. The said Gazette notification states as follows;

Crown Acquisition of Lands Ordinance

(Chapter 140)

Notice is hereby given that the land described in the schedule hereto is required by the Governor for public purpose.

Any person claiming to have any right or interest in the said lands is required within three months from the date of this notice to send to the Director of Lands a statement of his right and interest and of the evidence thereof of any claim made by him in respect of such right or interest.

And notice is also hereby given that the Governor intends to enter into possession of the said lands at the expiration of 14 weeks from the date of this notice.

Any person who shall wilfully hinder or obstruct the Governor or any person employed by him from taking possession of the said land is liable under the provisions of the Ordinance above-mentioned to imprisonment for three months or to a fine of twenty-five pounds or to both such imprisonment and fine.

The 24th day of December, 1959.

D. T. LLOYD,

Director of Lands. "

44. The above Gazette notification shows that the land under reference had been acquired under section 4(1) of the Land Acquisition Ordinance without payment of compensation. However, there is no evidence to show that a claim had been lodged in respect of the said acquisition in terms of the said Gazette and / or Ordinance.

45. Relatively short limitation periods reflect the fact that judicial review is concerned with the validity of decision making by individuals and bodies exercising Statutory and other powers that must be exercised in the public interest.

46. Section 161 of the Land Transfer Act, 1971 sets out the procedure that should be followed when the State acquired lands for a public purpose. However, the said Act has no application to the instant appeal as the acquisition under reference had taken place in the year 1960.

47. I have considered the relevant provisions of the Crown Acquisition of Lands Ordinance applicable to the date of acquisition of land and I am of the opinion that once a land is acquired by the State, the ownership of the said land is vested in the State by operation of law. It was not imperative to register a land as a State land to get the ownership/title of the land transferred to the State. Further, the absence of a Certificate of Title in respect of a land acquired by the State does not affect the ownership of the State. However, as stated above after the enactment of the Land Transfer Act of 1979 and the other legislation in respect of lands, the State is required to register the lands acquired by the State.

48. I am further of the opinion that, once a land is acquired by the State, it becomes a State land notwithstanding whether the subsequent administrative steps have been taken by the authorities to register the land acquired by the State as a State land. Once an acquisition Order is made the land in question will vest in the State.

49. Therefore, I am of the opinion that the failure to register the land as a State land or to delete the name of the previous owner from the register does not vitiate the acquisition of the land under section 4 of the Crown Acquisition of Lands Ordinance or the ownership of the State. Accordingly, the land under reference has been vested in the State pursuant to the Acquisition Order made under section 4(1) of the Crown Acquisition Ordinance notwithstanding the fact that it has not been registered as a State land in the register and the previous owners name still appears in the register as the owners of the said land.

50. I am also of the view that the Land Transfer Act, 1971 introduced certain requirements for the transfer of lands and to register such transfers. However, the said Act has no application to the instant appeal as the acquisition under reference had taken place prior to the enactment of the Land Transfer Act.

Is the Petitioner Entitled in Law to Challenge the Purpose of the Acquisition?

51. The Petitioner submitted that section 2 of the Crown Acquisition of Lands Ordinance defines “public purpose”. However, constructing a water treatment plant is not one of the public purposes set out in the said section. Therefore, the Petitioner submitted that the acquisition of the land is bad in law.

52. This raises the question as to whether an individual is entitled to institute action by way of a Writ of Summons in the High Court under private law to challenge an acquisition made under section 4(1) of the said Ordinance. This issue will be considered along with the "far reaching questions of law" urged in the petition.

Is There a Far Reaching Question of Law?

53. The petition filed in the Supreme Court stated that the grounds of appeal raised by the Petitioner raises far reaching questions of law. Particularly, whether the principle laid down in the case of in **O’Reilly v Mackman** is now extended to apply to a party seeking to enforce his private rights and seeking redress under private law remedies.

54. The Petitioner submitted that his appeal was dismissed by the Court of Appeal on the basis that he sought to enforce a public law right. However, the Petitioner was seeking to protect his property rights that had been purportedly acquired by the State without payment of compensation or consent. Therefore, he was not seeking a remedy under public law but under private law.

55. Hence, it is necessary to consider the nature of the action filed by the Petitioner in the High Court to ascertain whether the issues involved in an appeal fall within private law or public law.

56. The Petitioner filed a Writ of Summons in the High Court and prayed *inter-alia* for the following reliefs;

> *"A declaration that the 1st and 2nd Defendants are in illegal occupation of its native land amounting to 11 acres, 3 roods and 24 perches on which the Suva Water Treatment Plant and related facilities were constructed and has been in unlawful occupation of the same since on or about 1957".*

57. In the 2nd Statement of Defence, the Respondents took up the position that the land under reference had been acquired under the Crown Acquisition of Lands Ordinance and denied that they are in unlawful occupation of the land.

58. These two interwoven issues had to be adjudicated by the High Court. It appears that at the second pre-trial conference the parties had amended the issues to reflect the above position. The two issues that were highly contested at the High Court trial are reproduced below;

> *"Whether the 2nd Defendant had **purportedly** acquired the land in issue through compulsory acquisition?*
>
> *Whether the **purported** compulsory acquisition of the land in issue was carried out in accordance with the law? " (**emphasis added)***

59. At the trial, the land acquisition was at the forefront of the case. Most of the examination and cross-examination of the witnesses by the parties were on the legality of the acquisition. Particularly, whether the water treatment plant and related facilities fall within the "public purpose" referred to in section 2 read with section 4 of the Land Acquisition Ordinance.

60. In this context, it is necessary to consider the legality of the said acquisition and the publication of the Gazette notification to ascertain whether the issues before the High Court fall within the realm of private law or public law. Further, the core issue of acquisition of the land should be considered in the instant appeal in order to ascertain whether the reliefs prayed for can be granted.

Private Law Vs. Public Law

61. Laws concerning relationships between individuals are considered as "Private law". Private law governs relationships where the parties involved meet on a level playing field. A person may seek redress from the court for infringement of his private law matters under the private law.

62. On the other hand, "Public law" governs relationships between private individuals or private organizations and the State or public bodies performing public functions. A public function is a function carried out by the State or a public body. They are required to carry out a public function in accordance with public laws and rules. However, there can be instances where a public authority is acting as a private entity in order to enter into contracts.

63. A citizen aggrieved by a decision of public law can seek redress by judicial review. Judicial review is a legal process through which a court examines a decision, action or failure to act and whether or not the State or a State agency has performed matters according to law and rules.

64. The decision of the Governor under reference has taken under the Crown Acquisition of Lands Ordinance had exercised statutory powers conferred on him under the said Ordinance. I am of the opinion that the cause of action and the reliefs prayed for in the Statement of Claim arises from the compulsory acquisition of the land under reference

followed by the occupation of the land by the 1st and 2nd Respondents. Hence, I am also of the opinion that the Petitioner is contesting the powers and the acts performed by the Governor under the said Ordinance.

65. A special procedure is laid down in the Ordinance to claim compensation for the acquisition of lands. Although in the gazette notification published by the Director of Lands on behalf of the Governor there was a requirement that the persons claiming to have any interest in the land to make their claim within three months from the date of the notice which was 24th December, 1959, there is no evidence that the predecessors in title of the Petitioner or any other person who claimed to have title in the land, made any such claim. Therefore, section 9 and 11 0f the Crown Acquisition of Lands Ordinance have no application to the instant petition.

66. Further, the core issues involved in the appeal is based on public law issues and therefore, the subject matter of the instant appeal falls within public law.

67. Moreover, the instant appeal requires a statutory interpretation. As statutory interpretations fall within the realm of public law, and such matters are governed by public law.

68. The remedies for infringement of rights protected by public law could be obtained by judicial review and cannot be redressed under the private law remedies.

69. Therefore, a matter arising from public law issues cannot be challenged by a Writ of Summons which is a private law remedy.

There are No Mixed Questions of Matters of Public and Private Law

70. As stated above in the instant appeal, there is no mixed question of public and private law matters. The entire case revolves on the legality of the acquisition of the land under reference made under section 4(1) of the Crown Acquisition of Lands Ordinance. The acquisition and the subsequent events that had taken place falls within the public law realm

and not within the purview of the private law regime. Therefore, I am of the view that the Court of Appeal has not extended and/or applied the case of **O'Reilly v Mackman** contrary to the issues and the evidence led at the trial. Further, the Court of Appeal has not extended the principle set out in the said case to private law realm. Therefore, the cases cited by the Petitioner have no application in this instance.

71. In the circumstances, I am of the opinion that the Court of Appeal did not err in law in holding that the subject matter falls within the provisions of public law.

72. In this context, the question of awarding damages could not be considered without considering the legality of the acquisition of the land, which clearly falls within the public law realm. The public law issue is central to the case. Consequently, proceedings should have been brought by way of judicial review.

73. In these circumstances, it cannot be held that the 1st and 2nd Respondents are in illegal and/or unlawful occupation of the land in question, as claimed in the Statement of Claims filed at the first instance by the Petitioner.

74. Further, it is not possible to confer the jurisdiction on a court by the parties to act contrary to a stipulated procedure in a Statute.

75. In this regard, the Gazette notification issued under the Crown Acquisition of Lands Ordinance will come into play and it is admissible in evidence under section 2 of the Public Documents Ordinance, 1884. Moreover, under section 11 of the Civil Evidence Act, 2002 a document which is a part of the records of public authority may be received in evidence without further proof. In the instant appeal the High Court has accepted the said Gazette notification as evidence in the case. In any event, the petitioner has also admitted the same in the Agreed bundle of documents. Further, the courts are required to presume that the official acts have been properly performed.

Are the 1st and 2nd Respondents in Unlawful Occupation of the Land?

76. According to the said Gazette notification and the documents produced at the trial, the land was acquired by the Governor under the State Acquisition of Lands Ordinance and possession of the said land had been taken over as far back as 1960.

77. Careful consideration of the facts which are set out above and the law involved shows that the issues involved in this appeal are private matters relating to parties and thus, the grounds of appeal set out in the instant appeal would not affect the general public.

78. Further, the land under reference had been acquired by the State under Section 4 of the Crown Acquisition of Lands Ordinance. However, the said section had been repealed by the Fiji Independence Order, 1970. Hence, now it is not possible to acquire any lands under the said section.

79. Section 161 of the Land Transfer Act, 1971 sets out the procedure that should be followed when the State acquired lands for a public purpose. It states as follows:

> *" [LT 161] Acquisition of land for public purposes*
>
> *161 (1) When the Minister resolves under the provisions of the State Acquisition of Lands Act 1940 that any land subject to the provisions of this Act is required for public purposes, the Director of Lands shall file with the Registrar, within 14 days of the publications in the Gazette of the notice of intention required under the provisions of section 5 of the State Acquisition of Lands Act 1940, a notice of intention to acquire in the prescribed form and shall attach thereto a copy of the Gazette notification together with, if available, a plan of the area purposed to be acquired or resumed. The Registrar shall thereupon, without fee, enter a memorial of the notice of intention upon the instrument of title relating to the land so intended to be acquired.*

(2) Upon completion of an acquisition, a notice to that effect in the Gazette shall be sufficient evidence of the acquisition and the Director of Lands shall file with the Registrar within 7 days of the publication in the Gazette of such notice, a notice of acquisition in the prescribed form. The Registrar shall thereupon, without fee, enter a memorial of such acquisition in the register and on such of the duplicate instruments of title affected thereby as may be produced for endorsement. "

However, the Land Transfer Act, 1971 has no application to the instant appeal as the acquisition under reference has taken place in the year 1960.

80. A careful reading of the judgement shows that the High Court has dismissed the Writ of Summons not only for non-compliance with the provisions of the High Court Act (Chapter 13) and the rules published thereunder but also based on the merits of the case. The learned High Court judge has held that the Petitioner has failed to prove that the 1st and 2nd Respondents are in unlawful occupation of the land under reference and therefore, claiming compensation and/or damages would not arise. Further, the learned High Court judge has held that the Petitioner has failed to prove any losses, if any.

81. Moreover, the Petitioner has not been able to establish the amount of damages claimed. In the instant case there is no evidence on the quantum of damages claimed.

82. A careful consideration of the evidence shows that none of the witnesses who gave evidence at the trial were able to state what transpired at the time of the acquisition. In the instant appeal, the burden of proof was on the Petitioner to prove that the land under reference is still owned by the Petitioner and / or still a native reserved land. However, the Petitioner failed to prove the same.

83. On the contrary, the Respondents produced a Gazette notification which had been issued under the Crown Acquisition of Lands Ordinance. The Petitioner was unable to contradict

the same. In any event, as stated above it is not possible to challenge an acquisition order by filing a Writ of Summons which is a remedy available in private law.

84. Moreover, the Petitioner has not led any evidence to prove the damages sought in the prayer in the Statement of Claim. Thus, I am inclined to agree with the aforementioned finding of the High Court.

85. Further, there is no evidence to show how the 1st and 2nd Respondents occupy the land. Moreover, the said Respondents are in unlawful occupation of the land under reference. Thus, I hold that the Petitioner has failed to prove its case on a balance of probability.

86. In any event the said questions of law that are required to be determined in this appeal are not far reaching questions of law, matters of great general and public importance or have substantial general interest to the administration of civil justice.

87. Thus, I hold that the instant appeal does not involve a far reaching question of law, a matter of great general or public importance or substantial general interest to the administration of civil justice. Therefore, grounds of appeal do not satisfy the criteria set out in section 7(3) of the Supreme Court Act No. 14 of 1998 to obtain leave to appeal.

CONCLUSION

88. For the reasons stated above I hold that the High Court and the Court of Appeal did not err in law in their judgements and therefore, the question of granting Special Leave in the instant appeal will not arise.

89. For the reasons set out above, the Judgment of the Court of Appeal is affirmed and the appeal of the Petitioner is dismissed.

The orders of Court are:

1. Application for Special Leave to appeal is refused,

2. The judgment of the Court of Appeal dated 1st of June, 2018 is affirmed,

3. Taking into consideration the facts and circumstances of the appeal, I do not order costs.

.....

Hon. Mr. Justice Suresh Chandra

Judge of the Supreme Court

.....

Hon. Mr. Justice Priyantha Jayawardena

Judge of the Supreme Court

.....

Hon. Mr. Justice Quentin Loh

Judge of the Supreme Court

Solicitors:
Mr. Fa, for the Petitioner.
Ms. Motofaga, for the 1st and 2nd Respondent.
Ms. Komaitai, for the 3rd Respondent.