

IN THE HIGH COURT OF FIJI AT LABASA
CIVIL JURISDICTION

Civil Action No. 60 of 2014

BETWEEN : **VANUALEVU HARDWARE (FIJI) LIMITED**
1ST PLAINTIFF

BASHIR KHAN
2ND PLAINTIFF

AND : **LABASA TOWN COUNCIL**
1ST DEFENDANT

THE SPECIAL ADMINISTRATOR, LABASA TOWN
COUNCIL
2ND DEFENDANT

THE ATTORNEY-GENERAL OF FIJI
3RD DEFENDANT

NEWWORLD LIMITED
4TH DEFENDANT

MINISTER FOR LANDS AND MINERAL RESOURCES
5TH DEFENDANT

BEFORE : **Hon. Justice Kamal Kumar**

COUNSEL : **Mr F. Haniff for the Plaintiffs**
: **Mr A. Kohli for the 1st and 2nd Defendants**
Mr N Chand for the 3rd and 5th Defendants
Mr A. K. Narayan for the 4th Defendants

DATE OF JUDGMENT : 3 June 2016

JUDGMENT

Introduction

1. On 15 September 2014, Plaintiffs filed Originating Summons seeking following reliefs:-

- “1. *An Order or Declaration that the Labasa Town Council and the other Defendants without the prior written consent of the 2nd Defendant by the Director of Lands, and/or Vanualevu Hardware (Fiji) Limited and Bashir Khan had and have no powers to issue business licences to the 4th Defendant by itself, its supermarket, servants and/or agents to operate its supermarket from the protected leases at 6 Jaduram Street, Labasa.*
2. *An Order that the 1st Defendant severally and/or collectively be permanently restrained from further issuing business licences to the 4th Defendant by itself, its supermarket, servants and/or agents to operate its supermarket from the protected leases at 6 Jaduram Street, Labasa without the prior written consent of the Plaintiffs and the 2nd Defendant through the Director Lands.*
3. *An Order that the 1st Defendant forthwith cancel and/or remove any business licences issued to the 4th Defendant by itself, its supermarket, servants and/or agents to operate its supermarket from the protected leases at 6 Jaduram Street, Labasa.*
4. *An Order that costs of this Application be paid by the Defendants to the Plaintiffs on an indemnity basis.*
5. *And for any other Order or Relief to this Honourable Court may seem just.”*

(“the Summons”)

2. On 22, 23 and 29 September 2014, all Defendants filed Acknowledgment of Service.
3. On 6 December 2014, being the returnable date of the Summons the then Master directed Defendants to file Affidavit in Opposition and the Summons was adjourned to 4 November 2014.
4. On 4 November 2014, Counsel for 1st, 2nd and 4th Defendants informed that Affidavit in Opposition have been filed by those Defendants, when Counsel for 3rd and 5th Defendants sought further time to file Affidavit in Opposition. The 3rd and 5th Defendants were granted further twenty-one (21) days to file Affidavit in Opposition, whilst Plaintiffs were directed to file Affidavit in Reply within fourteen (14) days from thereafter. The Summons was adjourned to 5 December 2014.
5. On 17 November 2014, Plaintiffs filed Notice of Change of Solicitors.
6. On 5 December 2014, Counsel for Plaintiffs informed Court that Plaintiffs will not file Affidavit in Reply and the Summons was adjourned to 16 April 2015, for hearing.
7. On 15 April 2015, a day before the hearing, Plaintiffs filed Application for adjournment which Application was returnable on 16 April 2015.
8. On 16 April 2015, Summons was called before his Lordship Justice Alfred when the hearing date was vacated with costs. The Summons was adjourned to 20 April 2015, before Master to fix new hearing date.
9. On 20 April 2015, the Summons was adjourned to 25 June 2015, for hearing.
10. The Summons was called for hearing before me on 25 June 2015, when Counsel for the Plaintiff informed the Court that Plaintiffs are withdrawing action against 3rd and 5th Defendants by consent with no order as to costs.

11. Counsel for the 3rd and 5th Defendants, confirmed what Counsel for Plaintiffs stated and as such Plaintiff was granted Leave to withdraw action against 3rd and 5th Defendants, and the action against 3rd and 5th Defendants was dismissed and struck out with no order as to costs.
12. Counsel for the Plaintiffs and 4th Defendant handed in Submissions, and made oral submissions whilst Counsel for the 1st and 2nd Defendants made oral submission only. The Summons was adjourned for Judgment on Notice.
13. Following Affidavits were filed by the parties:

For Plaintiffs

- i. Affidavit of Bashir Khan in support of the Summons sworn on 12 September 2014 (“**Khan’s 1st Affidavit**”);
- ii. Affidavit in Reply of Bashir Khan sworn on 22 June 2015 (“**Khan’s 2nd Affidavit**”)

For 1st and 2nd Defendants

Affidavit of Vijay Chand sworn on 22 October 2014 (“**Chand’s Affidavit**”).

For 4th Defendant

Affidavit of Raj Gopal Achariya sworn on 27 October 2014 (“**Achariya’s Affidavit**”)

Consent of Labasa Town Council for Renewal of Business Licence

14. It is undisputed fact that the 4th Defendant has been engaged in a supermarket retail business and has been operating its business in Labasa from Plaintiffs property pursuant to the Tenancy Agreement, between the Plaintiffs and the 4th Defendant.

15. The 4th Defendant has raised preliminary issue, which is whether the Plaintiffs remedy lies in public law or private law.

Preliminary Issue

16. The 4th Defendant submitted that the Plaintiffs remedy (if any) lies in public law and not private law and as such Plaintiffs should have applied to Court for Leave to apply for Judicial Review.
17. The 4th Defendant relied on the case of **Digicel Fiji Limited v Pacific Connex Investment Limited** [2009] Civil Appeal No. ABU 0049 of 2008S (8 April 2009). **Prasad v Attorney General of Fiji** [1999] Civil Appeal No. ABU 0058 of 1997 (27 August 2009).
18. In **Digicel Fiji Limited** (Supra), the 1st Respondent; **Pacific Connex Investments Limited** filed claim against Minister for Information Communication, and Media Relations and Attorney General of Fiji arising out of conditional approval of mobile telephone network license. The relevant condition was that the approval was subject to outcome of Civil Action No. 576 of 2005, between Vodafone Fiji Limited v Minister for Information, Communication and Media Relations and Attorney General of Fiji and was also subject to further condition that the two operating companies be owned by Fiji citizen and the two applicants submit their shareholding agreement to the satisfaction of the government. 1st Respondent's statement also asserted that Appellant received similar approval in principle.

The 1st Respondent in High Court claimed that its license was approved subject to outcome of Civil Action No. 576 of 2005 whereas the Appellant contended that there were other conditions attached to the approval of the license.

Appellant then moved the Court to strike out 1st Respondent's claim on the ground that claim discloses no reasonable cause of action, it is scandalous, frivolous or vexatious, it will embarrass fair trial and is an abuse of process.

The High Court Judge, his Lordship Justice Jitoko (as he then was) dismissed Appellant's application on the ground that serious issues are to be tried, and whether the case raised public law or private law remedies needs to be determined at the trial.

19. The Full Court of Appeal in **Digicel Fiji Limited** case (Supra) after analyzing the issue and considering the position in Britain, Australia and Fiji followed what was said in **O'Reilly v Mackman** [1983] 2 AC 237 and **Prasad v Attorney General of Fiji** [1999] Civil Appeal No. 0058U of 1997s (27 August 1999).
20. **O'Reilly's** case is the leading authority on this issue and has been followed by Courts in Fiji.
21. In **O' Reilly's** case (Supra) Lord Diplock at page 1133 stated as follows:-

“So Order 53 ... has provided a procedure by which every type of remedy for infringement of the rights of individuals that are entitled to protection in public law can be obtained in one and the same proceeding by way of application for judicial review, and whatever remedy is found to be the most appropriate in the light of what has emerged on the hearing of the application can be granted to him. If what should emerge is that his complaint is not of an infringement of any of his rights that are entitled to protection in public law, but maybe an infringement of his rights in private law and thus not a proper subject for judicial review, the court has power under rule 9(5), instead of refusing the application, to order the proceedings to continue as if they began by writ. There is no such converse powers under the Rules ... to permit an action begun by writ (or originating summons) to continue as if it was an application for judicial review”.
22. The above principle was adopted and applied in **Native Land Trust Board v Kaukimoce** [2012] Civil Appeal No.ABU 0043 of 2008 [21 March 2012]; **Naborisi v. Native Lands Commission** [2013] Civil Action No. 76 of 2006 [26

July 2013]; **Ramoli v. The Native Land Trust Board & Others** [2013] Civil Action No. 5 of 2007 (21 November 2013).

23. In **Kaukimoce** case (Supra) his Lordship Justice Calanchini, the current President of Fiji Court of Appeal stated as follows:-

“38. When a decision is taken or made by a person designated by a statutory provision to perform a statutory function the High Court has a supervisory jurisdiction to ensure that the decision maker has not exceeded or abused his powers and that he has performed his duties. This supervisory jurisdiction over public bodies is by way of judicial review. An application for judicial review is made pursuant to the procedures set out in Order 53 of the High Court Rules. On the other hand where the High Court is required to make an initial decision affecting the privates rights of individuals by way of declaration or order not involving a public law element (i.e. a public body performing a public law function) the proceedings are commenced by either writ or originating summons. The decision in O’Reilly v Mackman (supra) is authority for the proposition that it is an abuse of the process of the Court to seek a declaration from the Court in its original jurisdiction in a public law case where the claim should proceed by way of judicial review under Order 53.”

24. In **Kaukimoce** the Plaintiff/Respondent sought following declarations:-

“1. A DECLARATION that Native Land Registrar pertaining to the various land owning units now residing at Qalikarua Village noting them as members of Yavusa Qalikarua with the sub-units (Mataqali) consisting of Mataqalis Narocake, Nadurubau, Toka, Levukana and Nasau is wrong, erroneous and contrary to customs and tradition.

2. A DECLARATION that the proper and correct description is Yavusa Muairewa consisting of Mataqalis Navau, Nadurubau, Toka, Levukana and Nasau with Mataqali Narocake as the dependent unit.

3. AN ORDER under Section 10(1) of the Native Land Act directing the Defendant to amend its register and insert the correct description herein.”

25. In **Kaukimoce** (supra) Court of Appeal allowed the appeal and struck out Respondent's claim on the Ground that Respondent should have sought public law remedy instead of private law.
26. The relief sought by the Plaintiff is stated in the Originating Summons filed on 15 September 2014, is quoted at paragraph 1 of this Judgment.
27. The 1st Defendant is a local authority which is charged with managing Labasa Town and enforcing by-laws and making policies for administration of Labasa Town.
28. The 1st Defendant falls under Ministry of Local Government and is currently and in 2014 was in direct control of the Ministry.
29. It is no doubt that the 1st Defendant is a public body.
30. The business licence is granted and renewed pursuant sections 3, 5 and 6 of Business Licensing Act (Cap 204).
31. The 1st Defendant granted and renewed 4th Defendant's business licence pursuant to powers conferred upon it under the provision of Business Licence Act.
32. The Plaintiff's main ground for the relief sought is that the renewall of business licence of 4th Defendant by 1st Defendant is invalid and illegal on the ground

that the business licence of 4th Defendant was renewed without the consent of the Plaintiffs and Director of Lands.

33. On the basis of what was said in **O'Reilly v. Mackman** (Supra); **Native Land Trust Board v. Kaukimoce** and **Digicel v. Pacific Connex** I hold that the 1st Defendant's decision to renew 4th Defendant's licence was in exercise of a public duty under the provision of Business Licence Act and as such Plaintiff should have sought public law remedy in the form of judicial review and not private law remedy.
34. What is said in the preceding paragraph equally applies to prayer 2 in Originating Summons dated 15 September 2014.
35. It is well established that whilst an action commenced in public law (judicial review) can be converted to a private action, any action in which Plaintiff should have applied for public law remedy but instituted private action cannot be converted to a public law action (judicial review): **O'Riley v Mackman; Prasad v Attorney General of Fiji; Digicel v. Pacific Connex; NLTB v Kaukimoce; Naborisi v NLC; Ramoli v NLTB.**
36. Therefore, having held that Plaintiffs claim (if any) lies in Public Law, this action then cannot be converted to a judicial review action.
37. If, Plaintiffs do choose to make Application for Leave to Apply for Judicial Review the Defendants may raise the issue of delay and Plaintiffs standing as highlighted in 4th Defendants Submission.
38. I do not think it is right to determine the issues mentioned in paragraph 37 now, because to do so would tantamount to this Court dealing with Application for Judicial Review.

Costs

39. I take into consideration the fact that parties filed Affidavits, Submissions and made Oral Submissions.

Orders

40. I make following Orders:-

- (i) Plaintiffs' Application by way of Originating Summons dated and filed on 15 September 2014, is dismissed and struck out;
- (ii) Plaintiffs are to jointly and severally pay 1st and 2nd Defendants costs assessed in the sum of \$500.00 within fourteen (14) days of this judgment;
- (iii) Plaintiffs are to jointly and severally pay 4th Defendant's costs assessed in the sum of \$1,500.00 within fourteen (14) days of this judgment.



K. Kumar
JUDGE

At Suva

3 June 2016

Haniff Tuitoga for the Plaintiffs

Kohli & Singh for the 1st and 2nd Defendants

AK Lawyers for the 4th Defendant