

IN THE COURT OF APPEAL, FIJI
[On Appeal from the High Court]

CIVIL APPEAL NO. ABU0031 OF 2022
[Labasa Civil Action No: HBJ 02/22]

BETWEEN:

RATU VILIAME WAQANITOGA
Appellant

AND:

ITAUKEI LANDS APPEAL TRIBUNAL
1st Respondent

ITAUKEI LANDS AND FISHERIES COMMISSION
2nd Respondent

THE ATTORNEY GENERAL OF FIJI
3rd Respondent

RATU JONE MATAOFA QOMATE RATOVA
4th Respondent

Coram : Mataitoga, AP/RJA
Qetaki, JA
Morgan, JA

Counsel : Mr. S. Nacolawa for the Appellant
Mr J. Mainavolau and Mr A. Bauleka for the 1st, 2nd and 3rd Respondents
Mr A.V. Bale for the 4th Respondent

Date of Hearing : 2 May, 2024
Date of Judgment : 30 May, 2024

JUDGMENT

Mataitoga, AP/RJA

[1] I concur with the judgment and the reasons.

Oetaki, JA

Background

[2] In this appeal, Ratu Viliame Waqanitoga (appellant) is challenging the decision of Honorable Justice Javed Mansoor made in the High Court of Labasa on 26th April 2022. The High Court decision was in respect of the appellant's application for leave for Judicial Review of a decision of the Itaukei Lands and Fisheries Commission (second respondent) and the Itaukei Lands Appeal Tribunal (first respondent).

[3] Leave was disallowed by the learned judge on the issue of the jurisdiction of the High Court to entertain the Leave application, that is:

Whether the High Court has jurisdiction to review the decision of the iTaukei Lands Appeal Tribunal made under section 7(5) of the Itaukei Lands Act 1905.

[4] The learned Judge ordered that the objection to jurisdiction raised by the respondents be upheld; the applicants summons filed on 15 August 2019 is struck out and the applicant is to pay the fourth respondent costs summarily assessed in a sum of \$1000.00 within three weeks of the decision.

[5] It is the confirmation of the appointment of the fourth respondent Ratu Jone Mataofa Qomate Ritova, on 15 May 2019, as Tui Labasa, which aggrieved the appellant that triggered off the events now with this Court for consideration. The appellant filed a Summons in the High Court for a judicial review of the iTaukei Lands Appeals Tribunal decision on jurisdiction.

[6] The leave for judicial review application was opposed by the respondents, who objected to the grant of leave on the basis that the court had no jurisdiction to hear the application in view of section 7(5) of the Itaukei Lands Act. For the reason given in the judgment of Mansoor, J dated 6 day of April 2022, the preliminary objection raised by the respondents was upheld. Aggrieved by the refusal of leave, the appellant filed this appeal against that decision.

Grounds of appeal

[7] The appellant's notice and grounds of appeal was filed on 25th May 2022 which contain 5 grounds of appeal. The appellant subsequently filed an amended notice and grounds of appeal on 12th December 2022, as follows:

Amended grounds of appeal

"1. The learned Judge erred in law and in fact in holding that there was no procedural impropriety when in fact there was substantial non-compliance on section 4, section 5(2) of the Itaukei Land Act which are to be read together with section 17(1) and (2) of the Act Cap133.

2. *That the learned Judge erred in law and in fact in holding that there was no procedural impropriety in appointing Apimeleki Tola and Korevi Curuki as assessors who are both officers of ITL&FC working under present Chairman Vananalagi Vesikula who are not required by the Act to make inquiries and that inquiries flies into the face of section 4, section 5(1), and section 5(2) of the Itaukei Lands Act Cap133 on the premise of the apparent bias against the appellant.*
3. *That the learned Judge erred in law and in fact in holding that there was no procedural impropriety in refusing to hold ultra vires the prejudgment of the second respondent on the Commission of Inquiry sitting on 27th-29th November 2018 by publishing in the Fiji Times 25th August 2018 the following statement;*

“Commission would rely on their previous ruling in favour of the Qomate Clan the previous title holder.”
4. *That the learned Judge erred in law and in fact in completely ignoring the Applicant’s tendering of the new evidence of the family tree of the Applicant which links him direct to Niunisava the 1st Tui Labasa nor was the Tribunal gave him an opportunity to be heard at all, despite his asking and the Tribunal gave no explanation as to why they refused him.*
5. *That by reason of the learned Judge’s failure to determine compliance or otherwise with section 5(1), section 5(2) of the Act Cap 133 and on the subject of apparent bias thus has been a substantial miscarriage of justice in the appointment of Tui Labasa.”*

The Law

[8] Court of Appeal Act- Section 12(1) and Section 13

- “12. (1) Subject to the provisions of subsection (2), an appeal shall lie under this Part in any cause or matter, not being a criminal proceeding, to the Court of Appeal -*
- (a) from any decision of the [High Court] sitting in the first instance, including any decision of a judge in chambers;*
 - (b)*
 - (c) on any grounds of appeal involves a question of law only, from any decision of the [High Court] in exercise of its appellate jurisdiction under any enactment which does not prohibit a further appeal to the Court of Appeal.*
13. *For all the purposes of and incidental to the hearing and determination of any appeal under this Part and the amendment,*

execution and enforcement of any order, judgment or decision made thereon, the Court of Appeal shall have all the power, authority and jurisdiction of the [High Court] and such power and authority as may be prescribed by rules of Court.”

[9] **Order 53 High Court Rules**

Rule 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 the Order.*”

Rule 3. “(1) *No application for review shall be made unless the leave of the Court has been obtained in accordance with this rule.*”

Rule 3.2 requires that an application for leave be made upon filing in the Registry; (a) a notice in Form 32 in the appendix to the rule, containing a certain statement, including: (i) the particulars of the judgment order, (ii) decision or other proceedings in respect of which judicial review is being sought;(iii) the relief sought and the grounds upon which it is sought; and (b) an affidavit which verifies the facts relied on.

[10] **Itaukei Lands Act 1905 (“the Act”)**

Section 4-Itaukei Lands Commission

“4. *The Minister shall appoint a Itaukei Lands Commission consisting of one or more commissioners, each of whom shall have the powers of the Commission, who shall be charged with the duty of ascertaining what lands in each province of Fiji are the rightful and hereditary property of itaukei owners, whether of mataqali or in whatever manner or way or by whatever division or subdivision of the people the same may be held.*”

Section 5-Roko of each province a member

“5. (1) *The Roko of each province in which the said Commission is conducting an inquiry shall be **ex-officio** a member of the Commission whilst the said Commission is sitting for the conduct of the said inquiry in his or her province.*

(2) Before the sitting of the Commission in any province for the conduct of inquiries a special meeting of the provincial council shall be convened by the Commissioner of the Division or the Roko. The said council shall elect at the said meeting one or more persons to sit as assessors at all sittings of the Commission for the purpose of conducting inquiries in the said province.”

Section 7- Appeal

- “7. (1) There is hereby constituted an Appeals Tribunal consisting of a chairperson and 2 other members all to be appointed by the Minister. It shall be the duty of the Appeals Tribunal to hear and determine appeals from decisions of the Commission under sections 6 and 17 and from a commissioner under section 16, and such determination by the Appeals Tribunal shall be final.*
- (2) Any person aggrieved by any such decision of the Commission or of a commissioner shall within 90 days of the announcement thereof give notice of his or her desire to appeal, which shall be signed by the appellant or his or her duly authorized agent, to the Commission. The notice shall contain the grounds of appeal.*
- (3) For the purpose of determining an appeal the Appeals Tribunal shall have power to hear further evidence but only if all of the three following conditions are satisfied –*
- (a) It is shown that the evidence could not have been obtained with reasonable diligence for use at the inquiry before the Commission or commissioner;*
 - (b) If the further evidence is such that, if given, it would probably have an important influence on the decision; or*
 - (c) If the evidence is such as is presumably to be believed.*
- (4) If no notice of appeal is given the record of the Commission or commissioner, as the case may be shall be final.*
- (5) Decisions of the Appeals Tribunal are to be final and conclusive and cannot be challenged in a court of law.”*

Section 17- Disputes as to headship of mataqali etc.

- “17. (1) In the event of any dispute arising between itaukei as to the headship of any division or subdivision of the people having the customary right to occupy and use any itaukei 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, provided that if the claimants agree in writing in the presence of the chairperson of the 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.*
- (2) On the conclusion of any inquiry held under subsection (1), the chairperson 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.

- (3) *A person aggrieved by the decision of the Commission under this section may appeal against it to the Appeals Tribunal constituted under section 7.”*

Appellant’s Submissions

(a) Submissions Filed on 16 January 2024

- [11] The appellant’s written submissions was filed on 16 January 2024, and a Supplementary Submissions was filed on 21 March 2024.
- [12] The appellant had abandoned grounds 1, 2 and 5 of his appeal.
- [13] Ground 3. The appellant is challenging the decision of the Appeals Tribunal as wrong in law and in fact in holding that there was no procedural impropriety in refusing to hold ultra vires the prejudgment of the Appeals Tribunal Judgment, in following the Commission of Inquiry ruling on 27-29th November 2015 where the Chairman of the Commission initially published in the *Fiji Times* on the 28th August 2018 the following statement: “..Commission would rely on their previous ruling in favour of the Qomate clan the previous title holder.”
- [14] The appellant submits that the gist of the appellant’s ground is the fact that the tribunal was biased, that is, in having followed the prejudgment of the Commission of Inquiry in November 2018, meaning that the content of the article published in the *Fiji Times* on 28th August 2018 coincided with the decision reached after the Commission of Inquiry held from 27th - 29th November, 2015.
- [15] The appellant submits that the Commission and the Tribunal were incapable of bringing an independent mind to the inquiry that took place on 27th - 29th November, 2008. It simply followed the earlier announcement as published in *Fiji Times*.
- [16] Referring to section 17(1) of the Act, the appellant submits that the inquiry and determination by the Commission or Tribunal need to include the following factors:
- (a) What is the proper basis for determining the particular headship in issue in that division or subdivision of the people having customary right in the area to participate in matters at hand. Generally, the inquiry may cover (among other things) who are the eligible candidate for selection, who may participate in the deliberations and what process need to be followed, and
 - (b) in applying the above, the Commission of Inquiry may arrive at and identify the proper person entitled to appointment to that headship.

- [17] The appellant submits that in practice, based on previous cases, it is often found that rules are ignored, violated or flouted. He submits that, that is the position with the case in this appeal and in, for instance, the case of **Ratu Livai Derenalagi**, Judicial Review N0. HBJ 003 of 2018, (“Tui Nawaka Dispute”) where the challenge was against the holder of Tui Nawaka title at that time. Here, the decision to appoint the incumbent (Tui Nawaka) was made on the 23 of March 2017, whereas the Commission of inquiry hearing was conducted in June 2017 and the decision of the Commission was made in July 2017. His Lordship Justice Stuart, allowed leave to apply for judicial review.
- [18] The appellant submits that the decisions stem from the fact that there is no independent body to scrutinize the evidence presented in the inquiries where a transparent decision can be made. In addition, the appellant says that is the result of the failure of the Commission to set up the independent Commission of inquiry envisaged and required to be set up under section 5 of the Act.
- [19] Section 5(1) of the Act requires that the Roko of each province in which the Commission is conducting an inquiry shall be *ex officio* a member of the Commission whilst the Commission is sitting for the conduct of the said inquiry in his province. In the appellant’s submission, subsection (1) of section 5 was complied with in this case.
- [20] However, the appellant submits that Section 5(2) of the Act was ignored, for under section 5(2), the Commission was bringing its own staff to be its assessors in the person of Apimeleki Tola and Kerevi Curuki who are both officers of the Commission. Under the circumstances, the appellant submits, there is no independence in the composition of the Commission, and its decision is bound to be compromised, in this and prior inquiries.
- [21] The appellant submits that Stuart J, in the Tui Nawaka case, had set out the steps taken during an inquiry by the Commission at paragraphs 4 and 5 of his judgment. The appellant submits that, it is not for the Commission and the Tribunal to take an active part in the application defending and arguing for the validity of their decision anymore, than it is for a judge whose decision is appealed against to appear on the appeal and argue that his/her decision was correct.
- [22] The appellant submits that the test for perceived bias in Fiji is: whether a fair minded and informed observer having considered the relevant facts would conclude that there was a real possibility that the tribunal was biased: **Maisamoa v Chief Executive for Health** FJCA 41, confirmed the test, as articulated in the House of Lords in **Porter v Magill** (2000) 2 AC 359.

(b) Supplementary Submission Filed on 21st March 2024

- [23] In response to the 4th respondent’s submissions, the appellant submits that the lack of procedural impropriety and failure in natural justice is staring in the face of this court.

The appellant said (paragraph 29 of the applicant's affidavit), that there is a caveat on the applicant or his family from contesting the position of Tui Labasa:

“29. That when Joeli died, Adi Sainimili Tulomaloma VKB 42/236 openly declared that the position of Tui Labasa is a family inheritance for the Qomates and thus became an issue resulting in the 2006 Commission of Inquiries which ruled in her favour and when challenged in the Tribunal in 2008, it also ruled in her favour and part of the ruling that the title of the Tui Labasa is to remain with Qomate family. Agnate Descendants Through the Male Line Will Answer The Present Dispute.”

1st, 2nd, and 3rd Respondents (“3Rs”) Appeal Submissions

[24] The 3Rs submit that the power to decide the rightful holder of the title of Tui Labasa is vested in the second respondent and it is the duty of the first respondent to hear and determine appeals from the decisions of the second respondent and any such determinations by the Tribunal shall be final. The 3 Rs cited 3 Cases in support of the above propositions:

(i) In **Ramasi v. The Native Land Commission** [2015] FJCA 83, ABU 0056.2012 (12 June 2015), this Court stated that:

“(4) The learned High Court Judge acknowledged that the effect of section 7(5) is that a decision of the Tribunal is final and cannot be challenged in Court. However, as the learned Judge observed, in examination of the decision making process is not prohibited by section 7(5) of the Act.”

(ii) In **Ratu Nacanieli Nava v. The Native Lands Commission and the Native Land Trust Board** [1994] FJCA 34; ABU005J.93S (11 November 1994), the then Court of Appeal held that the court has no jurisdiction to decide the merits of the dispute. The court stated that it is the decision making process of a statutory tribunal which is under review by the court, and not merits of the decision.

(iii) In **The State v. Native Lands Appeals Tribunal, Ratu Wiliame Ratudale Sovasova and Adi Makereta Roko Tui** [2009] FJHC 164; HBJ 2.2009L (14 August 2009), the High Court stated that it is the applicant that has the onus of proof of whether there has been procedural impropriety or breach of natural justice. This means that the onus of proof is on the party alleging a breach of natural justice by the Appeals Tribunal. In this case therefore, the appellant bears the onus of proving whether there was procedural impropriety and a breach of natural justice by the Commission of inquiries.

[25] In reply to **Ground 3**, the 3Rs submit that the High Court had stated in paragraph 23 of its decision that there is no procedural impropriety due to the fact that the appellant's

affidavit deposed on 14 August 2019 lacked the ground for leave to review the decision of the Tribunal. The appellant's affidavit did not contain sufficient facts showing procedural impropriety. For instance, the appellant's allegation that the Commission had initially published in *Fiji Times* on 28 August 2018 the following statement:

".....Commission would rely on their previous ruling in favour of the Qomate Clan, the previous title holder."

The appellant never raised an issue on the said publication in his evidence in the High Court, and cannot raise it in this appeal. The first and second respondent decided the matter after careful consideration of all the evidence presented before them.

- [26] The 3Rs submit that a close examination of the appellant's appeal grounds and the averments made in the Supplementary submissions, there is no suggestion made in them by the appellant in respect of procedural impropriety during proceedings before the first and second respondent. Further the respondents allege that the appellant complained that the evidence provided by him has not been considered, which is not so. They submit that the court is not permitted to scrutinize the correctness of the Appeal Tribunal's decision, and it may only review the first respondent's decision where it lacks jurisdiction, if procedural impropriety is established or where there is a breach of natural justice, and that is not the case in this matter.
- [27] The 3Rs submit that the Supplementary submissions filed by the appellant reveals that there is evidential failure to show procedural impropriety and/or breach of natural justice. The respondents referred to the case **The State v. Native Lands Appeals Tribunal** (supra), where Inoke J makes it clear that the court has no jurisdiction to review a decision of the Appeals Tribunal on the complaint that the Commission has failed to accept the evidence of one party as against the other. The Appeals Tribunal is vested with the authority to inquire into the grounds of appeal against a decision of the second respondent.
- [28] The 3 Rs submit that, the appellant seeks to challenge the merits of the first and second respondent's decision which is barred under section 7(5) of the Act.
- [29] Responding to **Ground 4**, the 3Rs submit that, the appellant's complaint that the first and second respondent disregarded the new evidence he tendered, that is, the family tree which he alleges link him directly to Niunisava the 1st Tui Labasa, is baseless. They submit that the first respondent has considered the evidence under paragraphs 5 and 6 and on page 325 of the copy record; has considered the evidence before it including the subject family tree. That in first respondent's assessment, there is no evidence from Maikali showing the blood lineage that connects the Drauna family to Niunisava. As such, they could not believe Maikeli's and the appellant's statement.
- [30] The 3Rs submit that they listened to all oral and documentary evidence adduced by the appellant and his witnesses. There is simply no logic in the appellant's argument that he was not given a fair chance to be heard since he was allowed to question the evidence

provided by the 4th respondent and that he was also permitted to make submission and call his own witnesses. The appellant was given a fair opportunity by the first respondent to be heard.

- [31] In conclusion, the 3Rs submit that the appellant's appeal should fail and the appeal should be dismissed with costs.
- [32] At the hearing, Counsel for the first and second respondents was directed to supervise the filing by its clients of an affidavit to address a number of issues that has been raised by the appellant in his grounds of appeal and in his written and oral submissions, which appeared to the Court as needing clarification and or to be explained by the first and second respondents. The specific areas that an affidavit might address include: (a) the appointment of the members of the Commission of inquiry that decide on the appointment of the 4th respondent as Tui Labasa; (b) the requirements under section 5 of the Act; (c) the allegation of prejudgment, and the *Fiji Times* publication raised in the appellant's grounds of appeal and in his written submissions.
- [33] The Chairman of the Native Land Commission had in response in an affidavit deposed to his and Curuki's appointment as Commissioners under section 4 of the Act. However, there was no mention of requirement (b) or (c) in the said affidavit.

4th respondent's Appeal Submission

- [34] On **Ground 3**, the 4th respondent submits that the High Court had clearly stated in paragraph 23 of its decision, that there is no procedural impropriety due to the fact that the appellant's affidavit deposed on 14th August 2019 lacks the grounds for leave to review the decision of the Tribunal. The affidavit did not contain facts showing procedural impropriety for example, paragraphs specifically stating that the Chairman of the Commission had initially published in the *Fiji Times* on 28th August 2018 the following statements:

"Commission would rely on their previous Ruling in favour of the Qomate Clan, the previous Title Holder."

- [35] The 4th respondent submits that, since there is no provision in the appellant's affidavit before the High Court about the *Fiji Times* publication, such facts should not be considered by the Court as the same was not given in sworn statement and the Court decided the matter after careful consideration of the matter before it.
- [36] Additionally, the 4th respondent submits that, the findings of the Commission of Inquiry of 2016 which the appellant referred to in paragraphs 4.5(1) to (4) of his submissions were issues that were not considered in the High Court because it does not deal with the merits of the case, The High Court would only deal with the matter of judicial review if the appellant can show that there was procedural impropriety, or a breach of natural justice, which were not the case in this matter.

- [37] The 4th respondent further submits that, since the appellant did not have in his affidavit evidence or proof of procedural impropriety, and breach of natural justice, the High Court does not have jurisdiction to deal with leave for judicial review and as such Ground 3 of the appeal is doomed to fail.
- [38] On **Ground 4**, on the appellant's submission, the 4th respondent submits that the appellant had stated that the learned judge had ignored the Applicant tendering new evidence of the family tree of the Applicant which links him to Niunisava the first Tui Labasa. Paragraphs 5 and 6 on page 325 of Court Records show that the Tribunal has considered the evidence before it including the family tree and had stated that they see no evidence from one Maikali to show the blood lineage that connects the Drauna family to Niunisava and as such could not accept and believe his statement.
- [39] On whether the Tribunal gave the appellant an opportunity to be heard at all, despite his asking and the Tribunal gave no explanation as to why they refused him, the 4th respondent submits that in the case **State v Native Lands Appeals Tribunal and Ratu William Ratudale Sovasova and Adi Makereta Mariama Roko Tui, Judicial Review No. HBJ2 of 2009L** at paragraph 46 of the Judgment, the Honorable Judge stated:
- “...if the applicant says that she was not given an opportunity to be heard at all, despite her asking and the Tribunal gave no explanation as to why they refused her, then that in my view would amount to breach of natural justice and procedural impropriety. It could also show bias, actual or apparent.”*
- [40] The 4th respondent submits that, the above did not occur in this case, as the Tribunal had sat for a number of days in Nasekula Village, in Labasa and heard all oral evidence together with the documentary evidence that the applicant together with his supporters wanted to be present before the Tribunal for them to consider. He submits that, in light of Part D, paragraph 1 of the Tribunal's decision, it is clear that the appellant was given an opportunity to be heard. The appellant consented to Maikali Masitabua Drauna (VKB 162/236) to speak on his behalf through sworn statements.
- [41] In conclusion, the 4th respondent submits that, in considering the grounds of appeal, the law and facts of this case, the fourth respondent submits that all the appellant's grounds of appeal should fail and that the appellant's grounds should be dismissed and costs be awarded accordingly.

Discussion

- [42] As earlier stated, the applicant filed action seeking judicial review of the decision of the first respondent. By its decision, the first respondent confirmed the appointment of the fourth respondent, Ratu Jone Mataofa Qomate, as Tui Labasa. The appointment was made by the second respondent. The applicant sought the following relief:

- (a) An order for certiorari to quash the decision of the first respondent dated 15 May 2019 confirming the Commission appointment of Ratu Jone Mataofa Qomate as Tui Labasa.
- (b) A declaration that the decision of the first respondent given on 15 May 2019 is unlawful, void and of no effect.
- (c) A declaration that the decision of the first respondent given on 15 May 2019 declaring and confirming the fourth respondent to be the rightful Tui Labasa is unreasonable on the ground that it was arbitrary and capricious and as such the decision is unlawful.
- (d) A declaration that the first respondent had acted in bad faith and in a manner which was unfair to the applicant by not following the well-established protocol of appointing the Tui Labasa based on the ancestral chiefly lineage but followed the unprecedented notion of what they believe to be the right decision.
- (e) A declaration that the fourth respondent's lineage cannot ascend the chiefly position, in that his lineage is from a "vasu" or maternally linked to the yavusa Wasavulu, and in Fijian protocol, vasu cannot either be appointed as chief or own land in the vanua where they are maternally linked.
- (f) A declaration that the first respondent's declaration of the fourth respondent as the rightful Tui Labasa is irregular, void and of no effect.

[43] The application for judicial review, was opposed by the respondents who raised the issue of jurisdiction of the Court to give leave to the appellant based on the clear wording of section 7(5) of the Act. The first issue to be decided is the grant of leave to apply for judicial review, which was raised by the respondents, who were opposed to the grant for leave. In upholding the objections to jurisdiction raised by the respondents the learned Judge (Mansoor, J) stated:

- “10. Section 17(3) of the Act provides that a person aggrieved by a decision of the Itaukei lands Commission may appeal against the decision of the Appeals Tribunal. The person aggrieved by the decision must give notice of his or her appeal within 90 days of such decision. The notice must contain the grounds of appeal. The court has not been provided the notice of the grounds of appeal filed by the applicant against the second respondents ruling.
- 11. Section 17(3) of the Act provides that a person aggrieved by a decision of the Itaukei Lands Commission may appeal against the decision of the Itaukei Lands Commission under sections 6 and 17 and from a commissioner under section 16, and that such determination by the Appeals Tribunal shall be final.
- 12. Section 7(5) of the Act, which was introduced by Act No.44 of 1998, states:
“Decisions of the Appeals Tribunal are to be final and conclusive and cannot be challenged in a court of law”.
- 13. The respondent objection to the court's jurisdiction to hear the applicant's summons is based on section 7(5) of the Act.”

[44] The learned judge ordered:

- A. The objection to jurisdiction raised by the respondents is upheld.
- B. The applicant's summons filed on 15 August 2019 is struck off.
- C. The applicant is to pay the fourth respondent costs summarily assessed in a sum of \$1,000.00 within three weeks of this decision. The learned Judge considered a number of authorities raised by the parties which are of assistance in adjudicating on the issue of jurisdiction raised by the respondents as a preliminary issue.

[45] The thrust and gist of the appellant's submissions and arguments is that the Tribunal was biased, having followed the prejudgment of the Commission of Inquiry of 2018. He submits that the Commission and the Tribunal were incapable of bringing an independent mind to the inquiry that took place on 27- 29th November 2018. On this ground, the appellant has placed reliance on the case of **Ratu Livai Derenalagi** (supra). In this case the application for leave was granted in an earlier decision dated 4 March 2020, and the application for judicial review was before the learned judge on 15 September 2020, in the result that the review of the decisions of the Itaukei Land & Fisheries Commission dated 23 March 2017 and 18 July 2017 was dismissed. The decision of the Itaukei Land Appeal Tribunal dated 11 January 2018 dismissing the plaintiff's appeal against the decision of the Commission, was quashed, and the Tribunal was directed to rehear the plaintiff's appeal against those decisions.

[46] The learned judge's reasons for disturbing the Tribunal's decision was based on the fact that the appellant did not get sufficient notice of the hearing date of his appeal, and because the applicant's request for an adjournment was refused. Stuart, J stated:

"Because he did not get sufficient notice of the hearing of his appeal, and because his application for an adjournment was refused, the plaintiff did not have a fair opportunity to present his case, and the decision that the tribunal gave on the appeal is null and void for breach of the principles of natural justice. I make a declaration to that effect and order the Itaukei Lands Appeals Tribunal to rehear the plaintiff's appeal against the decision of the Itaukei land & Fisheries Commission to confirm the appointment of Ratu Eraeli Driu Borabora as the Tui Nawaka."

[47] Clearly, the factual circumstance in this case is different, it is the application for leave to apply for judicial review that is under consideration, the learned judge having refused leave based on the objection as to jurisdiction raised by the respondents and in light of section 7(5) of the Act.

[48] The appellant and the respondents had filed affidavits in the High Court in support of their respective cases, as follows:

- (i) Affidavit in Support of Ratu Kini Viliame Waqanitoga- pages 290 – 423.

- (ii) Affidavit in Opposition of the first, second and third respondents, dated 14/10/2019-242-289 of Record.
- (iii) Supplementary affidavit in Opposition of the first, second and third respondents-Pages 237-241 of Record.
- (iv) Affidavit in Opposition (fourth respondent)-pages 187-236 of Record.
- (v) Affidavit in Reply to affidavit Opposition by first, second and third respondents -pages 180-186 of Record.

[49] A cursory glance at the affidavits, suggest they were on the decision made by the first and second respondents to appoint the fourth respondent as the Tui Labasa. They relate to the actual decision making which led to the confirmation of the fourth respondent as the Tui Labasa. That is, the affidavits were directed towards: who merits the appointment? For example, the affidavit in Support of Ratu Viliame Waqanitoga (appellant) canvassed the following aspects:

- (a) Chiefly Succession of the Vanua of Labasa- paragraphs 4-15.
- (b) Post-Colonial Rule-paragraph 16.
- (c) Itaukei Lands Appeal Tribunal Ruling (15/05/2019)-paragraphs 17-29.
- (d) Agnate Descendants through the Male line -paragraphs 30-33.
- (e) The Drauna Family-paragraphs 34-47.

The issues raised were in support of the appellant's summons seeking an order for certiorari and the related reliefs that are sought. The appellant did not raise any complaint or issue in his affidavit alleging denial of natural justice or that he was not given a fair hearing, or that there was procedural impropriety.

[50] The affidavits in opposition from the 3 Rs in opposition, and of the fourth respondent were in response to the issues raised in the appellant's affidavits and in opposition to the application made by the appellant, the relief sought and the grounds.

[51] **Grounds 3 and 4 of Appeal:** The appellant is not pursuing ground 4 as Counsel stated, the ground is adequately covered under submissions on ground 3. With respect to ground 3, the appellant says that the learned judge erred in law and in fact in holding there was no procedural impropriety when he refused to hold as ultra vires the 'prejudgment' of the Appeals Tribunal Judgment in following the Commission of Inquiry ruling on the 27-29th November 2015 where the Chairman of the Commission initially published in the *Fiji Times* on 28th August 2018 the following statements;
"Commission would rely on their previous ruling in favour of the Qomate clan the previous title holders.

[52] **High Court Rules:** Order 53 rule 1 of High Court Rules state: *"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....."*

[53] Order 53 rule 3- *"No application for judicial review shall be made unless the leave of the Court has been obtained in accordance with this rule."*

- [54] A requirement of an application for leave filed in the Registry is that, it is to be a Notice under Form 32 (in the appendix to the Rules), and containing: “(iii) *the relief sought and the grounds upon which it is sought.*” - Order 53 r3 (2(a)).”
- [55] Order 53 rule 3(2) (b) requires that an application for leave for judicial review must be made upon filing in the Registry accompanied by an affidavit which verifies the facts relied on in the application
- [56] **Ouster Clause**
This type of provision is normally referred to as an ouster clause-it is intended to oust the jurisdiction of the courts. A provision of this type deprives the courts of jurisdiction over a Minister of the Government or any other person or authority exercising an administrative or judicial function.
- [57] In the United Kingdom, the House of Lords in **Anisminic Ltd v Foreign Compensation Commission** [1969] 2 AC held that section 4(4) of the Foreign Compensation Act 1950 which provided that the determination by the commission of an application for compensation shall not be called in question in a court of law, did not protect any such determination from the jurisdiction of the courts. The case is recognized as establishing the basic principle that if an authority or tribunal exceeds its jurisdiction then its decision is regarded by the courts as invalid and beyond the protection of any exclusionary formula previously used by Parliamentary Counsel.
- [58] Under what circumstances can a court intervene? There are grounds upon which courts can intervene. VCRAC Crabbe, in “***Understanding Statutes***” (1994) at page 150 stated:
- “The position then is this: the certiorari would be issued notwithstanding the presence of words taking away the right to apply for it. The grounds for interference by the courts are that;*
- (a) *The inferior tribunal*
 - (i) *was improperly constituted, as where some of the members of the tribunal had interests which should have been disclosed- R v Cheltenham Commissioners (1841)1QBD 467;*
 - (ii) *lacked or exceeds its jurisdiction because of the nature of the subject-matter or the failure to observe essential preliminaries-R v Hurst [1960] 2 QB 133;*
 - (iii) *had deviated from the prescribed procedure-R v Chairman of General Sessions at Hamilton WWR 800 at page 806;*
 - (b) *the act in question is an infringement of a rule in natural justice- Ridge v Baldwin [1964] AC 40;*
 - (c) *There is a total absence of jurisdiction-Ex P Bradlaugh (1878) 3 QB 509.*

[59] There has been numerous judicial review applications brought before the courts in Fiji, both before and after section 7(5) of the Itaukei Lands Act 1905 was enacted by Parliament.

[60] In Judicial Review No. HBJ 2 of 2009L Between **The State, and Native Lands Appeals Tribunal, (Respondent), Ratu Wiliame Ratudale Sovasova (Interested Party) and Adi Makereta Marama Roko Tui (Applicant)**, in a comprehensive Judgment on the issues: Whether the High Court has jurisdiction to hear the application before him, in view of section 7(5) of the Act, the learned Judge (Inoke, J) after comprehensively reviewing background to the dispute; Legislative background; Legal arguments on the jurisdiction point which involves the review of relevant case law; analysis of statutes and cases; application of the law, concluded, (amongst others) that:

- (a) The Court has no jurisdiction to hear the application on the basis that section 7(5) of the Native lands Act ousts the jurisdiction of the High Court,
- (b) Further, or in the alternative, the applicant has not demonstrated that she has grounds for review based on breach of natural justice or procedural impropriety.
- (c) The application fails and is dismissed.
- (d) No order as to costs.

In this case, the grounds upon which the applicant is seeking relief is that the respondent, the Native Lands Appeals Tribunal was “*biased, acted illegally, irrationally and with procedural impropriety*” which are expanded in particulars and in the affidavit, which the applicant claims supports the ground.

[61] In **Jemesa Ramasi v Native Lands Commission, Native Lands Appeals Tribunal, Attorney General AT, itaukei Land Trust Board** Civil Appeal No. ABU 0056 of 2012, the Honourable Justice W D Calanchini, then President of the Court of Appeal, in agreeing to the Court’s Judgment (per Basnayake, JA) made the following comments on the application of section 7(5), at paragraphs [3]-[6]:

“[3] *The problem arises because section 7(5) of the Act provides that decisions of the Tribunal are to be final and conclusive and cannot be challenged in a court of law. This clause is a class that is known as an ouster clause and in the past referred to as “private clauses”*

[4] *The learned High Court Judge acknowledged that the effect of section 7(5) is that a decision of the Tribunal is final and cannot be challenged in court. However, as the learned Judge observed, an examination of the decision-making process is not prohibited by section 7(5) of the Act.*

[5] *The learned Judge concluded that it remains open to the court to examine the decision-making process by way of an application for judicial review. Of the accepted grounds upon which an application*

for judicial review may be made, the issues of jurisdiction and natural justice are more relevant to the decision-making process than to the merits of the decision and therefore can be reviewed by a court.

[6] *What this means is that it is open to an aggrieved person to apply for judicial review of a decision of the Tribunal alleging either lack of jurisdiction or a denial of natural justice. A denial of natural justice may mean either the existence of bias on the part of the Tribunal or procedural impropriety. These issues are not directly concerned with the merits of the decision.”*

[62] I agree with the above comments on the application of section 7(5), however, the case for judicial review was on the grounds of delay under Order 53 r.4 of the High Court Rules. For the reasons given in that Judgment, the Court dismissed the appeal. There was no order as to costs.

[63] In the present appeal, it is the jurisdiction of the Court to entertain an application for leave for judicial review that is in issue, in view of the clear wordings of section 7(5) of the Itaukei Lands Act 1905. The High Court Rules require that leave of the Court has to be obtained (Order 53 r.3). No application for judicial review shall be made unless leave of the Court has been obtained in accordance with the rule. The purpose of an affidavit filed in support under Order 53 r.3 (b) is for the appellant to verify the facts relied upon in the application.

[64] All the respondents had opposed the application for leave on the basis that the appellant is challenging the merit of the decisions of the first and second respondents which he cannot do, given the clear words of section 7(5) of Act.

[65] Under the circumstances, Ground 3 is unarguable. It has no merit and is dismissed.

[66] The appellant’s appeal against the judgment of Mansoor, J dated 6 day of April 2022, on the respondent’s objection to the Court’s jurisdiction to leave application, is dismissed.

Other Issues

[67] Digressing a little to Justice Calanchini’s earlier comments in the same case, on the appeal requirement, under section 7(2) of the Act, to the Commission by a person aggrieved by the decision of the Tribunal. It may need further examination, as to its effects (now) if any, on the “*delay*” aspects, and on the grounds for an application based on both merit and a breach of natural justice, and the tension, if any, between the purpose and functions of the Commission, and the purpose and objectives of Judicial Review (controlled by the Rules of the High Court), in our system of justice. The then learned President of the Court of Appeal sated:

“[2] *The effect of section 7(2) of the Act is that any person who is aggrieved by a decision of the Commission has an unrestricted right of appeal to the Tribunal on the one condition that the notice of his intention to appeal, setting out the grounds of appeal, is given to the Commission within 90 days of the announcement of the Commission’s decision. That unrestricted right of appeal allows an aggrieved person to raise grounds of appeal that relate to the merits of the decision as well as grounds that would otherwise be the basis of an application for judicial review and as a result would include issues such as lack of jurisdiction and denial of natural justice. When such an unrestricted right of appeal to the Tribunal is given by statute then in my judgment there can be no prior or subsequent right to apply for judicial review of the Commission’s decision. There can be no prior right to apply for judicial review on the basis of the generally accepted principle that available remedies should be exhausted before applying for judicial review. There can be no subsequent application for judicial review after the appeal challenging the Commission’s decision simply because the Tribunal has had an unrestricted opportunity to adjudicate on the grievances raised by the appellant.....*”

(Underlining is for emphasis)

[68] With respect, my reading of section 7(2) is that, it does not give unrestricted right of appeal on a person who is aggrieved by the Commission’s decisions under section 6 of the Act, concerning enquiries into titles and descriptions of land boundaries, or section 17, concerning disputes as to headship of mataqali, etc. There are conditions, and the “*within 90 days of the announcement*” requirement, is one. It requires the aggrieved person to include in such notice the grounds of appeal. It does not specify the nature of the grounds of appeal that must be included in the said notice, for instance, that the notice must include all the grounds that are required to be given, as if the aggrieved person is applying to the High Court for judicial review of the decision being challenged. If such, the High Court Rules will come into play. As well, the jurisprudence developed by the Courts on this area of the law, and the statutes, will be in a position to influence and shape or dictate the formulation of the grounds of appeal that will be filed with the Tribunal.

[69] There is also no unrestricted opportunity to adjudicate on the grievances, in my view. Section 7(3) while empowering the Tribunal to hear further evidence, in its quest to determine an appeal before it, the section also imposes conditions, as the Tribunal has to be satisfied with the following 3 conditions:

“(a) *If it is shown that the evidence could not have been obtained with reasonable diligence for use at the inquiry before the Commission or commissioner;*

- (b) *If further evidence is such that, if given, it would probably have an important influence on the decision; or*
(c) *If the evidence is such as is presumably to be believed.”*

[70] The Court notes with interest the nature of some of the issues raised in this appeal by the appellant, some of which are issues of a similar nature, it is noted, have been raised in previous cases where the decision of the first and second respondents have been challenged in accordance with law. They relate to complaints of unfairness, denial of natural justice, predetermination, and procedural impropriety to mention some. These complaints may be justified or otherwise, but the fact is that these issues have been constantly raised in the judicial review proceedings in this important area of the law relating to the *itaukei* leadership appointments, must raise concerns to those who administer, implement and enforce the Act. A good illustration is the case of **Livai Derenalagi**, and the comments and observations of Stuart J, in that case are pertinent.

[71] In this appeal case, the appellant had not complied with the rules of pleading, which prevents the Court from accepting his position, given section 7(5) of the Act. But, despite the outcome of a case, it is important that after the decisions are made, the contestants are at peace, as well as their supporters, the people of the same *Vanua*. Counsels for the 3Rs had a lot of difficulty in responding to straight-forward questions from the Court seeking explanations and clarifications on issues raised by the appellant in the grounds of appeal and written submissions. The affidavit of the Itaukei Lands Commissioner did not address all the issues which the Court needed clarifications on. There are lessons to be learnt from previous similar challenges and there are legitimate expectations from stakeholders for positive improvements in the processes as in decision making by those serving in these offices and those in authority.

Morgan, JA

[72] I have read and concur with the reasoning and conclusions of the judgment of Qetaki, JA.

Orders of Court:

1. *Appeal is dismissed.*
2. *No order as to costs,*

Hon. Justice Isikeli Mataitoga
ACTING PRESIDENT COURT OF APPEAL AND
RESIDENT JUSTICE OF APPEAL

Hon. Justice Alipate Qetaki
JUSTICE OF APPEAL

Hon. Justice Walton Morgan
JUSTICE OF APPEAL