RATU KALIOVA DAWAI v VILIAME NASETAVA & ORS (HBJ0002 of 2012L)

HIGH COURT — CIVIL JURISDICTION

NAWANA J

5 September, 24 October, 7 November 2012

Administrative law — judicial review — leave for judicial review — purpose of judicial review — whether respondent acted unlawfully or in excess of jurisdiction — consent order — whether valid legal basis to intervene — statutory right of appeal available — High Court Rules O 53 r 3(2) — Native Lands Commission Act s 17.

The applicant sought leave to apply for judicial review of the decision of the fourth respondent, appointing the sixth respondent as the Turaga Tui Nadi.

Held –

(1) In judicial review, the courts do not concern themselves with the actual decision which a tribunal is empowered by statute to make, but rather to ensure that those decisions are made lawfully. The application in this case is devoid of any evidence that the fourth respondent acted unlawfully or in excess of its jurisdiction so as to attract judicial review.

Chief Constable of the North Wales Police v Evans [1982] 1 WLR 1155, followed.

(2) The powers vested with the Minister under the Native Lands Commission Act and the parameters of judicial control of administrative action cannot be circumvented by the agreement of the parties, with or without the sanction of a court. Accordingly, the purported agreement of the parties, as evidenced by the consent order, could not form a valid legal basis for this court to intervene in judicial review.

Stephens v Fisher [2009] FJHC 240; HBC163.2008L (22 October 2009), considered.

(3) The discretion of the court is not usually exercisable in favour of an applicant, if a statutory right of appeal is available under the Act which gives rise to the impugned decision. The Native Lands Commission Act provides for a procedure to challenge the decision of the fourth respondent. The applicant did not exercise that right, nor did he explain the reasons for his failure to exhaust the statutory right of appeal.

Leave to apply for judicial review refused.

Cases referred to

Namatua v NLFC and Others (Civil Appeal No 20/2004: 04 March 2005: FJCA 85); *Nava and Ratu Viliame Bouwalu v NLTB* (JR No 09/1992: 21 Aug 1992), applied.

R v Epping and Harlow General Commissioners, ex parte Goldstraw [1983] 3 All ER 257, approved.

I. Fa for the Applicant

R. Green with T. Baravilala for the first to fifth Respondents.

S. Nacolawa for the sixth Respondent.

[1] Nawana J. The applicant seeks leave of this court in terms of O 53 r 3 (2) of the High Court Rules 1988 to apply for judicial review against the decision dated 09 December 2011 of the 4th Respondent-Commission appointing the 6th Respondent as the *Turaga Tui Nadi*. The 4th Respondent-Commission was comprised of 1st-3rd Respondents when the impugned decision was made.

[2] Specific reliefs sought by the applicant are:

(a) AN ORDER FOR CERTIORARI to remove into the High Court the said decision of the 4th Respondent dated the 9th December 2011 declaring the 6th Respondent to be the rightful Tui Nadi and that the same be quashed;

(b) A DECLARATION that the decision of the 4th Respondent of the 9th December 2011 is unlawful, void and of no effect;

(c) A DECLARATION that the decision of the 4th Respondent of the 9th December 2011 declaring the 6th Respondent to be the rightful Tui Nadi is unreasonable in the Wednesbury sense and as such the decision is unlawful;

(d) A DECLARATION that the 2nd Respondent had acted in bad faith and in a manner which was unfair to the Applicant by proceeding to appoint the 1st–3rd Respondents to be a Commission to investigate the rightful claimant to the title of Tui Nadi in light of the fact that at the relevant time there was a lawful Order of this Court that was made on the 12th of May 2005 that prevented the 4th Respondent from undertaking an Inquiry into the rightful holder of the title of the Tui Nadi and a further Order of this Court of the 27th of January 2007 that clearly set out the composition of the Commission and also a required terms of reference;

(e) A DECLARATION that the 4th Respondent's declaration of the 6th Respondent as the rightful holder of the title of Tui Nadi is irregular, void and of no effect;

(f) AN ORDER for damages and costs;

(g) SUCH FURTHER DECLARATION and other relief as to the Court may seem just.

[3] The Grounds relied on by the applicant are**:**

(a) That the decision by the 4th Respondent to declare the 6th Respondent to be the Tui Nadi pursuant to their ruling of the 9th of December 2011 was in breach of the rules of natural justice in that amongst other matters the Applicant was denied a fair hearing in that:

(1) That the 4th Respondent failed to provide a terms of reference for the Commission of Inquiry into the Tui Nadi dispute pursuant to the Orders of the High Court of the 27th of January 2007[sic];

(2) That the 4th Respondent failed to appoint an independent Commission for the Commission of Inquiry of the 22nd of November 2011 to determine the Tui Nadi dispute in accordance with the Orders of the High Court of the 27th of January 2007;

(3) That the 4th Respondent was biased against the Applicant in that the 1st–3rd Respondent failed to provide the Applicant with a terms of reference that the Commission of Inquiry would base its inquiry into, and

(4) The 1st–3rd Respondents had taken into account as evidence in the inquiry matters which were not placed before it.

(b) That the decision by the 4th Respondent was a decision that was made ultra vires the customs and traditions of the Vanua of Nadi and of section 17 of the Native Lands Act;

(c) That the 4th Respondent had made a predetermination in arriving at their decisions to declare the 6th Respondent or his supporters leading up to the Inquiry;

(d) That the decision by the 4th Respondent to declare the 6th Respondent to be the Tui Nadi pursuant to their ruling of the 9th December 2011 was in breach of the rules of natural justice in that amongst other matters, the Applicant was denied a fair hearing in that the 1st, 2nd and 3rd Respondents failed to warn the Applicant and his supporters:

1. (of the evidence of custom and tradition they would rely on; and

2. (any submission on behalf of the Applicant would not be considered relevant to the Commission of Inquiry.

(e) That the 4th Respondent in arriving at their decisions had:

[4] Taken into account relevant considerations and matters [sic], the irrelevant considerations and matters being those concerning the finding of the 4th Respondents that the 6th Respondent is of a senior lineage to the Applicant when in fact he was not, and taking into account matters contained in the Vola ni Kawa Bula (official register of families kept by NLC), not relevant to the issue of succession.

[5] [N]ot taken into consideration relevant matters, such as the customs and tradition of the Vanua of Nadi in relation to the issue of succession to a chiefly title;

[6] [A]cted unreasonably in that their decision was an unreasonable one having regard to customary law, was arbitrary in that the 4th Respondent did not make a determination according to law as they ignored the relevant customary evidence put to them and made a decision not based on such custom and was made in bad faith in that they had not acted fairly and had made their decision based on irrelevant considerations.

[7] The 1st-4th Respondents and the 6th Respondent, by their notices of opposition dated 09 May 2012 and 18 September 2012 respectively, opposed the grant of leave principally on applicant's failure to exhaust the statutory right of appealing to the Appeals Tribunal against the decision under Section 17 (3) of the Native Lands Act, as amended by the Native Lands (Amendment) (Appeals Tribunal) Act No 44 of 1998.

[8] At the hearing, learned counsel on behalf all parties made extensive submissions and tendered written-submissions as well.

[9] Mr I Fa, learned counsel appearing on behalf of the applicant, in my view, correctly spelt-out the scope of judicial review. Mr Fa submitted that:

> *The purpose of judicial review is for the courts to ensure that a statutory body or tribunal is carrying out its statutory function or duty within the parameters provided to it by law.* ***The courts do not concern themselves with the actual decision which a tribunal is empowered by statute to make, but rather to ensure that those decisions are made lawfully.*** *For by ensuring that a tribunal acts lawfully, the courts are ensuring that the intentions of parliament are met. If a Tribunal makes a decision which it is authorized to make but does so in an unlawful manner, judicial review is the process by which the courts will intervene to declare such a decision as a nullity by judicial review and compel the Tribunal to act lawfully when making its decision.*
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> (Highlighted for emphasis)

[10] I have carefully examined the application for leave for judicial review of the applicant in order to consider whether the 4th Respondent-Commission had acted unlawfully or in excess of its jurisdiction so as to attract judicial review procedure in light of the submissions of Mr Fa bearing in mind that judicial review is concerned not with the decision itself but with the decision-making process (*Chief Constable of the North Wales Police v Evans* [1982] 1 WLR 1155).

[11] I, however, find that the application is devoid of any such evidence or material based on the grounds relied upon by the applicant for this court to be satisfied prima facie in regard to the existence of an arguable case for the grant of leave.

[12] Conversely, the applicant is relying on a consent order dated 24 January 2007 entered by His Lordship Connors J. (as he then was) in Lautoka High Court Case No HBJ 04/2005L as a basis upon which judicial review is sought against the 4th Respondent-Commission as borne-out by document KD-3. The

applicant's complaint is that the 4th Respondent-Commission was not constituted in compliance with the consent order dated 24 January 2007; and, hence, it acted unlawfully.

[13] Although it was not disclosed by the applicant as he ought to have, the 1st-4th Respondents made clear in the course of the hearing that the applicant had invoked the jurisdiction of this court seeking a committal for contempt of court against the 4th Respondent-Commission and its members allegedly for not conforming to the consent order. By that consent order, the Minister [in charge of Fijian Affairs] was directed to appoint the Chairman of the [Native Lands] Commission; and, the disputant parties were also placed at liberty to nominate two members for appointment as commissioners to resolve the dispute over Tui Nadi. One such party is the applicant in the present proceedings.

[14] His Lordship Inoke J.(as he then was), dealing with the application for committal for contempt, held that the consent order dated 24 January 2007 was made without jurisdiction and dismissed the application for leave to apply for committal for contempt by his judgment dated 08 December 2011. In coming to the above conclusion, His Lordship Inoke J. stated that:

> *It seems to me beyond argument that the power to decide the rightful holder of the Tui Nadi title is vested in the Commission whose members can only be appointed in accordance with the Act. That is to say, such powers are vested exclusively in a Commission appointed strictly in accordance with the Act, namely, a Commission appointed by the Minister for iTaukei Affairs.*
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> *Secondly, the parties cannot bypass the Act by agreement sanctioned by the Court. Put simply, the parties cannot by agreement circumvent the law and have it sanctioned by the Court. Putting it in another way, the Court cannot order the parties to do something that is not allowed by the law even if they agreed to it. And if by trick or misconception they have so agreed, they cannot expect the Court to assist them in enforcing their illegal agreement; the loss lies where it falls: Stephens v Fisher* [2009] FJHC 240; HBC163.2008L (22 October 2009); Latchman *v* Ajudhya, Prasad ***[1960] 7 FLR 90.***
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> (Paragraphs 13 and 14)

[15] The above conclusions, in my view, clearly set-out the legal principles insofar as the powers vested with the Minster under the Act; and, also the parameters of judicial control of administrative action are concerned. Such powers cannot be circumvented by agreement of the parties with or without the sanction of a court. I, accordingly, agree and adopt the conclusions of Inoke J. In the result, I hold that the purported agreement of the parties, as evidenced by the consent order dated 24 January 2007, could not form a valid legal basis for this court to intervene in judicial review of the order dated 09 December 2011 of the 4th Respondent-Commission in the present application.

[16] Judicial review is a discretionary remedy; and, no party is entitled to such remedy as of right. (*R v Epping & Harlow General Commissioners; ex parte Goldstraw* [1983] 3 All ER 257) The discretion of court is not usually exercisable in favour of an applicant, if a statutory right of appeal is available under the Act, which gives rise to the impugned decision. The opposition, as advanced by Mr Green, learned counsel for 1st-4th Respondents, is based on this sound principle in judicial control of administrative action.

[17] Thus, the decision of 09 December 2011of the 4th Respondent-Commission could be challenged by way of an unrestricted appeal, which could encompass all grounds upon which judicial review is sought in these

proceedings. Section 17 of the Native Lands Commission Act that makes provisions in regard to the appointment of a headship in Fijian society states that:

> *(1) In the event of any dispute arising between native Fijians as to the headship of any division or subdivision of the people having the customary right to occupy and use any native lands, the Commission may inquire into such dispute and after hearing evidence and the claimants shall decide who is the proper head of such division or subdivision, and such person shall be the proper head of such division or subdivision:*
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> *Provided that if the claimants agree in writing in the presence of the Chairman of Commission as to who is the proper head of such division or subdivision it shall not be necessary for the Commission to hear evidence or further evidence as the case may be.*
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> *(2) On the conclusion of any inquiry held under subsection (1), the Chairman of the Commission shall inform the parties of the decision and shall transmit a copy of such decision to the scribe of the province in which the land belonging to such division or subdivision is situate and such decision shall be publicly read at the next meeting of the provincial council of that province.*
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> *(3)* **A person aggrieved by a decision of the Commission under this section may appeal against it to the Appeals Tribunal constituted under section 7**.
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> *(Underlined [Bolded] for emphasis)*

15. In *Nava and Ratu Viliame Bouwalu v NLTB* (JR No 09/1992: 21 Aug 1992), this court held that:

> *The Commission is the proper body set up by the Parliament to inquire into and resolve disputes of this nature. The Commission is better equipped and is the more appropriate forum to hear and resolve matters of chiefly headship, tradition and custom. While the jurisdiction of the court can be invoked by an aggrieved party who seeks to question the correctness of the Commission's procedure, the court should only intervene in the clearest cases of discernible error. This is not the case here. Section 17 of the Act empowers the Commission to hear and resolve disputes such as this. The Commission is not hamstrung or fettered by any particular procedure other than to act fairly and reasonably. What constitutes acting fairly and reasonably will depend on the circumstances of the particular case. The Commission is vested with discretion in performing its duties. It is only common sense to accept that in the exercise of its discretion it will pay heed to tradition and custom when carrying out its investigations and inquiries. To deny it the exercise of its discretion, and require rigid adherence to one particular formula when applying tradition and custom to any given situation, would be to inhibit it in carrying out the role and function parliament established it to perform.*

[18] The Court Appeal in *Namatua v NLFC and Others* (Civil Appeal No 20/2004: 04 March 2005: FJCA 85) emphasized the need to appeal against a decision of the Native Lands and Fisheries Commission if the decision is not tainted with jurisdictional incompetence (paragraph 30).

[19] It would, therefore, appear that the Act itself has provided for a procedure, which, in my view, is robust, to challenge the decision of the 4th Respondent-Commission. The applicant did not exercise that right; nor did he explain the reasons for his failure to exhaust the statutory right of appeal.

[20] I find no jurisdictional error in the process of making the decision on 09 December 2011 by the 4th Respondent-Commission warranting the exercise of the powers of review of this court. In the circumstances, I uphold the objections of the respondents and refuse the application to apply for judicial review against the decision dated 09 December 2011.

[21] The respondents are justifiably entitled to costs for the expenses incurred in bringing forward their cases through counsel even at the preliminary stage of leave. I, however, refrain from imposing costs against the applicant as such an

action could affect the possibility of ameliorating the feelings of acrimony, if there are any, among the members of the community over the dispute on community leadership for many years.

Application refused.