

**IN THE COURT OF APPEAL, FIJI**  
**ON APPEAL FROM THE HIGH COURT**

**CIVIL APPEAL NO. ABU 004 of 2020**  
**(Civil Action NO. HBJ 01 of 2015)**

**BETWEEN** : **AISAKE RAVUTUBANANITU**  
*Applicant/Appellant*

**AND** : **ITAUKEI LAND TRUST BOARD**  
*Respondent/Respondent*

**Coram** : **Guneratne P**  
**Basnayake JA**  
**Lecamwasam JA**

**Counsel** : **Mr. M. Degei for the Appellant**  
**Mr. J. Cati for the Respondent**

**Date of Hearing** : **14 February 2023**

**Date of Judgment** : **24 February 2023**

## **JUDGMENT**

### **Guneratne P**

- [1] I agree with the judgment that the appeal be dismissed.

### **Basnayake JA**

- [2] This is an appeal filed against the Ruling dated 7 February 2020 of the learned High Court Judge of Lautoka (pg. 17-30, Tab 4 of the Record of the High Court (RHC)). By this Ruling the learned Judge had dismissed the application for Judicial Review of the Applicant/Appellant (hereinafter referred to as the Applicant) without costs.
- [3] As per the affidavit filed (pgs. 228-356 under Tab 9 (RHC)) in support of the application for judicial review, the Applicant brings this action on behalf of himself and the Members of the Mataqali Navusabalavu. By this action the Applicant is seeking to have the decision of the Respondent, namely, the iTaukei Land Trust Board reviewed in granting eleven leases.
- [4] The Applicant states that the Applicant Mataqali is the native land owner of the land over which the eleven tenancies have been renewed. The Applicant states that when the leases began expiring from 2010 to 2014 the native owners were looking forward to taking over these lands. The Applicant states that from as early as 1998 the Respondent agreed with the intention and the request of the Applicant to allow the Applicant to take over the land.
- [5] On 15 April 1999 the Applicant attempted to purchase the lease No. 4/4/299 for the sum of \$141,458.00, but opted instead to wait until it expired as the Applicant Mataqali could not afford the price offered by the Respondent Board. In May 2012 the Applicant Mataqali learnt the renewal of all the eleven leases and hence the Applicant Mataqali commenced proceedings by writ on 2<sup>nd</sup> May 2012. This action was converted into an application for Judicial Review.

## **Ruling of the High Court**

[6] The learned Judge has decided this case on two preliminary issues which the learned Judge correctly thought has to be decided prior to going into the merits. Those two matters are so germane to this case and if not considered would have been a waste of time. One matter is with regard to not bringing necessary parties before court. The other matter is not tendering summons on time thus violating Order 53, r. 5 (5) of the High Court Rules.

[7] The learned Judge in paragraphs 3 and 4 of his Judgment (pg. 26 RHC) states as follows:

(03) ***As the first preliminary point,** it should be pointed out that the tenants of the renewed eleven Native leases are not named as parties to the proceedings. The action brought by the applicant against the respondent is based on the renewed eleven Native leases. Before this court makes a declaration of the respondent's decision to renew the eleven Native leases, the tenants of the said eleven leases should be heard, on the matters of fact and law which will determine the outcome of the proceedings because the decision of the court will affect their rights and interests. Therefore, they should be given a reasonable opportunity to present their point of view and their case fully and fairly and to respond to the facts presented by the applicant. It is material to a proper resolution of the case which is before me.*

(04) ***As the second preliminary point,** I note that the applicant after having obtained leave on 15/07/2015 to make an application for judicial review filed summons for judicial review on 07/04/2016. This was eight months and twenty two days after the grant of leave to move for judicial review.*

[8] In paragraphs 7 and 8 (pg. 27 RHC) the learned Judge states thus;

(07) *According to Order 53, r. 5(4), a motion must be entered for hearing within 14 days after the grant of leave. The applicant filed summons for judicial review eight months and twenty two days after the grant of leave. There had been no substantial compliance with Order 53, rule 5(4). Following grant of leave to move for judicial review, the applicant failed to file the summons for judicial review within the time stipulated by Order 53, rule 5(4). The application for judicial review has not been properly made. The summons filed is out of time. As stated, the respondent has not filed an affidavit in opposition to the summons for judicial review. Thus, the respondent has not taken any step in the proceedings following grant of leave to move for judicial review. Therefore, the respondent has not submitted to the court's jurisdiction.*

- (08) *The applicant's failure to comply with Order 53, rule 5(4) is a fundamental defect which cannot be rectified simply by the use of the court's discretion and the non-compliance vitiates the entire proceedings.*

### **The Grounds of Appeal**

[9] The grounds of the Appeal are as follows:-

1. *THE Learned Judge erred in law and in fact in implying that the plaintiff ought to have included as party to the action the eleven tenants of the Respondents. (P8, para (c)03).*
2. *THE Learned Judge erred in law and in fact in dismissing the appeal on the ground that the eleven tenants were not heard. (P8, para (c)03).*
3. *THE Learned Judge erred in law and in fact in ruling that the Respondent has not submitted to the Courts Jurisdiction by its failure to file an affidavit in opposition to the summons for Judicial Review.*
4. *THE Learned Judge erred in law and in fact dismissing the Appeal purportedly for non-compliance of O53 R5(4).*
5. *THE Learned Judge erred in law and in fact in not giving weight to the legal obligation of the Respondent to the Plaintiff native landowners under S9 of the iTaukei Land Trust Act.*

[10] It appears that the first two grounds are concerning principles of natural justice. In the Judicial Review application the Applicant had sought an order in the nature of a writ of certiorari to cancel the decision of the Respondent in the renewal of eleven leases and a writ of mandamus to compel the Respondent to grant those leases to the Applicant (Summons for leave and affidavit filed on 19 January 2015 at pg. 429). The learned counsel for the Respondent submitted that the lessees had been in the land under the leases issued originally for more than ten years ago. During this period the lessees had made improvements, temporary as well as permanent, mortgaging to Fiji Sugar Fund etc. Furthermore by renewal of these leases the lessees have been given a legitimate expectation to continue with their livelihood. After renewal if their leases are cancelled without even a prior notice that will cause them irreparable hardships and injustice.

[11] The learned counsel submitted that Order 53 Rule 5 of the High Court Rules requires that there is a positive obligation on the party bringing the judicial review application to ensure that a notice of motion or summons is served on all persons directly affected by the judicial review application. Order 53 rule 5 is as follows:

(Order.53. r.5)

- 5.(1) *When leave has been granted to make an application for judicial review, the application shall be made either by originating motion or by originating summons.*
- (2) *The notice of motion or summons must be served on all persons directly affected and where it relates to any proceedings in or before a court and the object of the application is either to compel the court or an officer of the court to do any act in relation to the proceedings or to quash them or any order made therein, the notice or summons must also be served on the court officer or registrar of the court and, where any objection to the conduct of the judge is to be made, on the judge.*
- (3) *Unless the judge granting leave has otherwise directed, there must be at least ten days between the service of the notice of motion or summons and the day named therein for the hearing.*
- (4) **A motion must be entered for hearing within 14 days after the grant of leave.**
- (5) *An affidavit giving the names and addresses of, and the places, and dates of service on, all persons who have been served with the notice of motion or summons must be filed before the motion or summons is entered for hearing and, **if any person who ought to be served under this rule has not been served, the affidavit must state that fact and the reason for it:** and the affidavit shall be before the Court on the hearing of the motion or summons.*
- (6) *If on the hearing of the motion or summons the Court is of opinion that any person who ought, whether under this rule or otherwise, to have been served has not been served, the Court may adjourn the hearing on such terms (if any) as it may direct in order that the notice or summons may be served on that person (emphasis added).*

[12] If a party is directly affected by whatever the order the Applicant is seeking, that party becomes a necessary party who ought to be added. If not the affidavit must state that fact and the reasons for not so making them parties. The Applicant in this case has failed not only to add the eleven tenants as parties but also to disclose that fact to court and to give reasons for not so adding thus violating Order 53 rule 5 (5). In **iTaukei Land Trust Board v Mohammed Asik Ali** Gunawansa JA stated as follows, “My reading of the Order 53,

*Rule 5 is that, firstly there is an obligation on the part of the party making the application for judicial review, when leave is granted for making such application, to serve notice of motion or summons on all persons directly affected by such application, Secondly an affidavit giving the names and addresses of, and the places, and dates of service on, all persons who have been served with the notice of motion or summons must be filed before the motion or summons is entered for hearing". The court continuing said, "In **Errington v Minister of Health** (1935) 1 KB 249, the Court of Appeal considered the dictum of Lord Loreburn in **Board of Education v Rice** [1911] AC 120, a public authority in its discharge of duties is bound by the dictates of 'natural justice', and thus an enquiry must be one which is fair to all parties concerned. Further in **Errington v Minister of Health** it was noted that one of the fundamental principles in the administration of justice that an administrative body which is to decide must hear both sides and give both an opportunity of hearing before a decision is taken". (Also **Twist v Rendwick Municipal Council** [1976] 136 CLR 106. The 1<sup>st</sup> and the 2<sup>nd</sup> grounds therefore have to fail.*

- [13] As per Order 53, r. 5 (4), a motion must be entered for hearing within 14 days after the grant of leave. The Applicant filed summons for judicial review eight months and twenty two days after the grant of leave. As the summons filed were out of time the Respondent has not filed an affidavit in opposition to the summons for judicial review. Thus the Respondent has not taken any steps following the grant of leave. Therefore the Respondent has not submitted to the court's jurisdiction. The third ground has to fail as the learned Judge did not err in his ruling that the Respondent has not submitted to the Court's jurisdiction.
- [14] The 4<sup>th</sup> ground is with regard to the entering of motion within 14 days. The Applicant obtained leave to file judicial proceedings on 15 July 2015. The Applicant filed summons on 7<sup>th</sup> April 2016, after the lapse of a period of eight months and twenty two days thus violating the Order 53, r. 5 (4). The learned Judge there did not err in dismissing the Applicant's judicial review application and has dismissed by strictly adhering to the rule. Therefore this ground fails.

[15] The 5<sup>th</sup> ground is that the learned Judge erred in not adhering to Section 9 of the iTaukei Land Trust Act. However the learned Judge has dismissed the Applicant's application for not following the procedural steps and thus this ground is without any value. I am of the view that the Applicant's application was dismissed for valid reasons and the appeal is without merit. Therefore this appeal is dismissed with costs of \$5000.00 payable by the Applicant/Appellant to the Respondent within 28 days from the date of this judgment.

**Lecamwasam JA**

[16] I agree with the reasons given and the conclusion arrived at by Basnayake, JA.

**Orders of Court are:**

1. *The appeal is dismissed.*
2. *The Applicant/Appellant to pay costs \$5000.00 to the Respondent/Respondent within 28 days from the date of this judgment.*



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**Hon. Justice Almeida Guneratne**  
**PRESIDENT, COURT OF APPEAL**

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**Hon. Justice Eric Basnayake**  
**JUSTICE OF APPEAL**

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**Hon. Justice S. Lecamwasam**  
**JUSTICE OF APPEAL**