

IN THE HIGH COURT OF FIJI AT SUVA
CIVIL JURISDICTION

Action No. HBJ 02 of 2019

BETWEEN

STATE

AND

MINISTER OF iTAUKEI AFFAIRS

AND

iTAUKEI LANDS AND FISHERIES COMMISSION

AND

iTAUKEI LAND TRUST BOARD

RESPONDENTS

EX PARTE

RATU NEUMI LEQATAQA as Vunivalu Salatu of Nakalawaca Village,
Tailevu suing in *propria persona* and in the representative capacity
for and on behalf of beneficiaries who qualify pursuant to
provisions of the iTaukei Lands Act and as customary
iTaukei owners of iTaukei land.

AND

MITIELI MOTOTABAU, MOSESE NAKALEVU and JESEVUETI of Nakalawaca
Village, Tailevu, suing as trustees of the YAVUSA SALATU
DEVELOPMENT TRUST.

APPLICANTS

Counsel : Mr. Chambers. K. for the applicants
Ms. Motofaga. M with Mr. Solvaliu. D for the 1st &
2nd Respondents.
Ms. Suveinakama. K. for the 3rd Respondent

Date of Hearing : 02nd May, 20

Date of Ruling : 24th May, 2019

RULING

(Leave to apply for Judicial Review)

[1] The applicants filed the present application seeking leave to file an application for judicial review. The grounds as stated in the application seeking leave are as follows:

6. On 03rd June 2019 the applicants' solicitor wrote to the respondents requiring on or before 24th January, 2019 that the 1st respondent refer the matters of dispute to the statutory dispute resolution process under section 16 of the iTaukei Lands Act; that the 2nd and 3rd respondents' to allow the applicants to inspect all relevant documents on file with the 1st and 2nd respondent; and for the 3rd respondent to freeze all dealings in trust

property and/or disbursement of trusts funds until final determination of the disputes resolution process.

7. The respondents have not responded to the applicants' demand either by the specified date or any time subsequently and they have breached their various statutory duties by conduct which amounts to a refusal to do anything at all.

[2] In the application sought to be filed for judicial review the applicants seek the following remedies:

- (a) Declaration that the 1st respondent has failed to comply with a statutory duty to initiate the dispute resolution process set out in section 16 of the iTaukei Lands Act.
- (b) Declaration that the 2nd and 3rd respondents have failed to comply with the *audi alteram partem* rule and the principles of natural justice by failing to allow the applicants to allow to inspect the relevant documents in their possession and control.
- (c) Declaration that the 3rd respondent has failed to comply with a statutory duty to act as trustee for the applicants pursuant to iTaukei Land Trust Act.
- (d) Certiorari to remove into this court and quash the aforesaid decisions.
- (e) Mandamus to compel the respondents to do their statutory duties, and to comply with the *audi alteram partem* rule and the principles of natural process.
- (f) Mandamus to compel the 1st respondent to initiate the iTLA section 16 process.
- (g) Mandamus to compel the 2nd and 3rd respondents to implement the 1905 and 1930 Native Land Commission boundary determinations.
- (h) Damages for breach of statutory duty to be quantified at trial.
- (i) The grant of leave on this application shall operate as a stay.
- (j) Injunction against the 3rd respondent freezing dealings in the land delineated in the aforesaid 2nd respondent's 1905 decision and the disbursement of trust funds until final determination of the dispute resolution process.

[3] In the affidavit in support of Fereti Mototabua it is averred that iTLTB have advised him that the 3rd respondent is about to issue leases in the Nawi Subdivision at Korovou over Yasua Salatu land and to disburse trust funds from the transaction in breach their fiduciary duty.

[4] The test for whether permission should be granted remains whether an arguable case has been shown, although now the court will be aware of the defendant's case. Consideration of the defendant's case – even if only in summary – will surely sometimes lead to the conclusion that the claimant's case is unarguable, thus leading to the denial of permission in cases in which would otherwise be granted. These changes have been criticised as unlikely to lead more efficient procedure and as being unfair to the claimants. Although some lawyers find even the most obvious propositions 'arguable', the grant of permission requires 'a realistic prospect of success'. Permission may also be refused because of delay or the availability of an alternative remedy or because the claim is premature. [*Administrative Law by Wade and Forsyth, 10th Edition, Pages 555 & 556*].

[5] In **State v Connors, ex parte Shah** [2008] FJHC 64; HBJ47.2007 (7 April 2008) it was held:

At leave stage, the threshold is low. What needs to be established is 'an arguable case' to be resolved only by a full hearing of the application for judicial review. At this stage a full review of the facts is unnecessary. Nonetheless, a court is obliged to sufficiently pursue the material provide to determine whether an applicant raises an issue arguably involving an error in law, a serious error in fact; a violation of natural justice or procedural fairness, or an excess of jurisdiction by the decision-maker the subject of the application.

[6] These observations of the High Court cited with approval by the Court of Appeal in the case of **Maisamoa v Chief Executive Officer for Health** [2008] FJCA 41; ABU0080.2007S (10 July 2008).

[7] In the case of **Nair v Permanent Secretary for Education** [2008] FJHC 140; HBJ02.2008 (11February 2008) it was held:

In an application for leave to apply for judicial review, the court must ask:

Does the applicant have sufficient interest in the application;

1. Is the decision susceptible to judicial review – that is, is it of a private or public nature;
2. Is the decision non-reviewable in accordance with the terms of the Public Service Act;
3. Are alternative remedies available to the applicant and, if so, pursued by the applicant;
4. Does the material available disclose an arguable case favouring the grant of the relief sought, or what might, on further consideration, be an arguable case?

[8] The applicants' request to the 1st respondent was pursuant to section 16 of the iTaukei Lands Act (the Act) which provides as follows:

- (1) In the event of any dispute arising the parties to which are Fijians in connection with land in a province or tikina in which the proprietorship of the Fijian owners has been ascertained by the Commission or in a province or tikina which it may be inconvenient or inexpedient for the Commission to visit without delay or in any other case when he may deem it expedient, the Minister may delegate a member of the Commission or some other proper person to inquire into the same.
- (2) It shall be lawful for the Minister to appoint one or more persons being native Fijians to sit as assessor or assessors with the commissioner appointed as aforesaid.
- (3) For the purpose of holding an inquiry under subsection (1), the commissioner shall have the same powers as those vested in the Commission and shall follow the same procedure as is laid down for the Commission in inquiries.
- (4) During such inquiry the commissioner shall take or cause to be taken a full account in writing of all proceedings and of the evidence.
- (5) On the conclusion of any inquiry held under subsection (1) the commissioner holding it shall inform the parties interested of his decision and shall transmit a copy of his decision to the scribe of the province in which the land is situate

and such decision shall be publicly read at the next meeting of the provincial council.

- [9] From the above provisions it is absolutely clear that the Minister in charge of the subject is not bound by law to delegate a member of the 2nd respondent commission to inquire into any dispute referred to in section 16 of the Act. There is no material before this court to say that any dispute was referred by the applicants to the 2nd respondent commission. Section 16(1) of the Act clearly explains the circumstances under which the Minister can interfere with the dispute resolution process that is to avoid inconvenience and delay.
- [10] The respondents object to this application on various grounds one of which was that there is undue delay in coming to court. From the letter written to the 1st respondent it appears that there allegation is that since the delineation of the land in question in 1905 the revenue of the land have been wrongfully allocated which means that the dispute had been there since 1905 or at least from 1930 but the applicants or their predecessors have not taken any action to resolve this issue until such time solicitors of the applicants requested the 1st respondent to initiate dispute resolution process under section 16 of the Act. This inordinate delay has not been explained by the applicants.
- [11] The next question is whether there is undue delay in bringing this application to court. The question of delay in filing an application for leave to apply for judicial review was discussed by the Court of Appeal in **Ramasi v Native Lands Commission** [2015] FJCA 83; ABU0056.2012 (12 June 2015). In paragraphs 29 to 33 the Court of Appeal said:

The learned Judge found that the application for review was made 2 years and 8 months after the dismissal of the appeal by the Appeals Tribunal. However the appellant submitted that in a judicial review application delay cannot be considered as a ground to deny relief.

Order 53, rule 4 (1) of the High Court rules (as far as it is applicable) is as follows:-

"Subject to the provisions of this rule, where in any case the court considers that there has been undue delay in making an application for judicial review or....the court may refuse to grant (a) leave for the making of the application".

Rule 4 (2) refers particularly to certiorari where the application should be made within 3 months.

The Supreme Court in PSC v Singh [2010] FJSC 3; CBV 0011.2008 (27 August 2010) referring to Order 53 rule 4 (1) held that, "Where there is a delay in making an application for judicial review the court may refuse to grant the relief...if it thinks that granting it would be likely to cause substantial hardship to, or substantially prejudice the rights of any person or would be detrimental to good administration" (emphasis added). The refusal of the application by the learned High Court Judge was on the basis that the delay would be detrimental to good administration and is thus within the ambit of the Supreme Court decision mentioned above.

There is no statutory limit imposed by the rules with regard to the time limit within which an application could be made under Order 53 rule 4 (1) of the High Court Rules. The limit is the "undue delay". The "undue delay" gives discretion to court which has to be judicially exercised. The question is whether the undue delay has been satisfactorily explained by the appellant. The only explanation given was due to lack of funds to find a lawyer which the learned Judge had correctly rejected as not legitimate. I am of the view that the delay has not been satisfactorily explained and the learned Judge was correct in the rejection.

For the above reasons I am of the view that this appeal has to fail and the same is dismissed. Considering the facts of this case I am of the view that there should be no costs.

[12] In this case the delay is inordinate and unexplained. The applicants have not made an attempt to explain the delay in coming to court or the reasons why their predecessors did not take any action in this regard for such a long time.

[13] The other allegation is that the 2nd and 3rd respondents failed to allow the applicants to inspect the relevant documents and thereby failed to comply with the *audi alteram partem* rule. *Audi alteram partem* is a Latin phrase which means 'hear the other side' or 'both parties should be heard'. The applicants allege that failing to give a fair hearing amounts to violation *audi alteram partem* rule. Failure to act under certain provision of a statute is not

a violation of the principle *audi alteram partem*. At a hearing if the one of the parties is not given a fair hearing it would amount to a violation of this principle.

[14] The applicants in this application relied on the decision in **State v Taus Khan & Ors; Exparte Joyce Heeman & Ors**. HBJ0014 of 1996. The facts of that case are totally different from that of the case before this court. It is a case where the parties who were dissatisfied with the decision of the Director of Town and Country Planning appealed to the Minister in charge of the subject and there was no response from the Minister and the court ordered the Minister to hear the appeal and arrive at a decision without delay.

[15] For the reasons aforesaid I make the following orders.

ORDERS

1. The application of the applicants for leave to file an application for judicial review is refused.
2. I make no order for costs of this application.




Lyone Seneviratne

JUDGE

24th May, 2019