IN THE COURT OF APPEAL, FIJI ISLANDS
ON APPEAL FROM THE HIGH COURTOF FIJI

CIVIL APPEAL NO ABU0026 OF 2002S
(High Court Action No. HBJ0021 of 1997)

BETWEEN:

RATU NAPOLIONI DAWAI

Applicant/Appellant

AND:

RATU ISIRELI NAMULO

Respondent/Respondent

Coram: Gallen, JA
Smellie, JA
Ellis, JA

Hearing: Thursday 8h May 2003, Suva

Counsel: Mr G.P. Shankar for the Appellants
Mr I. Fa for the Respondent

Date of Judgment: Friday, 16th May 2003

JUDGMENT OF THE COURT

This is an application pursuant to s10 of the Court of Appeal Amendment Act No. 13 of 1998 seeking an extension of time within which to file an appeal against the judgment of Townsley J. delivered in the High Court in Lautoka on the

16th of March 2000. The application was filed over twenty four months after the judgment was delivered.

As a preliminary point we note that there were six respondents in the Court below (the would-be Appellant was one of them) but none of the other five have been served.

The law relative to an application such as this has been stated and restated in the cases many times. There is no need to rehearse the authorities again here. Disposal of the application is within the discretion of the Court. The applicant has the onus and must advance an adequate explanation for his failure to comply with the time limits set down in the relevant legislation. The longer the delay the less likely it is that leave will be granted. Prejudice to one party or the other is a relevant consideration as are the merits of the applicant's case.

In addition to the above matters, (which are not necessarily exhaustive) the applicant advances an additional ground which is peculiar to the circumstances of this case. The argument is that the order of Townsley J. quashing the decision of a Commission of Inquiry of the 4th of October 1997 appointing the sixth respondent Ratu Napolioni Naulia Ragigia Dawai the Turaga Tui Nadi, was not one which the Judge was able to make. Mr Shankar's submission was that in Civil Appeal No. 55 of 1993 Ratu Nacanieli Nava v Native Lands Commission and the Native Land Trust Board (judgment 11 November 1994) it was held that pursuant to s100(4) of the 1990 Constitution (which Constitution was relevant at the time). The aforesaid

decision of the 4th of October 1997 was "... final and conclusive ... (and not able to be) ... challenged in any court".

It is beyond question that the Nava decision does not apply to an application for judicial review. This was made clear in Civil Appeal No. ABU0067 of 1997 Ratu Jeremaia Natauniyalo v The Native Land Commission and Ratu Akuila Koroimata. There the Court said at page 5 after discussing the leading English authorities – Ridge v Baldwin [1964] A.C. 40 and Anisminic Ltd. v Foreign Compensation Commission and Anor. [1969] 1 A.C. 147 - ***"In Nava's case, this Court (at pp 7-8) expressly left open the question whether the English policy approach as shown in the above quotations was appropriate to and applicable in Fiji. The applicant for judicial review in that case had sought to impugn the Commission's decision on the merits. There was no claim of lack of process or breach of natural justice. Not surprisingly, this Court held that s.100(4) meant what it said in relation to a decision of the Commission which had been reached by valid process. ...we consider that the Anisminic principles are part of the the law of Fiji. ... We do not read this Court's decision in Nava as precluding this conclusion. Accordingly, the appeal must fail. The application for judicial review must proceed in its merits."***

Having disposed of that matter we now return to the exercise of our discretion. The delay of over two years can only be described as inordinate. The explanation for that delay is inadequate and unsatisfactory. In paragraph 3 of his affidavit in support the applicant swore as follows:

> ***"That Mr Rabo was my previous solicitor. I left to him to proceed with appeal but he has neither filed appeal papers nor returned any file or papers. I have therefore been and still (sic) under great disadvantage to have all my grounds settled."***

In such circumstances an affidavit by the alleged defaulting solicitor (the applicant having waived privilege) is required. It should set out not only the solicitor's own defaults and the reason for it but any efforts made by the applicant to have the appeal filed and the matter advanced. The applicant, however, has given no evidence of what, if anything, he did to move the matter forward with Mr Rabo. Excuses of difficulty in obtaining the judgment, searching the Court file and securing the return of the Rabo file are unconvincing.

Prejudice is raised in that the decision of Townsley J. set aside the decision of the first respondent appointing the applicant to the prestigious and apparently remunerative chiefly office of Tui Nadi. But the selection process will again be embarked upon and the applicant in this matter will have the right to advance his claim again before an appropriate and independent tribunal.

On the other hand prejudice in a more general sense will be suffered if leave is granted. So far there have been two unsuccessful attempts to resolve the issue as to who should be the Tui Nadi. In a matter of such importance to a significant group of people, further delay is not in the public interest. There would also be prejudice to the respondent who appears to have arguable claim to the title.

Finally the Court can in appropriate cases look at the merits. The applicant in his affidavit and his Counsel in submissions addressed these quite extenstively. Mr Fa for the respondent was more circumspect. We say no more than that upon a reading of a very full and detailed judgment at first instance, the merits appear to favour the respondent.

The application for leave to appeal out of time is dismissed. The applicant is to pay cost of $750.00 to the respondent together with reasonable disbursements as fixed by the Registrar.

FIJI COURT OF APPEAL

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Gallen, JA

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Smellie, JA

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Ellis, JA

Solicitors:

Messrs G.P. Shankar & Co., Ba for the Appellant
Messrs Fa & Company, Suva for the Respondent