IN THE COURT OF APPEAL, FIJI
CIVIL JURISDICTION

Civil Appeal No. ABU 060 of 2018
(Lautoka HBC No. 08 of 2015)

BETWEEN	:	**I-TAUKEI LAND TRUST BOARD** a body corporate of Victoria Parade, Suva incorporated pursuant to the Native Land Trust Act 1940, Laws of Fiji.
		Appellant
AND	:	**RATU LEIENE WAQA** of Nadala, Nadarivatu, Tavua and Farmer, suing on his own behalf and on behalf of Mataqali Naqereqere.
		1st Respondent
AND	:	**FIJI HARDWOOD CORPORATION LIMITED** a Government commercial company under the Public Enterprise Act declared under the Companies Act.
		2nd Respondent
Coram	:	Almeida Guneratne, JA
Counsel	:	Ms. L. Komaitai for the Appellant
	:	Ms. M. Savou for the 1st Respondent
	:	Mr. F. Haniff for the 2nd Respondent
Date of Hearing	:	21st January, 2021
Date of Ruling	:	12th February 2021

RULING

The Background Factual History

[1] This is an application for leave to appeal (out of time) the judgment of the High Court dated 7th October, 2016.

[2] The High Court entered judgment in favour of the 1st Respondent (original Plaintiff) by granting *inter alia* the declarations prayed for by the Plaintiff's originating summons dated 19th January, 2015.

[3] The declarations prayed for were that:

> "1. The land known as Bulu belonging to Mataqali Naqereqere had been reserved for agricultural use of Mataqali Naqereqere.
>
> 2. 60 percent of adult members of the Mataqali had not consented to de-reservation of their agricultural reserve marked on NLC Lot 8 Sheet Reference H/15 2 on NLC Final Report Vol. 3 for leasing of the said land to the Director of Lands or the 2nd Defendant (presently 2nd Respondent)
>
> 3. The 2nd Defendant's (2nd Respondent's) instrument of tenancy no. 4469 over native land marked on the plan attached to the tenancy is null and void."

[4] Against the judgment of the High Court the Appellant (original 1st Defendant) filed its Notice and Grounds of Appeal on 13th December, 2016.

[5] Consequent to the procedural steps that followed the Full Court struck down the appeal by its judgment dated 13th July, 2018 for being out of time by 25 days. The initial appeal bore No. ABU 138 of 2016.

[6] As the record bears out, the Appellant's position in those proceedings had been that it was under the mistaken belief that the appeal was within time. It is evident therefore that, this was the reason why the Appellant had failed to seek leave for enlargement of time to appeal.

[7] It is thereafter that the present Notice and Grounds of Appeal were filed on 18th July, 2018.

[8] In the result, if one harks back to the date of the High Court Judgment of 7th October, 2016 and the present appeal which was filed on 18th July, 2018, there is admittedly a delay of 1 year and 9 months, although the Appellant has within 5 days filed the present application from the judgment of the Full Court striking out its initial appeal.

Initial Reflections on the Matter

[9] Given the resulting delay of 1 year and 9 months in so far as the present appeal is concerned and the reasons adduced therefor as recounted in paragraph (6) above, I was unable to accept the Appellant's explanation to overcome the criteria as to the length of delay and the reasons for the delay in seeking enlargement of time for leave to appeal and appeal as laid down in past judicial precedents.

[10] In several rulings I have delivered in the past I have expressed the view that, should an Applicant in an intended appeal fail to get over the threshold bars of the length and reasons for delay, then, such an application must be rejected for otherwise, the Court would be called upon to treat a party who appeals within time and a party who fails to do so on equal terms.

[11] However, writing as a Single Judge within the framework of Section 20 (1) of the Court of Appeal Act (Cap. 12) (the Act) I felt bound to consider the other criteria in considering an application for extension of time to appeal. (NLTB v Khan, CBV 2 of 2013, 15th March, 2013)

[12] In that decision the Court laid down that, the relevant criteria must be considered in the overall and then make a determination whether to grant leave to appeal notwithstanding the lapse of time (vide also Fiji Industries Limited v National Union of Factory and Commercial Workers (CBV 008 of 2016, 27th October, 2017).

[13] Thus, although I found that the reasons given for the delay are unacceptable, I proceed to consider the other relevant criteria.

[14] And what are those other Criteria?

(i) The Relative Prejudice to parties and the maintenance of the Status Quo.
(ii) Existence or not of Merits urged in appeal.

Consideration of the said Criteria in their application to the instant case

[15] I shall take first the criterion of "Relative prejudice to parties and maintenance of the Status Quo"

[16] The learned High Court Judge, in addition to the declarations he granted ordered an injunction on the 2nd Defendant "not to interfere with the Mataqali Naqereqere's negotiations of their Agricultural reserve for electrication purposes.....on the said reserve.

[17] Accordingly, should leave to appeal be granted, pending appeal, there will not be any prejudice caused to the 1st Respondent and the Status Quo as it stands will continue.

As to Merits urged in Appeal

[18] In that regard I looked at the following aspects which I lay down before I proceed to a determination in that regard viz:

(a) The judgment of the High Court.
(b) The grounds of appeal urged.
(c) The content of the contesting written submissions tendered by parties.
(d) The rival contentions made by Counsel at the hearing.

The Judgment of the High Court

[19] "[33] At paragraph 16 and 17 of the Affidavit in support as well as through their (Mataqali Naqereqere) Solicitor's letter dated 25th November, 2014 the Plaintiff reiterate that they had not given 60 percent of majority adult consent as required for de-reservation of their reserved land. The 1st Defendant has not produced any written majority consent of the Mataqali in this proceedings nor by the 2nd Defendant. It has to be then accepted that no such consent was given by the Mataqali to exclude the land from Reserve so the Director of Lands could lease it in January 1991."

"[36] The Director of Lands does not hold the status or the legal personality of an iTaukei. So the exception in Section 16 (1) does not apply to the Office of Director of Lands. The grant of Instrument of Tenancy to Director of Lands in January 1991 was therefore in breach of Section 16 (1) of the iTaukei Trust Act [Cap 134]. The 1st Defendant had no power to grant such an instrument. The Instrument of Tenancy was therefore null and void ab initio."

"[39] Since the Instrument of Tenancy was void its purported transfer by way of administration under Legal Notice 13 of 1996 was ineffective to transfer any form of tenure to 2nd Defendant under the maxim of *nemo dat habet non* [***"no one can give more than what he has."***]"

Grounds of Appeal (dated 18th July, 2018)

[20] The new Grounds of Appeal are in identical terms to those urged in the earlier aborted appeal. They are:

> *"1. That the Learned Judge erred in fact and in law at paragraph 33 of the judgment in upholding that there was no majority consent granted by the Mataqali Naqereqere to exclude the land from the reserve so that the Director of Lands could lease it.*

2. *That the Learned Judge erred in fact and in law at paragraph 36 of the judgment when upholding that 1st Defendant had no power to grant an Instrument of Tenancy to the Director of Lands and that such Instrument of Tenancy was null and void ab initio.*

3. *That the Learned Judge erred in fact and in law at paragraph 39 of the judgment by upholding that the Instrument of Tenancy was void and its purported transfer by way of administration under Legal Notice 13 of 1996 was ineffective to transfer any form of tenure to the 2nd Defendant under the maxim of nemo dat habet non.*

The Content of the contesting written submissions tendered by Parties

[21] The content of the written submission tendered on behalf of the Appellant may be summarised as follows:

(i) That, the Learned Judge had completely disregarded the affidavit in opposition of the Appellant in regards to the consent obtained by the landowning unit. Although there was an issue as to some landowners who had signed and/or not signed, the evidence revealed that some had consented for the lease to be given to the Director of Lands.

(ii) That, the Learned Judge had failed to consider that a proper lease had been issued by the Appellant to the Director of Lands and premium obtained and lease moneys paid over the years being distributed among the landowners, the 1st Respondent also they having benefitted and its landowning unit or Mataqali Unit, the 1st Respondent was estopped from saying it did not sign or consent to the leasing of the land in question which is currently under the tenure of the 2nd Respondent thus making the maxim "nemo dat habet non" inapplicable in the circumstances.

[22] The Appellant has also advanced the following points impliedly suggesting that those ought to have received the attention of the Learned Judge, viz:

(i) Leasing to the Director of Lands is necessary for development purposes and in the National Interest although the consent procedure followed was not properly documented.

(ii) The current policy by the Appellant in collecting the signatures and confirming with another authority the iTaukei Lands Commission for majority consent.

Summary of the 1st Respondent's Submissions

[23] Having already given my mind to the criteria of length of delay, reasons for the delay, prejudice and status quo as laid down in *inter alia* NLTB v. Khan (CBV 002 of 2013, 15th March 2013), I shall proceed to consider the 1st Respondent's submissions on the merits.

The Chances of the Appeal succeeding if time is extended

[24] In the 1st Respondent's written submissions, it has been contended that, the High Court found that, "the Plaintiff (1st Respondent) has established in this case that 60 percent of adult members of Mataqali Naqereqere had not consented to the de-reservation of their agriculture reserve..... for leasing of the said land to Director of Lands or the 2nd Defendant (2nd Respondent)

[25] At this point it is to be noted that the 2nd Respondent had not filed any written submissions. Thus, on the basis of the written submissions filed on record (by the Appellant and the 1st Respondent) is when I, on a calling (Mention) date fixed the matter for hearing.

What transpired on the date fixed for hearing?

[26] Mr. Haniff entering an appearance for the 2nd Respondent moved for a vacation of the hearing on the basis that, it is his client who stood to be affected by the High Court Judgment, being the present incumbent of the lease in question and thus seeking Court's permission to make submissions on his client's behalf.

[27] Learned Counsel for the 1st Respondent having submitted that, should the date for hearing be vacated costs must be paid, I made order that the 2nd Respondent pay a sum of $1,500 before the next date. The 2nd Respondent having complied with that order the matter was taken for hearing on 21st January, 2021.

The Rival Contentions made by Counsel for the Appellant and the 1st Respondent at the hearing on 21st January, 2021

[28] Learned Counsel for both the Appellant and the 1st Respondent re-iterated the submissions made by them in their written submissions which I have summarised earlier.

[29] Ms. Komaitai for the Appellant stressed on the following issues which she had raised in her written submissions and elaborated on them thus:

(a) The lease being given to the Director of Lands for purposes of development and therefore in the National (Economic) Interest, the said Lease was a valid lease to start with.

(b) The said lease being assigned to the 2nd Respondent and several years having passed thereafter where the 2nd Respondent has been developing the land, the 1st Respondent who is also a beneficiary as being a part of the Native Land Units where the moneys collected as lease rentals have been disbursed among the said units, the 1st

Respondent was estopped from challenging the said lease given to the Director of Lands and the assignment to the 2nd Respondent.

(c) Even if the 60 percent consent criterion may not have been satisfied for the granting of the initial lease given to the Director of Lands (as Ms. Komaitai appeared to concede on my intervention) her submission was that, nevertheless, the learned High Court Judge's reliance on the maxim "nemo dat habet non" stood inapplicable in the background circumstances as urged in (a) and (b) above.

[30] Finally, Ms. Komaitai submitted that on the basis of the said issues raised by her (which I recapped above) there are more than sufficient grounds and/or reasons for the Full Court to go into should leave to appeal notwithstanding lapse of time be granted.

Assessment of the said Contentions as against the judgment of the High Court

[31] If I were to assess the said contentions, taking first, Ground 1 of the grounds of appeal urged, as against the judgment of the High Court, the finding made by the Learned Judge being a pure question of fact, I could not see a legal basis to interfere with the same.

[32] In regard to Ground 2 urged also I could not find a basis to find fault with the High Court in as much as the Learned Judge had regard to:-

(i) Section 5 of Ordinance 19 of 1968 which had allowed the ILTB to exclude native land from Reserve.

(ii) Section 16 (3) of the NLT Act (Cap 134) in regard to consent of Fijian owners read with regulations made under Section 33 thereunder.

(iii) Regulation 2 of the Native Land (Miscellaneous form) Regulations as to the form of consent required as envisaged therein.

(iv) Section 16 (1) of the NLT Act (Cap 134) touching on the legislative provisions referred to thereon.

[33] It is on the interplay of these legal provisions that the Learned Judge had arrived at his determination, which *prima facie*, appeared to bear scrutiny.

[34] Nevertheless the matters urged by Ms. Komaitai which I have recapped at [21] and [29] above stand as arguable points, viz:

(a) The scope, content and the application of the maxim "*nemo dat habet non*"
(b) The issue raised on "the principle of estoppel".
(c) The validity of the initial lease given to the Director of Lands and the subsequent assignment of it issued to the 2nd Respondent in the background of how and why that had come about.

The Advent of the 2nd Respondent and the submissions made by Counsel on its behalf

[35] With no written submissions being tendered, relying on affidavits filed on record, Mr. Haniff for the 2nd Respondent (as the incumbent of the present lease in question) submitted that:-

> While conceding that the matters he was placing before this Court were not before the High Court, yet the said matters being in the nature of jurisdictional/justiciable issues, and therefore going to the root of the issue, he urged that, this Court was obliged to consider the same.

Oral submissions made by Counsel for the 2nd Respondent

[36] I shall summarise the said submissions as follows:

Reliance on the Supporting Affidavit of Semi Dranibaka dated 20th January, 2021 on the factual background

[37] In that affidavit (which was admitted without objection) it is deposed as follows:

> *" 4. Under an Instrument of Tenancy No. 4469, the land known as Namotovai in the Tikina of Savatu in the Province of Ba owned by the Mataqali Naqereqere was leased by the iTaukei Land Trust Board ("iTLTB") to the Director of Lands ("**the Instrument of Tenancy**").*
>
> *5. The Instrument of Tenancy commenced on 1 January 1991 for the term of fifty (50) years. Annexed hereto and marked **"SD 2"** is a copy of the Instrument of Tenancy.*
>
> *6. On 15 September 1998, the iTLTB gave the Director of Lands consent to assign the Instrument of Tenancy to Fiji Hardwood Corporation Limited. Annexed hereto and marked **"SD 3"** is the consent of the iTLTB for the assignment from the Director of Lands to Fiji Hardwood Corporation Ltd.*
>
> *7. Since the assignment in 1998, the Fiji Hardwood Corporation Ltd had paid lease rental to the iTLTB.*
>
> *8. Out of the 415 hectares the Fiji Hardwood Corporation Ltd acquired from the Director of Land, 204 hectares have been planted with mahogany trees. The remaining 211 hectares have not been planted because of rocky and/or steep terrain.*
>
> *9. Ever since the Lease was assigned to Fiji Hardwood Corporation Ltd, it has paid a considerable amount of money in maintaining the plantation.*
>
> *10. The value of the Mahogany trees is estimated to be $5.5 million; these value will increase in 2025 when the Mahogany trees are ready to be harvested. Annexed hereto and marked **"SD 4"** are current photos of the mahogany plantation."*

Reference to the annexures attached to Semi Dranibaka's said Affidavit

The Annexures

[38] (i) SD 2 – the instrument of tenancy.

(ii) SD 3 – the application for consent to assign to the 2nd Respondent under Section 12 of the Native Land Trust Act (Cap. 12)

(iii) SD 4 – the current photos of the Mahogany plantation.

Some brief Comments

[39] In regard to SD 3 – there was no material placed before the High Court as to (e) under the Heading. Notes, apparently why the Learned Judge made the findings he did on "No Consent."

[40] As for SD 4 – although nothing was placed before me to show the authenticity of the said photographs the same was not objected to by Learned Counsel for the 1st Respondent.

The Application of the Mahogany Industry Development Act, 2010 (MIDA)

[41] In that background of documents Mr. Haniff submitted that he was relying on the several provisions of the MIDA.

(a) Definition of Mahogany lease (Section 2)

*"**mahogany lease** means -*

(a) any lease in respect of mahogany plantation land; or

(b) any lease specified in regulations made under this Act to be a mahogany lease for the purposes of this Act, and the following leases in effect at the commencement of this Act –

(i) leases in respect of iTaukei land between the iTaukei Land Trust Board as lessor and Fiji Hardwood Corporation Limited as lessee (being lessee by virtue of an assignment from the Director of Lands as original lessee) conferring on the lessee the right to harvest mahogany timber grown on the land; and

(ii) leases in respect of State-owned land between [Director of Lands] as lessor and Fiji Hardwoord Corporation Limited as lessee conferring on the lessee the right to harvest mahogany timber grown on the land;

***Mahogany plantation land** means any land that is owned or leased by FHCL."*

The Impact of Sections 11 and 12 of the MIDA

[42] Section 11 of the MIDA provides thus:

"11 (1) it is the function of Fiji Hardwood Corporation Limited, acting on the direction of the Council –

(a) to manage all operations in connection with the planting, growing, harvesting and sale of mahogany timber on mahogany plantation land; and

(b) to provide services and expertise to the Counsel in connection with the management of mahogany plantation ands and the development of the mahogany industry.

(2) Without limited the effect of subsection (1)(b), the matters on which the Fiji Hardwood Corporation Limited is to provide services and expertise include –

(a) the reforestation of cleared mahogany plantation land; and

(b) the establishing of a scheme for certification of felled mahogany timber.

(3) In exercising any rights or performing any duties under this Act or as lessee under a mahogany lease, Fiji Hardwood Corporation Limited is subject to the direction of the Council.

(4) Without affecting the generality of subsection (3), Fiji Hardwood Corporation Limited must comply with the directions of the Council as regards –

(a) entering into any agreement for the sale of mahogany timber; or

(b) undertaking any transaction for or in connection with the harvesting of mahogany timber or the management of mahogany plantation lands.

(5) Fiji Hardwood Corporation Limited must report to the Council on the performance of its functions under this Act when so requested by the Council."

[43] It is to be noted that no material had been placed either before the learned High Court or before me that the requirements as envisaged in Section 11 and 12 have been followed given the fact that the MIDA (the Act) had been in operation from 2010 and the 2nd Respondent had continued from 1998 to be in occupation as an assigned lessee.

[44] Of course the fact of the matter is that the said Act had not been brought to the notice of the High Court by any party.

"12 (1) By this subsection, the terms of every mahogany lease in effect at the commencement of this Act are varied –

(a) by removing any obligation on the part of the lessee for any payment to the lessor in respect of the harvesting or removal of mahogany timber grown on mahogany plantation land; and

(b) by removing any provision for reassessment of the rent payable by the lessee under the lease.

(2) The iTaukei Land Trust Board, in the exercise of its rights and obligations as lessor under any mahogany lease, is subject to the direction of the Council including in particular as regards –

(a) any variation of the terms of the lease;

(b) terminating the lease;

(c) its rights under the lease in respect of default or failure on the part of the lessee in complying with the lessee's obligations under the lease.

[subs (2) am Decree 7 of 2011 s4, effective 1 March 2011]

(3) The iTaukei Land Trust Board must not, without first obtaining consent of the Council, enter into or consent to the issuing of any lease in respect of iTaukei land which is used or intended to be used for the growing of mahogany trees.
[subs (3) am Decree 7 of 2011 s4, effective 1 March 2011]

(4) The iTaukei Land Trust Board must, not less than 12 months before the expiry of any mahogany lease of which it is the lessor, notify the Council in writing of the date of expiry of the lease."
[subs (4) am Decree 7 of 2011 s4, effective 1 March 2011]

[45] In addition to what is stated in Section 11 and 12 the role the 2nd Respondent is ascribed to play under the MIDA is reflected further in Section 15 (1) to 15 (4) of the said Act.

Retrospective validation of certain Mahogany Leases

[46] Section 2(1) to (5) of Schedule 4 to the Act lays down in explicit terms as follows:

"2 (1) This paragraph applies to any grant of lease made or purported to be made before the commencement of this Act between the iTaukei Land Trust Board as lessor and the Director of Lands as lessee in respect of land that was or has since become mahogany plantation land.

(2) By the operation of this subparagraph –

(a) any grant or purported grant of lease to which this paragraph applies is deemed to have been validly made and, accordingly, the Director of Lands is deemed for all purposes to have acquired, as from the date of the purported grant of lease, an interest in the land as lessee in accordance with the terms of the grant document; and

(b) the subsequent assignment or purported assignment by the Director of Lands of his or her interest as lessee under the lease to Fiji Hardwood Corporation Limited is deemed to have been validly made and, purposes to have acquired, as from the date of the purported assignment, the interest of the Director of Lands in the land as lessee in accordance with the terms of the assignment document.

(3) For the avoidance of doubt, subparagraph (2)(a) has effect notwithstanding –

(a) that the term of the purported grant exceeded the maximum term permissible under regulation 20 of the iTaukei Land Trust (Leases and Licences)Regulations 1984 as it then applied;

(b) any other respect in which the purported grant was not in compliance with the iTaukei Land Trust Act 1940 as it then applied; or

(c) any judgment or order of a court declaring –

(i) the purported grant to be not permitted by law; or

(ii) the Director of Lands not to have acquired a valid interest in the land.

(4) For the avoidance of doubt, subparagraph (2)(b) has effect notwithstanding –

(a) any absence of consent to the purported assignment on the part of the iTaukei Land Trust Board under section 12 of the iTaukei Land Trust Act 1940 as it then applied;

(b) any other respect in which the purported assignment was not in compliance with the iTaukei Land Trust Act 1940 as it then applied; or

(c) any judgment or order of a court declaring the purported assignment not to have transferred any rights in the land, or being of no effect.

(5) Any judgment or order of a Court, including a judgment or order given or made before the commencement of this Act, is to have effect subject to subparagraph (2) and is, to the extent of any inconsistency with that subparagraph, not enforceable.

[47] These provisions appear to vindicate Mr. Haniff's argument re-capped above and indeed seem to cover the issues arising in the instant case as raised on behalf of the Appellant.

Consideration in particular of Section 16 and Schedule 4 Clause 5 (3) of the MIDA

"Section 16 (1) This Act has effect notwithstanding any provision of the iTaukei Land Trust Act 1940 or any other law and, accordingly, to the extent that there is any inconsistency between this Act and the iTaukei Land Trust Act 1940 or other law, this Act prevails.

[subs (1) am Decree 7 of 2011 s4, effective 1 March 2011]

(2) Without affecting the generality of subsection (1), and for the avoidance of doubt –

(a) this Act has effect notwithstanding sections 4 to 8 of the iTaukei Land Trust Act 1940;

(b) where there is any inconsistency between a direction given to iTaukei Land Trust Board by the Council under this Act and a provision of the iTaukei Land Trust Act 1940, the direction given by the Council prevails.

[s 16 am Decree 7 of 2011 s4, effective 1 March 2011]

"Schedule 4 Clause 5 (3)

> *(3) If any proceeding to which this paragraph applies is commenced after the commencement of this Act, the judicial officer before whom the proceeding is brought must, without hearing or determining the matter, transfer the proceeding to the Chief Registrar who must terminate the proceeding by issuing a certificate to that effect to the parties.*

[48] Mr. Haniff finally concluded submitting that those two provisions taken together put the final lid on matter and that therefore the impugned judgment cannot stand.

[49] Ms. Savou for the 1st Respondent though re-iterating what has been stated in the written submissions did not counter the submissions made by Mr. Haniff.

Determination and Conclusion

[50] Taking the Appellant's grounds of appeal taken in conjunction with the submissions made by Counsel for the 2nd Respondent (having a direct interest in the matter), it would appear that the interplay of the provisions of the MIDA suggests that not only:

(a) is the judgment of the High Court rendered *per incuriam* for the MIDA had not been cited before it and therefore not considered)

(b) but also on account of Schedule 4 Clause 5 (3), the Court had assumed jurisdiction in respect of a matter that was non-justiciable.

[51] For the foregoing reasons, I am of the view that there are strong reasons to grant the Appellant's application seeking extension of time to appeal the impugned judgment of the High Court.

[52] Accordingly, I proceed to make my orders as follows:

Orders of the Court

1. The application of the Appellant seeking leave to appeal notwithstanding lapse of time the judgment of the High Court dated 7th October, 2016 is allowed.

2. Consequently, primarily the Appellant, as well as the 2nd Respondent may advise themselves as to what steps they are required to take in terms of the relevant Practical Directions and Rules of this Court.

3. In all the facts and circumstances of this case, departing from the Rule that an award of costs follow the event, I make order that both the Appellant and the 1st Respondent pay a sum of $1,500.00 each to the 2nd Respondent within 21 days of this Ruling under the jurisdiction conferred on me as a single Judge of this Court as per Section 20 (1) (j) read with Section 20(1) (k) of the Court of Appeal Act.

.....

Almeida Guneratne

JUSTICE OF APPEAL