IN THE KIRIBATI COURT OF APPEAL **Civil Appeal No. 7 of 2019**
CIVIL JURISDICTION
HELD AT BETIO
REPUBLIC OF KIRIBATI

BETWEEN	**IAKOBA TAMOAIETA**	**APPELLANT**
AND	**LAVINIA JACOB TEEM**	**FIRST RESPONDENT**
AND	**MARETA KATARAKE**	**SECOND RESPONDENT**

Hearing: 22 July 2022

Before: Blanchard JA
Hansen JA
Heath JA

Counsel: Ms T Taoaba for Appellant
Mr B Berina for First Respondent
No appearance by or on behalf of Second Respondent

Judgment: 29 July 2022

JUDGMENT OF THE COURT

The appeal

[1] In August 2015, Mr Iakoba Tamoaieta applied to the High Court for orders extending the time within which he could file an application for leave to commence *certiorari* proceedings directed to a decision made by the Magistrates' Court on 20 July 1999 (the 1999 order). By that decision, Mr Tamoaieta's mother, Ms Mareta Katarake, was granted consent to transfer land known as Ambo 743e/i to a third party, Ms Lavinia Teem. If an extension of time were granted, leave to bring a *certiorari* proceeding was also sought.

[2] Mr Tamoaieta's application was heard before Muria CJ on 20 September 2019. For reasons given in a judgment delivered on 11 October 2019, the Chief Justice dismissed the application for an extension of time. That decision rendered the separate application for leave to issue a *certiorari* proceeding redundant. The Chief Justice did not address that aspect of the application.

[3] Ms Taoaba, for Mr Tamoaieta, submits that the Chief Justice erred in refusing to extend time because he failed to take into account that the transfer of land from Ms Katarake to Ms Teem was tainted by fraud and was made in circumstances amounting to

a breach of the rules of natural justice: she contends that Mr Tamoaieta was deprived of a right to appear and oppose his mother's application. Mr Berina, for Ms Teem, opposes the appeal, pointing out the discretionary nature of the decision that the Chief Justice made. No appearance was entered by or on behalf of Ms Katarake.

Background

[4] Ms Katarake applied to a Single Magistrate for an order that her share of the plot known as Ambo 743e/i be registered in Ms Teem's name. Ambo 743e/i is situated on South Tarawa. At a hearing on 8 July 1999, Ms Katarake explained to the Single Magistrate that the land was formerly owned by her father, with distributions having been made to her and her siblings. Ms Katarake told the Court that Ms Teem had paid $2,000 for the land.

[5] Section 14 of the Gilbert and Phoenix Islands Lands Code (the Lands Code), in the form in which it applies to land on South Tarawa, states:

> 14. An owner may sell a land, a pit or a fishpond if his next-of-kin agree and if the [Magistrates Court], having considered the matter, approve. Before reaching its decision the court should first consider if the lands remaining to the owner after the sale are sufficient for him and his children.

[6] To ensure that the rights of next-of-kin were protected, the Magistrate asked Ms Katarake whether she had children. Ms Katarake responded that she had one child, a daughter, who lived on Kiritimati Island. The application was adjourned while the daughter's consent was obtained. An appropriate form of consent was produced to the Court on 20 July 1999, and an order was made that Ms Teem's name be registered on the share of Ms Katarake on Ambo 743e/i. It is common ground that Ms Katarake did not disclose Mr Tamoaieta's existence to the Single Magistrate.

[7] Mr Tamoaieta claims to be Ms Katarake's son. Because he was not given notice of the application to register his mother's share in Ambo 743e/i in Ms Teem's name, he had no opportunity to be heard in opposition. Mr Tamoaieta's evidence is that he first learnt of the transaction in 2013. However, he did not file any application to challenge the 1999 order until
August 2015.

[8] There is a dispute as to whether Ms Teem purchased Ms Katarake's interest in the land with or without notice of the existence of Mr Tamoaieta. Ms Titaku Tamoaieta, the daughter who resided on Kiritimati Island, has deposed that she was approached by Ms Teem to consent to her mother selling "portions of land at Ambo for her house only". The

sister acknowledged that she had given consent for that purpose but also advised Ms Teem that "when she arrives in Tarawa she had to look for my brother who lived in North Tarawa for his consent". If Ms Tamoaieta's evidence were accepted, Ms Teem may well be found to have had contemporary knowledge of the existence of a child whose consent to the transaction had not been obtained.

[9] While there is no evidence before us to contradict what is said by Mr Tamoaieta's sister, we were informed by Mr Berina that an affidavit had been filed by Ms Teem in the High Court, disputing that she knew of Mr Tamoaieta's existence at the time of the 1999 order. For present purposes, we shall assume that such an affidavit was filed and that there is a live dispute over Ms Teem's state of knowledge.

The application to extend time

[10] Order 61, rule 2(1) of the High Court (Civil Procedure) Rules 1964 requires prior leave to be granted before an application for an order of *certiorari* can be made. Order 61 rule 3 states that any application for leave must be made within six months of the date of the proceeding the order in which it is sought to quash. Order 64, rule 7 confers a broad discretion on the High Court to enlarge time for making an application of this type.

[11] While the application for an extension of time was filed some 16 years after the 1999 order, factors relevant to the exercise of the Court's discretion by reason of delay are necessarily limited to the period between 2013, when Mr Tamoaieta learnt of the 1999 order, and August 2015, when the extension of time application was filed. While delay is an important feature of the present case, the need to ensure that any person who may be adversely affected by an application to which s 14 of the Lands Code applies is served is one of great importance.

[12] Recently, in *Tebanna v Tebanna*, [1] this Court examined the way in which a failure to serve an affected party should be treated when an order is sought under the Lands Code. While acknowledging that there remains a residual discretion to allow an order to stand in circumstances where there is no risk of a miscarriage of justice, the Court concluded that breach of the requirement to hear both sides before making a decision would generally carry a right to have the order set aside as of course. The Court said.[2]

> [29] Before we consider whether service of the distribution application was validly effected, we explain why service is so fundamental to the proper workings of any Court system.

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[1] Tebanna v Tebanna [2021] KICA 8.
[2] Ibid, at paras [29]-[31]

[30] It is a basic principle of law that, before making orders that will affect others, a Court must ensure any potential opposing party has an appropriate opportunity to be heard. This is known as the audi alteram pattem principle. It is a fundamental rule of natural justice. Orders made without hearing from parties who might be affected adversely by them are made only in exceptional circumstances, and usually on an interim basis. Final orders made on an ex parte basis carry a substantial risk of causing a miscarriage of justice. Judges can only know what orders are appropriate if they have all relevant facts and legal arguments put before them for consideration, by all affected parties.

[31] The fundamental nature of the obligation to hear both sides before making a decision is reinforced by the principles that apply when an application is made to set aside a judgment obtained following irregular (or no) service. Although there remains a residual discretion for the Court to allow such a judgment to stand, the general rule is that it must be set aside to enable the merits to be properly assessed by the relevant Court. As the Court of Appeal of New Zealand has recently said, in EA v Rennie Cox Lawyers:

> [20] In summary, where a judgment has been irregularly obtained, there will almost always be a miscarriage of justice such that the judgment should be set aside without considering the merits. However, that is not an inflexible rule that must be applied in every case, regardless of the circumstances. There may be cases where the irregularity in obtaining the judgment was so minor and inconsequential that it could not have caused prejudice and there is no arguable defence. If the court can safely conclude that there is no risk of a miscarriage of justice, it might properly decline to set aside the judgment.

(Footnotes omitted)

[13] The principles articulated in Tebanna are consistent with those identified in earlier decisions of this Court to which counsel have drawn our attention; in particular, see Tabora v Uruatarawa, [3] to which reference was made with approval in *Teuei v Toanikai*. [4]

[14] The Chief Justice was alive to the importance of the natural justice point. But, he was not satisfied that breach was sufficient to justify extending time. Muria CJ's judgment can be read as the exercise of a residual discretion not to allow a challenge to be made. We consider that the Chief Justice's reasons for taking that view can be summarised as follows:

(a) The delay in filing proceedings challenging the 1999 order militated against the grant of an extension of time to seek leave to apply for *certiorari*. On Mr Tamaoieta's evidence, he first became aware of the

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[3] Tabora v Uruatarawa [2009] KICA 9, at paras [10] and [11].

[4] Teuei v Toanikai [2015] KICA 1, at para [151; see also paras [17]-[20].

transfer in 2013, some 14 years after the order was initially made. He did not, however, issue proceedings until 2015.

(b) Ms Teem, whom the Chief Justice regarded as an arm's length third party unaware, until proceedings were issued in 2015, of Mr Tamaoieta's existence acted in good faith on the basis of Ms Katarake's evidence that she had only one child, who was resident on Kiritimati Island. The Chief Justice proceeded on the basis that Ms Teem was a bona fide purchaser for value of the land. Ms Teem had paid a sum of $2,000 to acquire the land and, subsequently, expended further funds for its development.

(c) Muria CJ harboured doubts as to whether Mr Tamaoieta was Ms Katarake's son. Ms Katarake had elected to take no steps in the proceeding. The Chief Justice considered that she must be taken to have neither accepted nor denied the suggestion that Mr Tamaoieta was her son. The Chief Justice held that application of s 14 of the Lands Code could not be justified unless there was "certainty" that the relationship of mother and son existed. The Chief Justice appears to have considered that the only evidence of the mother/son relationship came from Mr Tamaoieta himself, and that he had registered his own birth when he was 45 years old. He did not refer to the evidence of
Ms Katarake's daughter.

Analysis

[15] Was the Chief Justice right to exercise a discretion against Mr Tamaoieta even though he was not served with the application and had no opportunity to be heard on it?

[16] In our view, the Chief Justice approached the application to extend time in the same way that a substantive *certiorari* application would be determined. In doing so, with respect, the Chief Justice appears to have made two significant errors in his assessment of evidence relevant to the exercise of his discretion. The first concerns the question whether Ms Teem should be regarded as a bona fide purchaser of the land without knowledge of Mr Tamaoieta's existence at the time of the application. The second concerns the evidence to demonstrate that Mr Tamaoieta was Ms Katarake's son.

[17] As previously indicated, there was evidence from Mr Tamaoieta's sister that she told Ms Teem about her brother's existence when she was asked, in 1999, for her consent to the transaction. Although we accept that Ms Teem disputes that evidence, in the absence of cross-examination of either witness to test what they say, the Court could not reject the sister's evidence as false or unreliable.

[18] The Chief Justice also erred in regarding the evidence given by Mr Tamaoieta of his status as Ms Katarake's child as uncorroborated. As the evidence presently stands, Mr Tamaoieta's sister's evidence confirms that he is her brother. Therefore, any suggestion that Mr Tamaoieta would not be entitled to make a claim in his capacity as a child of Ms Katarake must be discounted, at least for the purposes of determining whether an extension of time should be ordered. Any contest about Mr Tamaoieta's standing, as Ms Katarake's child is one for determination after cross-examination of relevant witnesses at a substantive hearing.

[19] The possibility that Ms Teem was aware of Mr Tamaoieta's existence and the fact that he had not consented to the 1999 order puts a different complexion on the way in which the Chief Justice assessed the impact of delay on the discretion to extend time. Notwithstanding the time that had elapsed since the 1999 order was made, delay should not prevent an ability to challenge the order if it were tainted by Ms Teem's alleged fraud. Had there been incontrovertible evidence that Ms Teem had been a bona fide purchaser for value without notice of Mr Tamaoieta's existence, delay would have assumed much greater importance. However, if knowledge were established, Ms Teem could be regarded as complicit in a fraud. Section 4 of the Native Lands Ordinance (as amended in 2011) might then operate to defeat her title. [5] In its present form, s 4(3) of the Native Lands Ordinance provides:

> (3) Titles acquired under subsections (1) or (2) may be defeated by an application before a Magistrates' Courts constituted under section 7 (4) or section 7(5) of the Magistrates' Courts Ordinance only when the person bringing the application is able to prove that the person whose title is being challenged or that person's predecessor in title obtained such title either by or through fraud.

[20] In our view, the delay in issuing proceedings between 2013 and 2015 is not such as to justify a refusal to extend time to bring a *certiorari* proceeding. There is evidence which, if accepted after a full hearing, could establish that Ms Teem had knowledge of Mr Tamaoieta's existence at the time of the 1999 application but proceeded even though he had not been served.

[21] In our view, as a result of the errors that we have identified, the exercise of the Chief Justice's discretion not to extend time miscarried. On the evidence before the High Court, there was a factual foundation for the proposition that Mr Tamaoieta was a child entitled to be heard before an order was made under s 14 of the Lands Code, and that Ms Teem was aware of his existence at the time. Applying Tebanna, we consider there is no basis on which a Court should foreclose Mr Tamaoieta's right to challenge the 1999 order.

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[5] As amended by s 2 of the Native Lands (Amendment) Act 2011.

Result

[22] For those reasons, the appeal is allowed. The order refusing an extension of time to bring *certiorari* proceedings is set aside. In substitution, we make an order granting an extension of time to apply for leave to bring such proceedings.

[23] Because the Chief Justice refused an extension of time, he did not deal with the separate application for leave to bring *certiorari* proceedings. Mr Berina accepted that, if an extension of time were granted, he had no grounds on which to oppose an application for leave to bring *certiorari* proceedings. In those circumstances, we also grant leave for proceedings to be brought.

[24] We direct that a substantive *certiorari* proceeding be both filed in the High Court and served on or before 19 August 2022. When filed, the Registrar shall list it for a case management conference before the Commissioner, so that it may be timetabled to a hearing as soon as practicable.

[25] We reserve questions of costs in both this Court and the High Court. Whether Mr Tamaoieta is successful in his *certiorari* proceeding will have a bearing on where costs should lie.

Blanchard JA

Hansen JA

Heath JA