IN THE HIGH COURT OF FIJI

AT LAUTOKA

CIVIL JURISDICTION

Judicial Review No. HBJ 02 OF 2015

BETWEEN : **THE STATE**

AND : **iTAUKEI LAND TRUST BOARD,** a corporate body established under the iTaukei Land Trust Act Cap 134 of 361 Victoria Parade, Suva.

RESPONDENT

EX-PARTE : **VETAIA BARI RALULU** of Vatunidrusa (part of Tavua), self employed.

APPLICANT

Appearances : Mr N. Nawaikula for the applicant

: Mr P. Nayare for the respondent

Date of Hearing : 04 October 2016

Date of Judgment: 13 March 2017

DECISION

INTRODUCTION

[01] This decision relates to an application for judicial review.

[02] The applicant applies, with leave to apply for judicial review being granted by this court pursuant to Order 53, rule 3 of the High Court Rules 1988 ('*HCR*'), for judicial review of the decision of the respondent to grant the

renewal of Native Lease Nos.: 4/4/2160, 4/4/2145 and 4/4/352 NLC Lot 15 on Map ref: H/5-3 (part of) to Kawa Li Kuwe (Fiji) Ltd and seeks the following prerogative orders and declarations:

i. **A DECLARATION** that the Respondents, decision to renew the above named leases, was illegal and unlawful and ultra vires its powers in that it was made in breach of the Native Land Trust Act.

ii. **A DECLARATION** that the Respondent took into account irrelevant consideration in that it was totally unreasonable, mischievous and absurd having regard to the Wendsbury principle.

iii. **A DECLARATION** that the Applicants had a legitimate expectation that in accordance with the Respondents role under Native Land Trust Act and the Respondents own undertaking that the leases will be renewed to his name on the bases of his occupation and cultivation.

iv. **CERTIORARI** to issue quashing any offer or lease issued to Kawa Li Kuwe over the subject land.

v. **A MANDAMUS** directing the Respondent re-issues leases to the Applicant on the basis his use, occupation and cultivation.

vi. **COSTS** on indemnity basis.

vii. <u>ANY OTHER ORDER</u> that the court may deem just and fair.

BACKGROUND

[03] The background facts as on the affidavit of the applicant are as follows: Vetaia Bari Ralulu, the applicant is a member of Mataqali Tilivasewa, Tokatoka Nadula in the Yavusa Bila in the Vanua of Tavua. The Respondent is a body corporate established under the Native Land Trust Act Cap 134, and its primary function is to administer native land on behalf of its native Fijian owners.The subject matter of this action is NLC Lot 15, (part of), NLC sheet Ref, H/5-3, located in the district of Tavua, containing the total area of 1.7039 hectares (*'the subject land'*), which, according to the applicant, has been under occupation and use by him since 2000.

[04] A part of the subject land is known as Vatunidrusa Lot 1 was under a Native lease to a Mr Suresh Prasad who vacated the land in 1998 but the remainder has always been native reserve that was de-reserved in 2004.

[05] After Mr Suresh vacated the land in 1998, the applicant, having obtained the approval, immediately moved in and started occupation and cultivation. In 2001, the Applicant planned to further secure his occupation and cultivation under a lease and he approached the Respondent for assistance, which advised that his occupation and cultivation is lawful because he is a landowner but he should apply to lease the whole area in 2004 after Mr Suresh Prasad's interest formally expires.

[06] In 2004, the applicant returned to the land owners to ask them to consent not only to his use and occupation but also to his proposed leasing of the subject land. The Mataqali members gave their consent and the applicant formally lodged his application in 2004.The applicant completed the

building of his house in 2004 but he was cultivating the full extent of the land from the year 2000 to date.

[07] In 2005, some of the Applicant's Mataqali members, in particular the former chief of Tavua Ratu Ovini Bokini, became complacent when the Applicant began occupying the house and started to cultivate the land and operate his business therefrom.

[08] The respondent delayed the applicant's lease application. This necessitated the applicant to apply to the Agricultural Tribunal on 21 September 2005 to get some further security on his occupation and tenure. In 2009, the applicant's application to the Agricultural Tribunal was struck out and the applicant attended meetings with the respondent for settlement talks.

[09] In December 2005, the members of the Mataqali unlawfully and forcibly entered the applicant's compound and dismantled his building structure.The applicant complained to the Police and they were charged, prosecuted and fined.

[10] The same Mataqali members took issue with the respondent and the respondent gave them a development lease despite the fact of the applicant's occupation and cultivation of the subject land. The members on the strength of the development lease attempted to evict the applicant through an action at the High Court at Lautoka namely Civil Action No. HBC 237 of 2006 and the Applicant defended that action on the basis that he is occupying in accordance with custom and tradition.The applicant lost at the High Court but took the matter up before the Court of Appeal under Civil Appeal No. ABU032 of 2007 and the Court of Appeal decided in the applicant's favour, although not on the basis of his customary occupation.

[11] Upon enquiry about the delay in processing of the application for lease, the respondent informed the applicant that it is still assessing the status of the applicant's case.

[12] In the meantime, on January 2012, the applicant lodged with the respondent a new application to lease the subject land under a development lease and accordingly the application lodged with the Town and Country Planning Scheme Plan in anticipation of a development lease. The applicant did not receive any positive response from the respondent.

[13] However, the applicant states that he has been informed by very reliable sources in January 2013 that the respondent is planning to lease out the subject land despite the applicant's occupation and use. The applicant further states that the purported leasing of the subject land by the respondent is null and void and of no effect as it contravenes section 9 of the Native Land Trust Act. The applicant applies to judicially review the purported decision of the respondent to lease out the subject land to Kawa Li Kuwe.

DISCUSSION

[14] The applicant seeks writ of certiorari and mandamus along with certain declarations. An order of certiorari is sought to quash the defendant's purported decision to grant the renewal of Native Lease (for the subject land) to Kawa Li Kuwe (Fiji) Ltd ('KLK') and mandamus directing the respondent re-issues leases to the applicant on the basis of his use, occupation and cultivation.

Reviewable decisions and acts

[15] A decision (or act) is subject to judicial review if it was made (or done) in exercise of a public function. The defendant ('*iTLTB*') is a body corporate established under the Native Land Trust Act Cap 134 ('*NLTA*'), and its primary function is to control and administer all of native land vested in it on behalf of its native Fijian owners. The iTLTB's functions are functions of a public nature. A function is public if the government would make provision for its exercise if it was not being performed by the functionary in question (see: *R v Chief Rabbi of the United Hebrew Congregations of Great Britain and the Commonwealth ex p. Wachmann* [1992]1 WLR 1036). The iTLTB operates as an integral part of a public statutory scheme of regulation or service provision. Clearly, the iTLTB is a public functionary and its decisions are amenable to judicial review.

[16] The question then arises whether there is a decision to review. Judicial review is the process by which the High Court exercises its supervisory jurisdiction over the proceedings and decisions of inferior courts, tribunal and other bodies or persons who carry out quasi-judicial functions or who are charged with the performance of public acts and duties (see: *para 567, Vol.37 Halsbury's Laws of England (4th Ed)*).

[17] In Fiji, judicial review jurisdiction derives from Order 53 of the High Court Rules 1988 ('*HCR*').

[18] Is there a reviewable decision in this case? The applicant seeks to judicially review a decision of the respondent to grant the subject land on lease to Kawa Li Kuwe. The applicant did not provide a copy of the decision to

which the application relates. The applicant states that he came to know about the decision in November 2015. To date, the applicant could not provide a copy of the decision to be reviewed. At the hearing, counsel for the respondent informed the court that **the land in question was not leased to Kawa Li Kuwe.** Mr Nawaikula, counsel for the applicant filing a reply to the respondent's submission confirms the respondent's position. He submits that:

> *"The Respondent confirmation will actually make the court's decision in favour of the applicant a lot easier because it means that there is no third party interest over the land. The Applicant has also, since the argument on 4th October 2016, made its investigation and confirms Kawa Li Kuwe lease on a separate land."*

[19] The crux of the matter is that the subject land, which the applicant is occupying, was given for lease to Kuwa Li Kuwe. Now, it is clear that there is no lease given to a third party affecting the subject land. That means there is no reviewable order or decision depriving of the applicant's rights. In the absence of any reviewable decision made by the respondent, the applicant is not entitled to seek an order of Certiorari (quashing order) or an order of Mandamus against the respondent. It goes without saying that the applicant has no sufficient interest in the matter to apply for judicial review in the absence of any reviewable decision.

Standing of the applicant

[20] At the stage of the substantive application for judicial review, the fact that the court had granted leave to apply, which implies that it then considered that the applicant had a sufficient interest to make the application, will not preclude the court itself from considering the question afresh nor the opposite party from contending that the applicant has no sufficient interest to maintain his application. The grant of leave is not binding on

the court or the parties on the hearing of the substantive application that the applicant has the requisite sufficient interest: it will not fetter the court's power to grant or refuse the substantial relief sought on the ground that the applicant lacks the requisite sufficient interest (see: para 570, *Vol. 37 Halsbury's Laws of England*).

[21] In **R (Murley) v Secretary of State for Transport** [2005] EWHC 2324 (Admin), LTL 10/1/2006, where the orders did not deprive the claimant of anything, the application could not succeed as the court's role was to decide between the parties and not to pronounce on hypothetical question, however interesting, where there is no dispute to be resolved.

[22] The phrase 'sufficient interest' has been given a wide interpretation by the courts. They will assess the extent of the claimant's interest against the factual and legal circumstances of the claim. The test for deciding whether a claimant has sufficient interest was considered by the House of Lords in *R v Inland Revenue Commissioners, ex parte National Federation of Self-Employed and Small Businesses Ltd* [1982] AC 617. The court held that not only was standing a ground in itself upon which permission could be refused, it should also be considered at the substantive hearing after the relevant law and facts were examined in full. The court added that there are different tests for standing at the permission and the substantive stages. At the former stage it is merely a 'threshold' question for the court, designed to weed out frivolous or vexatious cases. However, at the substantive hearing the claimant must be able to show a strong case on the merits, judged in relation to the claimant's own concern with the subject matter of the claim (**R v Monopolies and Mergers Commission**, ex parte Argyll Group plc [1986] 1 WLR 763), (see also, Blackstone's Civil Practice 2011, page 1176).

[23] At the substantive hearing, in the matter at hand, the applicant admitted that the decision to which the application relates does not deprive of his

right. As a result, the applicant not only lost his standing at the substantive stages but also fails to show a strong case on the merits, judged in relation to his own concern with the subject matter. I therefore decline to issue prerogative reliefs sought by the applicant.

Possibility of another remedy

[24] The question then arises whether the applicant is entitled to any other remedies in lieu of prerogative orders.

[25] An application for declaration or an injunction may be made by way of an application for judicial review. Order 53, rule 1 of the HCR provides:

*'**Cases appropriate for application for judicial review** (O.53, r.1)*

1.-(1) An application for an order of mandamus, prohibition or certiorari shall be made by way of an application for judicial review in accordance with the provisions of this Order.

(2) An application for a declaration or an injunction may be made by way of an application for judicial review, and on such an application the court may grant the declaration or injunction claimed if it considers that having regard to-
(a) the nature of the matters in respect of which relief may be granted by way of an order of mandamus, prohibition or certiorari,
(b) the nature of the persons and bodies against whom relief maybe granted by way of such an order, and
(c) all the circumstances of the case, it would be just and convenient for the declaration for injunction to be granted on an application for judicial review.'

[26] On an application for judicial review, pursuant to O.53, r.1, the court may grant the declaration or injunction claimed if it considers that it would be

just and convenient for the declaration or injunction to be granted having regard to the nature of the matters in respect of which relief may be granted by way of an order of mandamus, prohibition or certiorari.

[27] I will now consider whether the applicant is entitled to the declaration or injunction on his application for judicial review.

[28] I believe relief might have been granted if it had been sought in an action begun by writ by the applicant at the time of making his application, albeit I have refused prerogative orders. The court has power to do so pursuant to Order 59, rule 9 (5) of the HCR, which states:

> ***'(5) Where the relief sought is a declaration, an injunction or damages and the Court considers that it should not be granted on an application for judicial review but might have been granted if it had been sought in an action begun by writ by the applicant at the time of making his application, the Court may, instead of refusing the application, order the proceedings to continue as if they had begun by writ; and Order 28, rule 8, shall apply as if, in the case of an application made by motion, it had been made by summons.'*** (My emphasis)

[29] The applicant seeks in his application for judicial review the declaration that the Applicants had a legitimate expectation that in accordance with the Respondent's role under Native Land Trust Act and the Respondent's own undertaking that the leases will be renewed to his name on the basis of his occupation and cultivation.

Evidence

[30] On affidavit in support of his application for judicial review, the applicant states that:

a) *He has been in continuous occupation and cultivation of the subject land as a customary land owner since 2000.*

b) *He is a member of Mataqali Tilivasewa, Tokotoka Nadula in Yavusa Bila of the Vanua of Tavua that is the customary owner of the subject land.*

c) *The subject land is the planting reserve (Kanakana) for his family and to formalize the customary approval for him to begin occupation, he approached and obtained the sanction of his Clans (Mataqali) elders.*

d) *Part of the subject land (Vatunidrusa Lot 1) was under a Native lease to a Mr Suresh Prasad who vacated the land in 1998 but the remainder has always been native reserve that was de-reserved in 2004.*

e) *In 1998, the applicant was informed by Mr Suresh Prasad that he had left the subject land.*

f) *He obtained the approval and moved in and started occupation and cultivation.*

g) *In 2001, he planned to further secure his occupation and cultivation under a lease and approached the Respondent for assistance. It advised that his occupation and cultivation is lawful because he is a landowner but he should apply to lease the whole area in 2004 after Mr Suresh Prasad's interest formally expires.*

h) *In 2004 the applicant returned to the land owners to ask them to consent not only to his use and occupation but also to his proposed leasing of the subject land. The Mataqali members gave their consent and formally lodged his application in 2014.*

i) He completed the building of his house in 2004 but he was cultivating the full extent of the land from 2000 to date.

j) in 2005, some of his Mataqali members namely the former chief of Tavua Ratu Ovini Bokini, became complacent when he (applicant) began occupying the house and started to cultivate the land and operate his business there from.

k) He, because of the threat and because of the delay by the respondent in processing his lease application, applied to the Agricultural Tribunal on 21 September 2005 to get some further security on his occupation and tenure.

l) In December 2005, the said Mataqali members unlawfully and forcibly entered his compound and dismantled the building structure. He complained to the Police and the individuals were charged, prosecuted and fined. The same individuals took issue with him and the respondent gave them a development lease despite his occupation and cultivation of the subject land.

m) They, on the strength of the development lease, attempted to evict him through an action at the High Court at Lautoka (Civil Action No. HBC 237 of 2006) and he defendant that action on the basis that he is occupying in accordance with custom and tradition.

n) He lost at the High Court but took the matter up before the Court of Appeal under Civil Appeal No. ABU 032 of 2007 and the Court of Appeal decided in his favour, although not on the basis of his customary occupation.

o) He continues to use and occupy the subject land in accordance with custom and tradition. The respondent is yet to issue a lease to him despite the many promises by the respondent to do so.

p) He currently has a carwash on the property and the remainder he cultivates with cash crops.

q) In 2009, his application to the Agricultural Tribunal was struck out and he attended meetings with the respondent for settlement talks. It was agreed between the respondent and him that he will not file any application to reinstate the Tribunal case upon the undertaking given by the respondent and his occupation and cultivation is in accordance with custom and tradition and it is obliged to formalise that occupation under a lease.

r) The Respondent followed up on its promise and undertaking with a meeting with all Mataqali members on 16 June 2009 were it advised all the members present that all Mataqali members who were occupying and cultivating Mataqali land were doing so lawfully and that it will issue lease to them.

s) On 16 December 2009, his solicitor wrote a reminder to the respondent about the delay in issuing the lease. To which, on 14 April 2010, the respondent replied stating it is still assessing the status of his case and that it will relay accordingly.

t) On 10 January 2012, he lodged with the respondent a new application to lease the subject land under a development lease and accordingly he lodged with the Town and Country Planning Scheme Plan in anticipation of a development lease.

u) Again, on 23 January the he wrote to the Respondent to enquire about the status of the development lease that he lodged on 10 January 2012. The respondent replied that it is still processing the application and it will advise him later.

v) *He says he has been under customary occupation and use of the subject land since the 2000 and seeks declaration his continuous occupation of the subject land from the year 2000 is in accordance with custom and tradition and it is lawful.*

[31] The respondent did not file any affidavit in opposition. As a result, the applicant's evidence on affidavit remains unchallenged. I could not find any cogent reasons to disregard his evidence. I therefore accept his evidence given on affidavit.

Conclusion

[32] On the evidence, I find the applicant is a member of Mataqali Tilivasewa, Tokatoka Nadula in the Yavusa Bila in the Vanua of Tavua and he has been occupying and cultivating the subject land with the consent of the landowners since 2000 in accordance with custom and tradition and therefore it is lawful. Accordingly, the applicant is entitled to a declaration that his occupation of the subject land from the year 2000 to the present day is in accordance with custom and tradition and is lawful. I would also grant costs summarily assessed at costs of $2,000.00 to the applicant.

[33] I grant the relief to the applicant not on the application for judicial review but on the basis the relief might have been granted if it had been sought in an action begun by writ by the applicant at the time of making his application. For this purpose, acting under Order 53, rule 9 (5) of the HCR, I have treated the proceedings continued as if they had begun by writ.

The Outcome

1. Declaration granted that the applicant's occupation of the subject land from the year 2000 to date is in accordance with the custom and tradition and therefore is lawful.

2. The Respondent will pay summarily assessed costs of $2,000.00 to the applicant.

.....13/3/17

M H Mohamed Ajmeer

JUDGE

At Lautoka

13 March 2017