IN THE HIGH COURT OF FIJI
AT SUVA
CIVIL JURISDICTION

Judicial Review HBJ No.: 5 of 2014

BETWEEN : **STATE**

AND : **ITAUKEI LAND APPEALS TRIBUNAL & ATTORNEY GENERAL OF FIJI** a body duly constituted under the iTaukei Lands Act and its Nominal Defendant respectively both of the Government of Fiji, Suva

RESPONDENT

EX-PARTE : **SEMI TAWADOKAI (VKB NO. 31/1060)** of Tokatoka Koronivia, Mataqali Rukunikoro, Yavusa Nauluvatu of Taira Village, in the Distict of Totoya in the Province of Lau in the Eastern Division, for and on behalf of the descendents of Semesa Vakaloloma.

APPLICANT

AND : **SEMI MATAI BESE NACANIELI CAMA (VKB NO. 44/1060)** of Tokatoka Koronivia, Mataqali Rukunikoro, Yavusa Nauluvatu of Taira Village, in the District of Totoya in the Province of Lau in the Eastern Division.

INTERESTED PARTY

Counsel : **Ms. Romoce L for the Respondent**

Mr. Bukarau T.V.Q for the Applicant

Date of Hearing : **21 October, 2014**

Date of Decision : **14 August, 2015**

DECISION

INTRODUCTION

1. The Applicant seeks Leave for Judicial Review of the decision of Respondent handed down on 26th February, 2014. The said decision allowed the appeal against the previous

decision of the Native Land and Fisheries Commission and the appointment of the Applicant was quashed and the Interested Party was appointed in place of that.

2. The requirements for an Application for Leave for Judicial Review are contained in the High Court Rules of 1988. These are fond in Order 53 rule 3(2), (3), (4) and (5) of High Court Rules of 1988. Accordingly, an application for leave should be filed in the High Court Registry, with a notice in Form 32 in the Appendix 1 to the High Court Rules of 1988. The Applicant has not complied with the said Form 32. The Applicant had filed an *ex parte* notice of motion (which was converted to *inter partes*), seeking 'Judicial Review of the decision of the Respondent dated 26th February, 2014.' According to the said Form 32 the Applicant needed to 'set out particulars of the judgment, order, decision or other proceeding in respect of which judicial review is being sought' and 'set out relief sought and the grounds up on which it is sought', but these were not complied in this instance. There is only a motion seeking leave of the court for judicial review of decision. This was not raised as an objection, by the Respondents at the hearing and presumably did not prejudice the Respondent.

3. The application should also contain a statement of particulars of the order of which judicial review is sought, and grounds for such relief, name and description of the applicant and solicitors and applicants address for service (see O. 53 r.3(2)(a)(i)(v) of High Court Rules of 1988)The Applicant had filed a 'statement of applicant' the grounds upon which the application was made were as follows

    a. *The Applicant is the only surviving grandson of the first registered title holder of TuiVanua as registered in the VKB Register - Semesa Valaloloma (VKB Reg No. 1)*

    b. *the grounds relied upon by the Interested Party was based on uncertain evidential material that are pre VKB-registration era and there outside the jurisdiction of the Court.*

    c. *The evidential material taken into 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 Native 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 a 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 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. 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 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 Feb 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.*

4. There are no names and addresses of the applicant's solicitor and any address of service in the said statement as required by the High Court Order 53 rule 3(2)(a)(iv) and (v). Apart from what was stated above, an affidavit is also required verifying the facts which the Applicant relies. I cannot see any failure on the part of the Applicant regarding these requirements. (see O. 53 r.3(2)(b) of High Court Rules, 1988)

5. The Applicant was also, required to serve the copies of application for leave and the affidavit in support to all persons directly affected by the application. (See O.53 r3 (3)(i). High Court Rules, 1988).This is an important provision and service of '**a*ll persons directly affected***' is an essential requirement, even though hearing of them is not mandatory before granting leave for judicial review. (See O.53 r3(3)(ii) High Court Rules, 1988). The requirement under said provision is twofold. One is to ascertain the parties who are directly affected by this application and for this attention should be directed to the orders sought in the summons. The second thing is to ascertain whether all such parties were served with the Application.

6. It is necessary to ascertain whether there are any directly affected party not being named as a party to this application. The judicial review was sought against the decision of the First Respondent. This decision related to an appointment and the appointee was also made a party to the application and was served with the application seeking leave. The statutory authority that made the decision is the first named Respondant. There is an affidavit in support of the service. I cannot see any other person being directly affected not named in this application, thus the Applicant had fulfilled the requirement laid down in Order 53 rule 3(i).

7. The Order 53 rule 3(5) of the High Court of 1988, states as follows

> *'The court shall not grant leave unless it considers that the applicant has a sufficient interest in the matter to which the application relates.'*

8. In ***R v Secretary of State for Foreign Affairs, ex parte World Development Movement Ltd*** [1995] 1 All ER 611 at 620 after discussing the law relating to identical provision in UK, held,

> '*For my part, I accept that standing (albeit decided in the exercise of the court's discretion, as Donaldson MR said) goes to jurisdiction, as Woolf LJ said. But I find nothing in IRC v National Federation of Self-Employed and Small Businesses Ltd to deny standing to these applicants. The authorities referred to seem to me to indicate an increasingly liberal approach to standing on the part of the courts during the last 12 years. It is also clear from IRC v National Federation of Self-Employed and Small Businesses Ltd that standing should not be treated as a preliminary issue, but must be taken in the legal and factual context of the whole case (see [1981] 2 All ER 93 at 96, 110, 113, [1982] AC 617 at 630, 649, 653 per Lord Wilberforce, Lord Fraser and Lord Scarman).*
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> *Furthermore, the merits of the challenge are an important, if not dominant, factor when considering standing. In Professor Sir William Wade's words in Administrative Law (7th edn, 1994) p 712:*
> *'... the real question is whether the applicant can show some substantial default or abuse, and not whether his personal rights or interests are involved.'*
>
> *Leaving merits aside for a moment, there seem to me to be a number of factors of significance in the present case: the importance of vindicating the rule of law, as Lord Diplock emphasized in IRC v National Federation of Self-Employed and Small Businesses Ltd [1981] 2 All ER 93 at 107, [1982] AC 617 at 644; the importance of the issue raised, as in Ex p Child Poverty Action Group; the likely absence of any other responsible challenger, as in Ex p Child Poverty Action Group and Ex p Greenpeace Ltd; the nature of the breach of duty against which relief is sought (see IRC v National Federation of Self-Employed and Small Businesses Ltd [1981] 2 All ER 93 at 96, [1982] AC 617 at 630 per Lord Wilberforce); and the prominent role of these applicants in giving advice, guidance and assistance with regard to aid (see Ex p Child Poverty Action Group [1989] 1 All ER 1047 at 1048, [1990] 2 QB 540 at 546). All, in my judgment, point, in the present case, to the conclusion that the applicants here do have a sufficient interest in the matter to which the application relates within s 31(3) of the 1981 Act and Ord 53, r 3(7).*
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> *It seems pertinent to add this, that if the Divisional Court in Ex p Rees-Mogg eight years after Ex p Argyll Group was able to accept that the applicant in that case had standing in the light of his 'sincere concern for constitutional issues', a fortiori, it seems to me that the present applicants, with their national and international expertise and interest in promoting*

and protecting aid to underdeveloped nations, should have standing in the present application'

9. As stated in the above decision, the issue of 'sufficient interest' is more than a mandatory requirement in terms of Order 53 rule 3(5) of High Court Rules of 1988 and it deals with the jurisdiction of the court to in judicial review. The attitude of the courts in UK was to give a liberal interpretation of said provision a wider interpretation thus, a wider jurisdiction. These decisions were applied in Fiji Court of Appeal.

10. ***R v Monopolies and Mergers Commission, ex p Argyll Group plc*** [1986] 2 All ER 257, [1986] 1 WLR 763. Donaldson MR, when referring to the provision of Ord 53, r 3(7), which is analogous to High Court Rules 1988 of Fiji, said ([1986] 2 All ER 257 at 265, [1986] 1 WLR 763 at 773):

> *'The first stage test, which is applied on the application for leave, will lead to a refusal if the applicant has no interest whatsoever and is, in truth, no more than a meddlesome busybody. If, however, the application appears to be otherwise arguable and there is no other discretionary bar, such as dilatoriness on the part of the applicant, the applicant may expect to get leave to apply, leaving the test of interest or standing to be re-applied as a matter of discretion on the hearing of the substantive application. At this second stage, the strength of the applicant's interest is one of the factors to be weighed in the balance.'*

11. The said case was applied in Fiji Court of Appeal in ***Proline Boating Company Ltd v Director of Lands*** [2014] FJCA 159; ABU0020.2013 (decided on 25 September 2014) and in UK in ***R v Secretary of State for Foreign Affairs, ex parte World Development Movement Ltd*** [1995] 1 All ER 611 at 618-619.

12. In the circumstances the interest of the Applicant in this case falls within the scope of Order 53 rule 3(5) High Court Rules, 1988 as the previous appointee whose status was not accepted in the appeal, and that makes him an interested party. He cannot be considered as 'meddlesome busybody'. I do not think that standing of the Applicant in this proceeding is at issue. The grounds of opposition do not state it as an objection.

13. Fiji Court of Appeal in ***Proline Boating Company Ltd v Director of Lands*** [2014] FJCA 159; ABU0020.2013 (decided on 25 September 2014) Goonarana J held,

> *'**Other Requisites to be looked into at the Leave Stage***
> *[41] I now move onto deal with the other requisites which ought to be looked into at the stage of seeking leave to apply for judicial review.*
>
> *[42] This is necessary in order "to eliminate frivolous vexatious or hopeless applications" that would prima facie appear to be so. (vide: **Harikissun Ltd v. Dip Singh &Ors**. [FCA Rep. 96/365].*
>
> *[43] These requisites in developed jurisdictions may be noted as follows:*
> *(1) Was there an inordinate delay in seeking Judicial review against the decisions that is complained of by an applicant?*
>
> *(2) Does that decision/emanate from the exercise of statutory power by a public body even if disputes involving private parties are involved?*
>
> *(3) What reliefs have been sought by an applicant in his/her application for leave to apply for Judicial Review and against whom?'*

Delay

14. Though the Applicant has failed to come within 3 month stipulated time period in terms Order 53 rule4 (2)of the High Court Rules, the delay in this matter cannot be considered as inordinate at this stage and in any event this is a matter that can be dealt at the substantive hearing.(see Fiji Court of Appeal decision of ***Harikisun Ltd Vs Sing*** ABU 19 of 1995 (unreported) decided on 4th October,1996) The decision of the first Respondent was made on 27th February,2014 and this Application was made on 3rd June,2014. Fiji Court of Appeal held that extension of time, where delay was minimal and no prejudice to other party, may be justified. (See: ***FEA Vs Arbitration Tribunal*** ABU 79 of 2007(unreported) decided on 10th July, 2008). In this case the delay was minimal and less than 14 days, and there is no prejudice to the Respondents by granting leave for judicial review.

15. Though I am not inclined to refuse the leave for delay beyond the 3 month time period, this is a factor that I consider to refuse a stay of execution by the Respondants of the

decision dated 26th February, 2014. There is prejudice to the Respondents if a stay is granted after three months from the decision. The Applicant has not sought a stay promptly.

Does that decision/emanate from the exercise of statutory power by a public body even if disputes involving private parties are involved?

16. The decision of the first named Respondent was a decision taken in terms of a statutory power as the appellate body to a decision of Native Fisheries Commission. It is stated that fist named Respondent, had considered fresh evidence in terms of Section 7(3) of the Native Lands Act (Cap 133). The Respondent's position is that fresh evidence can be considered in terms of the said provision in terms of conditions stipulated therein. So whether the statutory requirements were met in the exercise of that statutory power is raises an arguable issue to be dealt in the judicial review.

What reliefs have been sought by an applicant in his/her application for leave to apply for Judicial Review and against whom?'

17. The relief was sought against the said determination where additional materials were considered by the first named Respondent to allow the appeal of the Interested Party.

18. The Respondent alleges that the Applicant had adduced fresh evidence in this application seeking leave for judicial review, I have not considered them. In my judgment these cannot be considered in a judicial review when it involved a decision of inferior tribunal.

CONCLUSION

19. The Applicant was appointed after an inquiry and this appointment was challenged in appeal to the first Respondent. In appeal fresh evidence was considered and the appointment was quashed and the Interested Party was appointed. There is provision for considering fresh evidence in appeal, but whether this discretion was fairly exercised in terms of the statutory requirement needs to be considered in the judicial review. The Leave for Judicial Review is allowed. No costs

FINAL ORDER

a. The leave for Judicial Review is granted against the decision of the first named Respondent handed down on 27th February, 2014 (dated 26th February, 2014).

b. The request for Stay is denied.

c. No costs.

Dated at **Suva** this **14th** day of **August**, **2015**.

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Justice Deepthi Amaratunga
High Court, Suva