**IN THE COURT OF APPEAL, FIJI**
**ON APPEAL FROM THE HIGH COURT**

**Civil Appeal No. ABU 0079 of 2016**
**(High Court Civil Action No. HBJ 5 of 2014)**

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| **BETWEEN** | : | **SEMI TAWADOKAI** |
| | | ***Appellant*** |
| **AND** | : | **I TAUKEI LANDS APPEAL TRIBUNAL AND** |
| | | **ATTORNEY GENERAL OF FIJI** |
| | | ***Respondents*** |
| **AND** | : | **SEMI MATAI BESE NACANIELI CAMA** |
| | | ***Interested Party*** |
| **Coram** | : | **Lecamwasam, JA**<br>**Guneratne, JA**<br>**Jameel, JA** |
| **Counsel** | : | **Mr. V. Faktauton & Mr. S. Bulimaibau for the Appellant**<br>**Ms. U. Motofaga for the Respondents**<br>**No Appearance for the Interested Party** |
| **Date of Hearing** | : | **12 February 2019** |
| **Date of Judgment** | : | **8 March 2019** |

## JUDGMENT

**Lecamwasam JA**

[1] I agree with the reasons and conclusion of Jameel, JA.

**Guneratne, JA**

[2] While I agree with her Ladyship's Judgment and proposed Orders, I wish to express my own view on a particular aspect as follows; - merits review is not always outside the pale of Judicial Review for the reason that sometimes review may be inevitable when the balance tips heavily one way "and the Court must simply substitute its own opinion", (**Wade & Forsythe**, 11th Ed. P.313, see also **Edore v Home Secretary** [2003] 1 WLR 2979).

[3] However, this is not the ideal case that merits review.

**Jameel, JA**

***Introduction***

[4] This is an appeal from the judgement of the High Court of Suva dated 31 May 2016, striking off the application of the Appellant for Judicial Review of the determination of the Appeals Tribunal "(**Tribunal**). The Tribunal established under the iTaukei Lands Act 1905 Cap 133 ("**the Act**"), allowed the appeal of the Interested Party, and set aside the decision of the iTaukei Lands Commission ("**the Commission**"), appointing the Appellant as the Turaga Ni Mataqali Rukunikoro (Clan Leader), Turaga Ni Yavusa Nauluvatu and Tui Vanua.

***Factual Background***

[5] The Appellant had, on 26 November 2011, been traditionally installed as the Tui Vanua of the Mataqali Rukunikoro, Yavusa Nauluvatu of Taira Village Vanuavatu in the District of Totoya of the Province of Lau. On the same day, the Interested Party had objected to the installation of the Appellant.

***The Proceedings before the Commission***

[6] In 2013, the parties had attempted to mediate the dispute under the auspices of the Commission and the Roko Tui Lau. This was unsuccessful. The dispute was then referred to the Commission, constituted under Section 4 of the I-Taukei Lands Act (Cap 133) which inquired into the matter on 23 August 2013. Parties were heard and the evidence of witnesses of the Yavusa was led, including that of the Appellant and the Interested Party. The Commission made its determination on 27 August 2013 appointing the Appellant as the Tui Vanua.

***The Appeal to the Tribunal***

[7] The Interested Party by letter dated 26 September 2013 appealed against the decision of the Commission, to the Appeals Tribunal constituted under section 7 of the Act. The Tribunal heard the Appellant, the Interested Party and other witnesses. By its decision dated 27 February 2014, the Tribunal overruled the decision of the Commission which had confirmed the Appellant as the title holder of Tui Vanua, and substituted the name of the Interested Party.

***The Appellant's application to the High Court for Judicial Review***

[8] Supported by an affidavit dated 24 June 2015, the Appellant applied for Judicial Review of the decision of the Appeals Tribunal which had set aside his appointment.

***Grounds urged for Judicial Review***

[9] The basis of the application in the High Court for Judicial Review of the Tribunal's decision was set out in eleven grounds, which are reproduced below (RHC 22):

"(a) *The Applicant is the only surviving grandson of the first registered Title holder of Tui Vanua as registered in the VKB Register – Semesa Vakaloloma (VKB Reg No. 1).*

(b) *The grounds relied upon the Interested Party is based on uncertain evidential material that are of pre VKB – registration era and there outside the jurisdiction of the Court.*

(c) *The evidential material taken in account by the Respondent from evidence that was not taken in the first instance by the Commission do not pass the threshold test as set by the Section 7(3) of the iTaukei Lands Act, Cap 133.*

(d) *There is ample evidence in documents before the Respondent asserting that the Interested Party and or his relatives or sympathizers do not object to the Applicant being installed as the Tui Vanua; and that they only objected to the process of installation. Despite these numerous admissions the Respondent still went ahead to find untested evidence to the contrary.*

(e) *The applicant has strong legitimate expectation to be accepted by the Respondent as the candidate to be registered as* ***Turaga Ni Mataqali Rukunikoro, Turaga ni Yavusa Nauluvatu and Tui Vanua.***

(f) *There is no basis or information available to confirm the finding that Semi Matai or his son Mesake Soro No. 2 were Tui Vanuas' because the VKB Register does not express this to be so. The Interested Party accordingly has no evidential nexus to the title of Tui Vanua.*

(g) *The evidence is clear that the eligibility to the Title of Tui Vanua is through blood lineal relations and is not dependent on whether a potential candidate is of an elder*

*bloodline to the other potential candidates. Notwithstanding this fact that the Respondents contradicted that evidence by ruling in the contrary.*

*(h) Following the registration process created by the then Native Lands Act, Cap 133 created for Yavusa Nauluvatu on 1st July 1939 the only recognized chiefly household after the registration process is the one that finds their lineage to the first registered Tui Vanua i.e. Semesa Vakaloloma (VKB Reg No. 1/1060).*

*(i) The Respondent was not within jurisdiction in overruling the Commission and substituting the Interested Party for the Applicant in the title of the Tui Vanua.*

*(j) The Respondent misinterpreted the quote by the former Commissioner Ratu Sir Lala Sukuna in a 1944 Tavua Case (unnamed case as the ratio for its decision in the ruling made on the 26th and delivered to the Yavusa Nauluvatu on 27th February 2014. That misinterpretation made the Respondent to commit a pivotal error of law in its decision.*

*(k) The Respondent had failed to deal with the question remitted to it."*

## ***The Judgment of the High Court***

### ***Ouster of the court's jurisdiction***

[10] In determining the application before him, the learned Judge drew his attention to Section 7 of the Act which provides that the decision of the Appeal Tribunal shall be final. This provision also provides for the Tribunal to hear further evidence, if the criteria set out in sub section (3) of section (7) are satisfied.

[11] Section 7 of the Act provides as follows:

> *7.-(1) There is hereby constituted an Appeals Tribunal consisting of a chairman and two other members all to be appointed by the Minister. It shall be the duty of the Appeals Tribunal to hear and determine appeals from decisions of the Commission under section 6 and from a commissioner under section 17, and any such determination by the Appeals Tribunal shall be final.*
>
> *(2) Any person aggrieved by any such decision of the Commission or of a commissioner shall within ninety days of the announcement thereof give notice of his desire to appeal, which shall be signed by the appellant or his duly authorised agent, to the Commission. The notice shall contain the grounds of appeal.*
>
> *(3) For the purpose of determining an appeal the Appeals Tribunal shall have power to hear further evidence, but only if all of the three following conditions are satisfied: -*
>
> *(a) if it is shown that the evidence could not have been obtained with reasonable diligence for use at the inquiry before the Commission or commissioner;*
>
> *(b) if the further evidence is such that, if given, it would probably have an important influence on the decision;*
>
> *(c) if the evidence is such as is presumably to be believed.*

> *(4) If no notice of appeal is given the record of the Commission or commissioner, as the case may be, shall be final.* [Emphasis added].

[12] In this regard, the learned Judge was guided by the decision of Calanchini P. in **Ramasi v Native Lands Commission [2015]** FJCA 83; ABU0056.2012 (decided on 12 June 2015), in which his Lordship held that:

> *'[11] Therefore, in my judgment, whenever a challenge to a decision of the Tribunal is based on a lack of jurisdiction or a denial of natural justice, the High Court has the necessary jurisdiction to consider an application for judicial review under Order 53 of the High Court Rules notwithstanding section 7(5) of the Act. However, in this case the challenge by the Appellant went to the merits of the Tribunal's decision and for that reason there was no right to apply for judicial review.'*

[13] The learned Judge proceeded on the basis that in law, the only grounds on which judicial review of a Tribunal's decision could be set aside is the lack of jurisdiction, or a denial of natural justice, and then considered the matters challenged by the Appellant.

[14] In considering the application for judicial review, the learned Judge first categorised the several grounds pleaded. He concluded that: grounds (a) (b), (d), (e), (f) (g) and (h) dealt with the merits of the decision of the Tribunal, and are therefore outside the remit of an application for judicial review.

[15] The learned Judge found that; ground (k) is vague and therefore could not be considered.

[16] The learned Judge therefore only considered grounds (c), (i), (j) and (k) urged by the Appellant in the High Court.

[17] With regard to ground (c), the learned Judge found that despite the allegation that the Tribunal had admitted fresh evidence in contravention of the provisions of section 7(3) of the Act, learned Counsel for the Appellant was unable to establish this by reference to any specific evidence. In those circumstances, he did not allow that ground.

[18] With regard to ground (i), the jurisdiction of the Tribunal, the learned Judge found that section 7(3) of the Act confers jurisdiction on the Tribunal to consider appeals from the decision of the Commission made under sections 6 and 17 of the Act. It was not disputed that the Commission had exercised power under section 17 of the Act. Indeed, the Appellant and the Interested Party gave evidence before the Commission, and the Commission arrived at its decision after hearing the parties and considering the evidence tendered.

[19] The Appeals Tribunal is vested with jurisdiction in respect disputes relating to the title to all lands claimed by *mataqali* or other divisions or subdivisions of people, and headship of any division or subdivision of people having the customary right to occupation and use of native lands. The dispute in appeal before the Tribunal was therefore covered by the provisions of section 7 of the Act. Therefore the Tribunal had properly assumed the jurisdiction. The learned Judge therefore held that ground (i) was without merit. I see no reason to disagree with this finding of the learned Judge.

[20] With regard to ground (j), the learned Judge found that the allegation that the Tribunal had misinterpreted a quotation in a 1944 case, amounted to an error, was without merit. I see no reason to disagree with this finding of the learned Judge.

[21] Finally, the learned Judge struck off the Appellant's application for Judicial Review, and awarded costs summarily assessed at $2000.00.

***The grounds of appeal before this Court***

[22] The nine grounds of appeal pleaded by the Appellant in this court are reproduced below:

1. *The learned Judge erred in law when he failed to address his mind to the Applicant's submission on Res-Judicata Estoppel in the first instance, such submissions, if allowed, would have the effect of placing the dispute beyond the jurisdiction of the I-Taukei Land & Fisheries Commission and the 1st Respondent Tribunal.*

2. *The learned Judge erred in law and in fact when he ruled that grounds a, b, e, f and h go to the merits of the decision of the tribunal when in fact they all deal in various ways of how the tribunal had ventured beyond jurisdiction and how the tribunal had taken into account irrelevant consideration that is outside the Register of i Taukei Owners (or VKB –Vola ni Kawa Bula).*

3. *The learned Judge erred in law and in fact when he accepted the evidence of the 1st Respondent, such evidence either being non-existent, of doubtful import or irrelevant evidence to the determination of entitlement to the chiefly title of Tui Vanua ie. That Mesake Soro No.1 is the elder brother of Semesa Vakaloloma.*

4. *The learned Judge erred in law and in fact when he accepted the submission of the 1st Respondent such submission relying on the evidence of doubtful import or irrelevant evidence to the decision to entitlement to chiefly title in Yavusa Nauluvatu.*

5. *The learned Judge erred in law and in fact when he accepted the ruling of the 1st Respondent that went beyond the jurisdiction of the*

*Tribunal and not staying within the VKB as stipulated in Section 2 of the Fijian Affairs Act.*

6. *That the learned Judged erred in law and in fact when he refused to hear counsel for the Applicant address the Court on an application demonstrating to the Court that the Tribunal of the 1st Respondent had visited chambers of the learned Judge after the first hearing dated of this application on the 8th April 2016 signifying apprehension of bias.*

7. *The learned Judge erred in law when he reaffirmed the decision the 1st Respondent Tribunal because the effect of the decision is to amend the VKB Register contrary to Section 2 of the Fijian Affairs Act and therefore wrong in law.*

8. *The learned Judge erred in law when he reaffirmed the decision of the 1st Respondent Tribunal, such decision being contrary to law and not in the public interest.*

9. *The learned Judge erred in law and in fact when he reaffirmed the decision the 1st Respondent Tribunal such decision creating a dangerous and unstable precedent for the i-Taukei community in the area of chiefly succession, such decision of the court being wrong in law but contrary to public interest."*

***Determination of the grounds of appeal***

***Ground one***

[23] The essence of this ground is that the learned Judge ought to have held with the Appellant's submissions, on *res judicata* and estoppel, so that it would have had the

effect of rendering the entire dispute outside the jurisdiction of the Commission. The Respondent on the other hand submits in its written submissions that this matter was not relied on as a ground of judicial review before the High Court, and it cannot be relied on before this Court, due to the provisions of Order 53 rule 6(1) of the High Court Rules, 1988.

[24] In any event this ground is based on the Appellant's submission that when the Commission first began recording its decisions from 1 July 1939, the registration of Semesa Vakalaloma was not challenged by the blood lineal relations of Semi Matai (from whom the Interested Party claims title), and therefore the Commission should not have entertained the Interested Party.

[25] In my view it is too late now for the Appellant to take this position after having participated before the Commission himself. More importantly, as set out above, the said ground was not urged before the High Court. Ground One is therefore dismissed.

***Ground two***

[26] This ground challenges the learned Judge's categorization of grounds (a), (b), (e), and (f) and (g) that they amount to requiring the learned Judge to review the merits of the Tribunal's decision. I have considered those grounds and find that the learned Judge was correct. The decision of a Tribunal to whom Parliament has given special powers because of the special nature of the knowledge required to carry out is functions, is protected by the finality clause in section 7(3) of the Act.

[27] The Appellant argues that the Tribunal went outside its jurisdiction by taking into consideration material outside the *Vola ni Kawa Bula* ("**VKB**"), and that the consideration of any other material is illegal. The Respondent argued that the "Tukutuku Raba" was a record that was available to the Commission and that therefore it was not irrelevant. The case of **Ah Koy v Registration Officer for the Suva City Fijian Urban**

**Constituency** [1993] FJLawRp 36; [1993] 39 FLR 191 (20 August 1993) was relied upon. In that case the court said this:

> *"8. That customs such as that relating to the right of a person to be a member of his mother's mataqali are recorded in a book of record kept with the Commission, called the "Tukutuku Raraba", which contains statements taken on oath during the first investigation of the Commission in any particular area."*

[28] Drawing from that judgment, there is no illegality that can go to the jurisdiction of the Tribunal so as to enable this court to hold that the learned Judge was in error. Ground two of the appeal is therefore dismissed.

***Grounds three and four***

[29] These grounds can conveniently be dealt with together. The gravamen of these grounds is that the Tribunal exceeded its jurisdiction by relying on the Tukutuku Raraba. For the reasons set out in regard to ground two, these grounds of appeal are also dismissed.

***Ground five***

[30] The Tribunal was within its jurisdiction when it relied on the contents of the Tukutuku Raraba, which is also a record of evidence taken by the Commission. "Chief" is defined in the Fijian Affairs Act as follows:

> *"Chief" means any person enrolled in the principal mataqali of a yavusa in the register of native land owners recorded under the provisions of section **8** of the Native Lands Act".*

[31] The Respondent submits that the Fijian Affairs Act (Cap 120) a does not provide that once registered it only his direct descendants that can inherit title. This is correct and I see no reason to dismiss this submission. The sixth ground of appeal is therefore dismissed.

***Ground six***

[32] The Appellant's complain is that the learned Judged erred in law and in fact when he refused to hear counsel for the Applicant address the Court on an application demonstrating to the Court that the Tribunal of the 1st Respondent had visited chambers of the learned Judge after the first hearing dated of this application on the 8th April 2016 signifying apprehension of bias. However, if there was any basis for this complaint the record does not show that the Appellant took any steps in this regard. The basis for this ground of appeal is not borne out in the records. There was no immediate challenge in this regard, and this court considers this ground to be without merit, and therefore ground six is dismissed.

***Grounds seven, eight and nine***

[33] The essence of these grounds also goes to the merits of the decision of the Tribunal. The Respondent submits that section 2 of the Fijian Affairs Act does not state that the VKB records cannot be amended, and points to section 10 of the iTaukei Lands Act (Cap 133) which provides for the correction of errors. In my view, this argument of the Respondent is incorrect because the errors contemplated for correction are errors which are described as follows:

> *"2) When it is found that an error has been made in the preparation of such register or that any iTaukei has been recorded and registered in any proprietary unit other than the proper unit or that the name of any Fijian has been inadvertently*

*omitted from the register recording the proper unit of such iTaukei, it shall be lawful for the Registrar of Titles on the receipt of an order under the hand of the chairman of the iTaukei Lands Commission to correct the same or delete or add the names of such persons as the case may be."*

[34] Although I am unable to agree with the arguments of the Respondent on ground seven of the appeal in respect of correction of errors of appeal, nevertheless I reiterate that these grounds of appeal (grounds 7, 8 and 9) will amount to a merits review of the Tribunal's decision and that the lower Court was correct in rejecting those grounds of review. Grounds seven, eight and nine are therefore dismissed.

***The Orders of the Court are:***

1. *The judgment of the High Court dated 31 May 2016 is affirmed, and the appeal of the Appellant is dismissed.*

2. *In all the circumstances, the parties will bear their costs.*

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**Hon. Justice Susantha Lecamwasam**
**JUSTICE OF APPEAL**

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**Hon. Justice Almeida Guneratne**
**JUSTICE OF APPEAL**

.....
**Hon. Justice Farzana Jameel**
**JUSTICE OF APPEAL**