

IN THE HIGH COURT OF FIJI
AT LAUTOKA
CIVIL JURISDICTION
ACTION NO. HBC163 OF 2005

NO. 1/2006L

BETWEEN:

JOSAIA NACIKA of Lot 1 Hunter Street,
Flagstaff, Suva as representative of the
Vanua of Momi.

FIRST PLAINTIFF

OSEA TURUVA of Lot 1 Hunter Street,
Flagstaff, Suva as another representative
of the Vanua of Momi.

SECOND PLAINTIFF

AND:

NATIVE FISHERIES COMMISSION

FIRST DEFENDANT

MINISTER FOR FIJIAN AFFAIRS

SECOND DEFENDANT

ATTORNEY GENERAL OF FIJI

THIRD DEFENDANT

Tevita Fa & Associates for the Plaintiffs
(City Agents Messrs Krishna & Co)
The Solicitor-General for the Defendants

Date of Hearing: 16 September 2005
Dates of Submissions: 14 October, 28 October and 4 November 2004
Date of Judgment: 13 January 2006

JUDGMENT OF FINNIGAN J

I have before me an Originating Summons filed on 10 March 2005 in which the Plaintiffs seek the following remedies;

- (i) **A Declaration** that the decision of the Native Fisheries Commission that was made on 11th August, 1964 in respect of the boundaries of areas covering the fishing rights of the vanua of Momi cannot be supported by the evidence that was adduced at the hearing and is therefore null, void and of no effect.
- (ii) **An Order** setting aside the decision of the Native Fisheries Commission on the boundaries of fishing rights of the vanua of Momi.
- (iii) **An Order** directing the Native Fisheries Commission to do its duties according to laws and to determine again the boundaries of the fishing rights for the vanua of Momi in accordance with Section 14 of the Fisheries Act Cap. 158.

The History of the Matter:

The proceedings were filed first at the High Court in Suva. The Solicitor-General filed an Acknowledgment of Service on behalf of all three Defendants but no other pleadings. On 4 April 2005 after Counsel

for the parties were heard Pathik J transferred the proceedings to the Lautoka Registry.

On 1 July 2005 the matter was put before me and Mr Tevita Fa appeared for the Plaintiffs, there was no appearance for the Defendants. Mr Fa persuaded me that an affidavit in reply by the Defendants was needed and I timetabled affidavits by first the Defendants (9 September 2005) and then by the Plaintiffs in answer (15 September 2005) and listed the matter for 16 September.

On 16 September Counsel appeared for both parties. Mr Fa sought another fourteen days for the Plaintiffs' affidavit in answer, there was no objection and this was timetabled. Thereafter the Plaintiff was to file and serve written submissions with submissions in reply and answer as set out in the heading above. I undertook to deliver a ruling on notice on or after 7 November 2005.

No submissions were filed.

The Affidavits

Affidavits in support of the application were filed by the Plaintiffs on 10 March 2005. On 5 September 2005 the Chairman of the Native Fisheries Commission filed an affidavit in reply on behalf of the First Defendant. On 22 September 2005 the First Plaintiff filed an affidavit in answer. These affidavits not only set out the basic facts of the matter, they also contain considerable comment and submission.

The Facts and Submissions

The Plaintiffs say they bring these proceedings as representatives of the Vanua of Momi, the people generally known by the name Tabanivono-ira.

The First Plaintiff was present on a date in 1964 when the Native Fisheries Commission conducted an enquiry into the fishing rights for the Vanua of Momi or Tabanivoro-ira. He has, apparently only recently, begun to question the decision that the Commission subsequently made. He has been reading the notes of the evidence that were taken during the enquiry. He says that the decision does not match the evidence. He wants the fishing boundaries re-drawn. He submits in his first affidavit (para. 26) that the failure of the Commission "to base its ruling as highlighted on the evidence adduced at the hearing renders such ruling null, void and of effect". Hence his application for the relief set out above.

In his affidavit the Chairman of the Commission sets out relevant facts from the Commission's records including its record of the enquiry which was conducted at Lawaqa, Nadroga on 11 August 1964. He states in his affidavit (at para. 26) that **Section 17 of the Fisheries Act Cap 158** provides for an appeal against the decision of the Commission and that neither the Plaintiff nor any other person lodged an appeal against the Commission's decision, which was made on 11 August 1964. The appellate body is the Appeals Tribunal which is created by Section 17.

That last statement by the Chairman is both fact and submission. So far as I can see it is one of the several reasons why this application cannot succeed. I set out here the relevant parts of Section 17;

- S. 17 (1) *There is hereby constituted an Appeals Tribunal consisting of a Chairman and two other members*
- It shall be the duty of the Appeals Tribunal to hear and determine appeals from decisions of the Commission under Section 16, and any such determination by the Appeals Tribunal shall be final.*
- (2) *Any person aggrieved by any such decision of the Commission shall within ninety days of the announcement thereof give notice of his desire to appeal,*
- (3) *.....*
- (4) *If no notice of appeal is given the record of the Commission shall be conclusive and final.*

The only submission that the First Plaintiff makes is in para. 25 of his second affidavit; "I say in reply that the Commission has not done its work according to law. I pray as per the reliefs in the Originating Summons". That is not sufficient answer. The Plaintiffs had by law ninety days after 11 August 1964 to challenge the Commission's boundaries determination. They did not exercise their right to do that. An Originating Summons brought 40 years later cannot be entertained.

A further reason for rejecting this application is that it may be considered to be in the nature of judicial review. Without going into detail, if judicial review of the boundaries determination were sought now it would probably fail for the reasons I have just stated and it would certainly fail by reason of the delay.

A further reason presents itself. I have read the affidavits and those of the annexures, which the Plaintiffs supplied in English translation. The evidence falls far short of persuading me that the Commission made such a mistake that its determination should in justice be re-visited.

For these reasons I decline the Plaintiffs' application and dismiss the Originating Summons.

Each party will bear its own costs. I make no order.



At Suva

13 January 2006

A handwritten signature in black ink, appearing to read "D.D. Finnigan". The signature is stylized and includes a large flourish at the end.

D.D. Finnigan

JUDGE