

IN THE HIGH COURT OF FIJI
AT LAUTOKA
CIVIL JURISDICTION

HBJ 09 of 2021

IN THE MATTER of application by Nemani Lalabalavu, Villager of Solevu Village, Malolo, for Judicial Review.

AND

IN THE MATTER of the iTaukei Lands Act 1905 of the Laws of Fiji whereby the iTaukei Lands and Fisheries Commission have removed Nemani Lalabalavu and his descendants from the Vola Ni Kawa Bula of the Mataqali Ketenamasi, Tokatoka Nalotulevu, Yavusa Lawa (Solevu, Malolo, through its powers under the iTaukei Lands Act 1095).

BETWEEN: **NEMANI LALABALAVU** Villager of Solevu Village, Malolo.

APPLICANT

AND : **ITAUKEI LANDS AND FISHERIES COMMISSION** a statutory body set up by law of North Wing TTF Buildings, Nasese, Suva.

FIRST RESPONDENT

AND : **THE ATTORNEY GENERAL** of Level 7, Suvavou House, Victoria Parade, Suva.

SECOND RESPONDENT

Appearances: Mr. Fa I. for the Applicant
Mr. J. Mainavolau for the Respondents
Date of Hearing: 19 July 2022
Date of Ruling: 26 May 2023

RULING

1. Before me is an application seeking leave to apply for Judicial Review. The application is filed by Fa & Company for and on behalf of Nemani Lalabalavu, pursuant to Order 53 Rule 3 (2) of the High Court Rules 1988. Order 53 Rule 3 (2) of the High Court Rules provides as follows:

(2) An application for leave must be made *ex parte* and must be supported-

- (a) by a statement, setting out the name and description of the applicant, the name and address of his barrister and solicitor (if any), the relief sought and the grounds on which it is sought, and
- (b) by affidavit, to be filed before the application is made, verifying the facts relied on.

2. The application is supported by an affidavit of Lalabalavu sworn on 09 December 2021 and filed on the same date.
3. The office of the Attorney General did file a Notice of Opposition on 26 January 2022 together with an Affidavit of one Apimeleki Tola sworn on 24 January 2022. Tola is the Principal Administrative Officer at the Office of the *i*-Taukei Lands & Fisheries Commission ("***i*-TLFC**").
4. Lalabalavu swore an affidavit in reply on 11 March 2022 which affidavit is also filed herein.
5. Lalabalavu is aggrieved about a decision of the Chairman of the *i*-TLFC which was made on 16 September 2021. By the said decision, the *i*-TLFC had cancelled or removed Lalabalavu's registration in the Vola ni Kava Bula ("**VKB**") under tokatoka Nalotulevu.
6. The core facts which led the *i*-TLFC to make that decision are not in dispute between the parties. What is in dispute, as I gather from the affidavits and submission filed, is whether or not the *i*-TLFC is legally entitled in law, under the peculiar circumstances of the facts, to make the decision in question, and if it is – whether or not it is entitled to do so without first hearing the party whose registration status is at stake.
7. The core facts, which are not in dispute and which formed the basis of the *i*-TLFC's decision are as follows.
8. Lalabalavu was born on 22 July 1974. His biological father was once Ratu Sevanaia Varani ("**Varani**"). Varani is registered in the VKB under Tokatoka Namatua.
9. Upon Lalabalavu's birth, or at least at some point immediately after his birth, Lalabalavu was given up for adoption to one Ratu Filipe Nabola and one Salanieta Tanumi.
10. Ratu Filipe (deceased) was Lalabalavu's paternal grand-uncle. He was the biological brother of Varani's mother (Lalabalavu's paternal grandmother).
11. Lalabalavu alleges that his adoption by Ratu Filipe and Adi Salanieta was carried out following traditional protocol as well as through the formal procedures under the Adoption Act. Lalabalavu's Birth Certificate records Ratu Filipe and Adi Salanieta as his father and mother respectively.
12. I observe that the *i*-TLFC takes the position that the entry of Ratu Filipe and Adi Salanieta's names on Lalabalavu's Birth Certificate – was the result of a "fraud". This position is evident in letters written by *i*-TLFC on 24 and 27 September 2021 in response to letters written by Fa & Company on 22, 27 and 30 September 2021.
13. In any event, it appears that, upon the formulization of Lalabalavu's adoption by Ratu Filipe – and the ensuing entry of Ratu Filipe's name on Lalabaalvu's Birth Certificate as the father – the Birth Certificate was then used by the *i*-TLFC in 1974 or thereabouts, as the reference point on which it (*i*-TLFC) then registered Lalabalavu into Ratu Filipe's Tokatoka Nalotulevu.

14. Generally, where an *i-taukei* man is registered in the VKB, and his name appears on a child's Birth Certificate, the Birth Certificate becomes the primary reference point by which the *i-TLFC* will trace and determine the child's patrilineage and tokatoka and, accordingly, will enter the child in the VKB (see **Hutson Instruction 3 of 1926**).

15. Whether or not the Birth Certificate rule should apply equally in a situation as present in this case is called into question. The question is, as I said in **State v iTaukei Lands Commission** [2016] FJHC 1052; HBJ 004.2012 (22 November 2016) at paragraphs 50 – 51;

“...the Hutson Instruction would serve its purpose quite well in ensuring a principled approach to the preservation of the integrity of the VKB as a registrar of multi-generational group of *i-taukei* relatives related by patrilineal descent. However, ...that birth certificate rule in the Hutson Instruction, as one would imagine, may not have been intended willy nilly to enable the registration of a child into his or her adoptive father's proprietary unit, where the said father is named on the child's birth certificate after a formal adoption process”

16. Mr. Fa of course, would argue as follows, as he did in his submissions in court:
 - a) this is a situation where an *i-taukei* child was formally adopted by the family of his paternal grandmother, and registered into that tokatoka accordingly.
 - b) that adoption was carried out in accordance with native custom and tradition and later formalized under the Adoption Act.
 - c) the *i-Taukei* Lands Act also allows registration of children into the mother's family (eg; section 21) in the case of an illegitimate child, and also in accordance with custom and tradition as could happen to a Fijian whose mother is an *i-taukei* and whose father is of other race (see **Ah Koy v Registration Officer for the Suva City Fijian Urban Constituency** [1993] FJ LawRp 36; [1993] 39 FLR 191 (20 August 1993).
 - d) in this case, the decision by *i-TLFC* to remove Lalabalavu from his adoptive father's (paternal grandmother's) tokatoka was made without proper consultation, if at all, and without giving Lalabalavu the opportunity to be heard on it.
 - e) accordingly, the decision was made arbitrarily, in breach of natural justice and was unreasonable and unlawful.
 - f) accordingly Lalabalavu was denied an opportunity to be heard and to argue that his adoption into the family of his paternal grandmother, and his registration into the tokatoka, was regular in accordance with custom and tradition.

17. It is alleged by Lalabalavu that, he did try to appeal the decision of 16 September 2021 to the *i-TLFC*'s Appeal Tribunal - but was refused. He seeks the following relief;
 - i. **AN ORDER FOR CERTIORARI** to remove into the High Court the said decision of the first Respondent dated 16/09/21, cancelling the Applicant's registration from the VKB for the Mataqali Ketenamasi, Tokatoka Nalotulevu, Yavusa (Lawa), Malolo, and quash the same;
 - ii. **A DECLARATION** that the decision by the first Respondent in or about 29/07/74, to register the Applicant as a member of the Mataqali Ketenamasi, Tokatoka Nalotulevu, Yavusa (Lawa), Malolo, is a final decision of the first Defendant and is Res Judicata. As such, the first Respondent's decision of 16/09/21 to cancel the Applicant's registration

from the VKB of the Mataqali Ketenamasi, Tokatoka Nalotulevu, Yavusa (Lawa), Malolo and to remove his name from the VKB of the Mataqali Ketenamasi, Tokatoka Nalotulevu, Yavusa (Lawa), Malolo, is unlawful, null and void and of no effect.

- iii. **A DECLARATION** that the decision of the first Respondent of 16/09/21, cancelling the Applicant's registration from the VKB for the Mataqali Ketenamasi, Tokatoka Nalotulevu, Yavusa (Lawa), Malolo was made in excess of the first Respondent's jurisdiction and was therefore unlawful, void and of no effect.
 - iv. **A DECLARATION** that the first Respondent breached Section 7 of the iTaukei Lands Act 1905 by refusing the Applicant the opportunity to appeal its decision of 16/09/21.
 - v. **A DECLARATION** that the decision of the Respondent 16/09/21 to cancel the Applicant's registration from the VKB for the Mataqali Ketenamasi, Tokatoka Nalotulevu, Yavusa (Lawa), Malolo was made ultra vires.
 - vi. **A DECLARATION** that the decision of the first Respondent of 16/09/21, was made in breach of the rules of Natural Justice and therefore unlawful.
 - vii. **A DECLARATION** that the decision of the first Respondent of 16/09/21, cancelling the Applicant's registration in the VKB for the Mataqali Ketenamasi, Tokatoka Nalotulevu, Yavusa (Lawa), Malolo is unreasonable in the Wednesbury sense and as such the decision is unlawful.
 - viii. **AN INJUNCTION** against the first Respondent restraining the Respondent from cancelling the Applicant's registration from the VKB for the Mataqali Ketenamasi Tokatoka Nalotulevu, Yavusa (Lawa), Malolo.
 - ix. **AN ORDER** for damage and costs.
 - x. **SUCH FUTHER DECLARATION** and other relief as to the Court may deem fit.
18. I am of the view that Lalabalavu has sufficient interest and that he has an arguable case.
19. Leave granted. The decision of the *i*-TLFC is stayed until further Orders.



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Anare Tuilevuka
JUDGE

26 May 2023