

**IN THE HIGH COURT OF FIJI**  
**CIVIL JURISDICTION**  
**AT LAUTOKA**

**JUDICIAL REVIEW HBJ 004 of 2012**

**BETWEEN** : **THE STATE**

**AND** : **i-TAUKEI LANDS COMMISSION** a body duly constituted under the i-Taukei Lands Act.

**RESPONDENT**

**AND** : **JOSATEKI NAISAU** of Nailaga Village, Ba, Farmer for and on behalf of the descendants of Jone Sito.

**APPLICANT**

**AND** : **INOKE NAVIKO** of Vunato, Lautoka, Retired, **MAIKELI NAUCAMIRIMIRI (No.2)** of Vatulaulau, Ba, Plumber and **EPELI DRISO** of Tawarau, Ba, Farmer – for and on behalf of the descendants of Maika Nariro.

**INTERESTED PARTIES**

Counsel : Mr. K. Vuataki – Vuataki Law for the Applicant  
Mrs. Lee - Office of the Attorney-General for the Respondents  
Mr. Nawaikula - Nawaikula Esquire for the Interested Parties

**JUDGEMENT**

(Pursuant to section 3 of the Native Lands (Amendment) Decree 2011, the principal Act (the Native Lands Act) is amended by deleting the word "native" wherever it appears and inserting "iTaukei". The words "native" and "i-taukei" may be used interchangeably in this Judgement).

**INTRODUCTION**

1. Before me now is an application for judicial review. The Orders sought are:
  - i. **A DECLARATION** that Maika Nariro's name was **entered in error** in the Vola ni Kawa Bula of Tokatoka Nacobowale of Mataqali Mota, Yavusa Nasolo in Nailaga Village, Ba and that he and his descendants are not registered in the proper unit. **And or alternatively, a declaration** that the Respondent ought to have followed the procedure of sighting the birth certificate of Maika Nariro as being the son of Josateki Naisau of Tokatoka Nacobowale, Mataqali Mota of Yavusa Nasolo before entering his name in the Vola ni Kawa Bula of Tokatoka Nacobowale, Mataqali Mota of Yavusa Nasolo and it not having done so, the name of Maika Nariro was entered in error in the Vola ni Kawa Bula of Tokatoka Nacobowale, Mataqali Mota of Yavusa Nasolo and he and his descendants are not registered in the proper unit.
  - ii. **A DECLARATION** that the Respondent was **not within Jurisdiction** in not addressing its mind on whether an error had been done in the entry of Maika Nariro into the Vola ni Kawa Bula of Tokatoka Nacobowale, Mataqali Mota of Yavusa Nasolo by entry of said name on the basis of information provided by one Opeti Naio who was not a member of such a unit and being a prohibited source of entry of name in the Vola ni Kawa Bula according to instructions for entry into the Vola ni Kawa Bula.
  - iii. **A DECLARATION** that the Respondent ought to take into account the **relevant considerations** that:

- (a) Maika Nariro and his children were already registered in Tokatoka Nakorosewa of Mataqali Navitabua in Yavusa Drola of Nacula village in Yasawa when he and his children were re-registered in Tokatoka Nacobowale.
  - (b) Maika Nariro's name could not be entered into Tokatoka Nacobowale, Mataqali Mota of Yavusa Nasolo in Nailoga, Ba unless his purported father Josateki Naisau had sworn by affidavit before Registrar of Birth that he was the father of Maika Nariro and birth certificate had been issued with him as father on it for Maika Nariro and his descendants to become hereditary owners of Josateki Naisau's lands in Nacobowale.
- iv. **A DECLARATION** that the Applicants had a legitimate expectation
    - a) That the Respondent would take into account the view of Turaga ni Yavusa Nasolo that the names of the descendants of Maika Nariro be cancelled from Tokatoka Nacobowale, Mataqali Mota of Yavusa Nasolo and they be registered into Tokatoka Nakorosewa of Mataqali Navitabua, Yavusa Drola in Nacula village.
    - b) That the Respondent would take into account the non-existence of a birth certificate for Maika Nariro.
    - c) That the Respondent would look fully into the issue of registration of Maika Nariro and his descendants in Tokatoka Nacobowale, Mataqali Mota in Yavusa Nasolo of Nailoga, Ba.
  - v. **A DECLARATION** that the Respondent made error of law in registering Maika Nariro in both mother and purported father's proprietary units and in purported father's proprietary unit when he was already an owner of land in mother's unit.
  - vi. **CERTIORARI** to issue quashing decision of Respondent given verbally on 4th of October 2011.
  - vii. **A MANDAMUS** directing Respondent to reconsider the Petition of the Applicants by directing its mind
    - a) On whether Maika Nariro was registered in error in the Register of Native Owners of Tokatoka Nacobowale and whether his descendants are recorded in the proper unit as hereditary owners
    - b) On relevant considerations for deciding that issue as found by the honourable Court.
    - c) Corrective measure and
    - d) Written reasons on the above

**OR ALTERNATIVELY A MANDAMUS** directing the Respondent to consider by the hand of its Chairman to make an Order directing Registrar of Titles to delete the names of Maika Nariro and his descendants from the Register of names of members of Tokatoka Nacobowale, Mataqali Mota, Yavusa Nasolo of Nailoga Village in Ba and record them as members of Tokatoka Na-Korosewa, Mataqali Navitabua, Yavusa Drola of Yasawa.
  - viii. Other Declarations or Mandamus Orders as the honourable Court may decide
  - ix. an order for *certiorari* against the *i-TLC* to correct some entries in its records in relation to a particular *i-taukei* proprietary unit.
- 2. Leave for judicial review was granted by Mr. Justice Nawana in 2012.
  - 3. There are two decisions to which this application relates. The first was the *i-Taukei Lands Commission's ("i-TLC")*<sup>1</sup> decision in the 1940s to register the

<sup>1</sup> (then known as the Native Lands Commission).

name of Marika Nariro (“**Nariro**”) into his father’s *tokatoka*, *mataqali* and *yavusa*. The second was *i-TLC*’s purported refusal on 04 October 2011 to remove Nariro’s name from his father’s *tokatoka*, *mataqali* and *yavusa* following a petition from the applicant.

### **THE *i*-TAUKEI LANDS COMMISSION**

4. The *i-TLC* is set up under the *i-Taukei Lands Act* (Cap 133). It was established in 1880 primarily to register native lands, ownership of such lands, and to classify customary roles and migration records of communal units<sup>2</sup>.
5. Because *i-taukei* lands have always been beneficially owned by kinship-based communal proprietary units called *i-tokatoka* or by the larger proprietary unit called *mataqali* (which comprises two or more *i-tokatokas*), the *i-TLC* was concerned in its early days with identifying every such unit and demarcating and then registering all land over which they held beneficial interest<sup>3</sup> (see also **Bulou Eta Kacalaini Vosailagi v Native Lands Commission** [1989] FJHC 53 to in depth discussion). Accordingly, in its early days, *i-TLC* led extensive inquiries<sup>4</sup> throughout Fiji to record the membership of every proprietary unit and then recorded its findings in a Register of Native Lands which became commonly known as the *Vola Ni*

<sup>2</sup> see its official website (<http://www.fijianaffairs.gov.fj/NLFC.html>).

<sup>3</sup> See sections 8 and 9 of the *i-Taukei Lands Act*.

<sup>4</sup> Section 6 of the Act says:

*Commissioners to enquire into titles and describe boundaries of lands claimed*

6.-(1) The Commission shall institute inquiries into the title to all lands claimed by mataqali or other divisions or subdivisions of the people and shall describe in writing the boundaries and situation of such lands together with the names of the members of the respective communities claiming to be owners thereof.

*Rules re procedure*

(2) The Commission shall, with the approval of the Minister, make rules for regulating the procedure to be followed and prescribe forms to be adopted at any such inquiry.

*Owners to mark out land*

(3) When any inquiry is to be held in any tikina of which notice in accordance with the rules of the Commission has been duly given it shall be the duty of the persons claiming to own lands in that tikina to mark out and define in such manner as the bull of the tikina may direct the boundaries of the lands of which they claim to be the respective owners. Every such person failing to comply with this provision shall be liable to a fine not exceeding two dollars or to imprisonment for one month and shall defray any expense in marking out and defining the boundaries caused by his default.

*Commission to record boundaries where no dispute*

(4) If there is no dispute as to the ownership of any lands marked out and defined as aforesaid and the Commission is satisfied that the claim is bona fide and that all conditions as to notice of the inquiry and the claim made have been duly complied with and that full opportunity of objecting to the ownership claimed has been given to all interested in the Commission shall record the boundaries of such lands and the names of the owners.

*Disputes to be decided by Commission*

(5) If there is a dispute as to the ownership of any lands marked out and defined as aforesaid the Commission shall inquire into it and, after hearing evidence and the parties to the dispute, decide the question of ownership and record its decisions:

Provided that if the parties to the dispute agree in writing in the presence of the chairman of the Commission to a compromise the Commission shall record the boundaries of the lands and the names of the owners in accordance with such compromise.

*Record of encumbrance, etc.*

(6) When recording the owners of any lands the Commission shall ascertain and record the name of any person who holds with respect to that land any customary title or office and shall also record any encumbrance or easement to which the land may be subject.

*Kawa Bula* (“VKB”). This aspect of the core function of the Commission is defined in section 4 of the Act.

6. As part of its core statutory function, *i-TLC* has continually updated and maintained the VKB over the years to this day. Key amongst these is its power under section 10 to correct or rectify the VKB by adding any name omitted in error, or, by removing any name entered in error. I set out the relevant part of section 10 below and discuss it more fully later in this judgement.

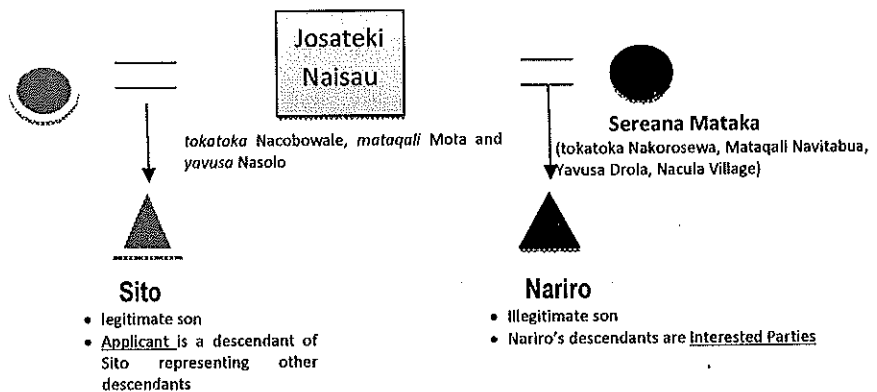
*How register shall be kept*

10.-(1) .....

(2) When it is found that an error has been made in the preparation of such register or that any Fijian has been recorded and registered in any proprietary unit other than the proper unit or that the name of any Fijian has been inadvertently omitted from the register recording the proper unit of such Fijian, it shall be lawful for the Registrar of Titles on the receipt of an order under the hand of the chairman of the Native Lands Commission to correct the same or delete or add the names of such persons as the case may be.

**BACKGROUND**

7. The applicant is a descendant of one Jone Sito (“Sito”). He files this application for and on behalf of himself and other descendants of Sito. They are all registered members of the said *tokatoka*. The interested parties are the descendants of one Marika Nariro (“Nariro”). Nariro was a half brother of Sito. Nariro was registered in *tokatoka* Nacobowale, *mataqali* Mota and *yavusa* Nasolo in the 1940s.
8. Sito and Nariro were both sons of one Josateki Naisau (“Naisau”). Naisau was a member of the said *tokatoka* Nacobowale, *mataqali* Mota and *yavusa* Nasolo. Sito was a legitimate son of Naisau. Nariro was an illegitimate son of Naisau.



9. The applicant desires that Nariro's and his descendants' names be removed from the register of *tokatoka* Nacobowale. His application is fuelled by some animosity which had disintegrated the family into two squabbling factions. That animosity erupted when the Nariro faction alleged that certain members of the Sito faction had misappropriated funds held by *i-Taukei* Lands Trust Board from the lease of *tokatoka* land. In retaliation, the Sito-faction would challenge the other's right to any beneficial claim over any share of the monies in question. As they would argue, Nariro was not a descendant of Naisau and his registration into the *tokatoka* was carried out by *i-TLC* in the 1940s in error of the law after taking into account irrelevant factors.
10. Inoke Naviko in his affidavit of 22 August 2013 gives an account of how this point was raised at the first meeting held on January 2012 (see further below) convened by *i-TLC* with the parties:

The Native Land Commissioner then asked ....., "What are you disputing?" Irinieta mumbled something that could not be heard so the Native Land Commissioner turned to Josateki Naisau and he said that it is about the money.

The Commission sought further explanation and Josateki Nasau said. "Someone has been drawing out money from our Account with Housing Authority without our consent." The commissioner then said to him, "point out that person and Josateki Naisau pointed to the applicant, Sikeli Sakuca.

The Commissioner then asked the applicant, have you been doing this and he was silent.

11. It was against that background that the applicant wrote to *i-TLC* on 22 May 2009<sup>5</sup> to petition for the following<sup>6</sup>:

- (i) That the names of Marika Nariro and his descendants be cancelled from our Book of Descendants.
- (ii) We also want you to clarify whether Marika Nariro is child of marriage or not.
- (iii) We also ask that you clarify the entry of non-members of a Tokatoka, should the members of the Tokatoka consent to it or not.
- (iv) We also ask Sir that if you cannot cancel the name of Maika Nariro 17/565 what way should we follow to achieve this.
- (v) What can you do in the Book of Descendants so that those this (sic) should know who they are.
- (vi) Can a person be registered twice.
- (vii) We ask that they be returned to Nacula where they were first written into.
- (viii) Which turaga ni Yavusa or Mataqali or Roko did their entry into our Tokatoka.
- (ix) We also ask sir what year did their entry into our Book of Descendants happen.

<sup>5</sup> *i-TLC*, vide the affidavit of Ilaitia Buadromo sworn on 11 December 2013 and filed on 17 December 2013, confirms receiving this letter.

<sup>6</sup> (as translated verbatim in an annexure in the applicant's affidavit sworn on 19 September 2012).

## HOW THE PETITION WAS HANDLED?

12. The applicant's letter of 22 May 2009 was copied to the *Roko Tui Ba* who then sent his copy to *i-TLC* under a cover letter<sup>7</sup>. Upon receiving the applicant's petition, *i-TLC* would write directly to *Roko Tui Ba* on 24 June 2009 with a view to consulting with the applicant about settling the dispute. On 03 July 2009, the *Roko Tui Ba* wrote to *i-TLC* to advise that he had visited the applicant and his faction who remained adamant that the inclusion of Nariro's name into their tokatoka be investigated.
13. On 14 August 2009, the applicant again wrote to *i-TLC* to highlight some intriguing and dubious facts concerning Marika Nariro's registration:

...if you look at the Book of Descendants in Yasawa Drola Korosewa (225), you will see there Maika Nariro 3/225 was born in 1898, but in the book of descendants in Nacobowale, Nailaga, Marika Nariro 17/565 was born in 1910. ....this is devious, or misleading in the pursuit of a lie so that those who took part in this inclusion of name can be true.....Josateki Naisau 1/565 was born in 1884, but Maika Nariro 3/225 was born in 1898.....Josateki Naisau was only 14 years old when Maika Nariro 3/225 was born.....that was still the time of darkness, how can this young child leave Nailaga Village and go and have a child in Yasawa since it was the time of cannibalism.....this is why our grandfather Josateki Naisau 1/565 did not write his name, because he knows that he was not his son.

...this is why we are humbly requesting that you remember us...regarding our request...in our letter of 22<sup>nd</sup> May, 2009, that is, that you remove the name of Maika Nariro 17/565 and all of his descendants....if not, that you advise us what route to follow for them to be removed.

14. On receiving the above letter, *i-TLC* would again urge *Roko Tui Ba* vide a letter dated 17 September 2009 to consult with *Tui Ba* and *Turaga Ni Yavusa Nasolo* to clarify **“all they know concerning the things being said about Maika Nariro”** and that an *i-TLC* **“inquiry will be suspended till the above is received”**.

### *Response From Turaga Ni Yavusa Nasolo & Tui Ba*

15. On 19 September 2009, the *Turaga ni Yavusa Nasolo* wrote to *i-TLC*. He said he could tell Nariro and his descendants were not members of the proprietary unit in question from the way they behaved, or conducted themselves or related to (or could not relate to) the descendants of Jone Sito

<sup>7</sup>As translated by the applicant in his affidavit.

I am sending herewith the petition of the above Tokatoka concerning Maika Nariro (NLC 17/565) and his descendants and witnessed by the Book of Descendants to be also written in Tokatoka Na-Korosewa [225] Mataqali Navitabua, Yavusa Drola in Nacua. Your enlightenment is requested in the things that emerge from their petition.

and that he had always heard that Maika Nariro was actually from Yasawa where he was born and was first registered in a proprietary unit there.

16. There was no letter however from the Tui Ba, despite a plea-by-letter dated 06 October 2009 by the applicant to the former to oblige to *i-TLC*'s request (just as the *Turaga ni Yavusa Nasolo* had (see above).

#### *Applicant Again Writes To i-TLC*

17. When the *Tui Ba* did not write a letter, the applicant then wrote to the Chairman of *i-TLC* on 14 October 2009 to seek advice on what they should do<sup>8</sup>.
18. At paragraph 31 of his affidavit sworn on 19 September 2012, the applicant deposes that he was informed by Roko Tui Ba that *i-TLC* was coming to hear their petition on 17 December 2009 but this had to be cancelled because of hurricane winds. On 07 January 2010, the applicant's counsel, Mr. Vuataki, then wrote to the Chairman of *i-TLC* to seek a hearing date. The Chairman responded to Vuataki vide a letter dated 12 January 2010 that the case **“will be heard as requested by your letter dated 07 January 2010”** on Thursday 14 January at 2.00 p.m. at the District Officer's Office.

#### *The First Hearing – 14 January 2012*

19. The first hearing happened as scheduled. At paragraphs 33 and 34, the applicant said that the Chairman and another officer came to hear their petition. They heard from both a representative of Jone Sito followed by a representative of Maika Nariro. He then promised to look deeply into the matter and for the parties to try and solve their dispute.
20. Inoke Naviko who swore an affidavit on 22 August 2013 for and on behalf of the interested parties said that, at the meeting, the *i-TLC* Chairman had explained from the record that Nariro was first registered in his mother's proprietary unit (*mataqali* Naivatabua, *tokatoka* Nakorosewa of Nacula Yasawa) because his father was unknown at the time<sup>9</sup>. However, Nariro was

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<sup>8</sup> The applicant wrote as follows:

...we are asking for your advice if the Lady refuses to write, what else should we do concerning our Petition. The lady Tui Ba is not doing anything and we are meeting with difficulties, that is why we are hoping you will help us concerning the things about Marika Nariro 17/565 and his descendants.

<sup>9</sup> As he deposes at paragraph 13:

13. That it was on the very first meeting at Nailaga on 14/01/2010 that the Native Land Commissioner Mr Tagivetaua had explained to all that according to their records Maika Nariro was initially registered with his mother of Mataqali Naivatabua, Tokatoka Nakorosewa of Nacula Yasawa on the basis that his father was unknown at the time.....

later registered in his father's proprietary unit in 1940 after his father became known and by which time, Nariro had moved from Yasawa to live with his father at his village in Ba<sup>10</sup>.

21. Naviko then presents the following account of the first meeting:

15.... The first sitting was conducted at Nailaga Village in the presence of all parties before Mr Viliame Tagivetaua from the Native Lands Commission on 14/01/2010. The proceedings progressed as follows:

- (i) When everyone was seated, the Native Land Commission commenced and asked, pointing to the VKB record. Does anyone know this person Josateki Naisau?" and everyone answered yes. Then he continued and said "Josateki Naisau has two sons: Maika Nariro born 1910 and Jone Sito born 1911". Then he continued and asked, "Do you all know these two brothers" and everyone said yes.
- (ii) The Native Land Commissioner then asked "Are the eldest sons of Maika Nariro and Jostakei Naisau present" and Josateki Naisau (the eldest living son of Maika Nariro) lifted his hand and was called forward to the front. Then he was asked "Is there any eldest child of Jone Sito present?" And the appellant wanted to stand up to move to the front but his elder sister, Irinieta, moved forward instead because she is older.
- (iii) The Native Land Commissioner then asked the two eldest at the front, "What are you disputing?" Irinieta mumbled something that could not be heard so the Native Land Commissioner turned to Josateki Naisau and he said that it is about the money.
- (iv) The Commission sought further explanation and Josateki Nasau said. "Someone has been drawing out money from our Account with Housing Authority without our consent." The commissioner then said to him, "point out that person and Josateki Naisau pointed to the applicant, Sikeli Sakuca.
- (v) The Commissioner then asked the applicant, have you been doing this and he was silent.
- (vi) After these the Native Land Commissioner began to explain the details of our registration in the VKB in response to the request made by the appellant. He explained, "Maika Nariro was born in Nacula, Yasawa, and was registered under his mother's Mataqali because his biological father was not known. Later in the 1940 an NLC sitting was conducted at Nailaga, Maika Nariro's biological father was confirmed to be Josateki Naisau who is a member of Tokatoka Nacobowale, Nailaga and thereafter, Maika Nariro has been registered under his father's Tokatoka of Nacobowale."
- (vii) The respondent, Native Lands Commissioner added, to say "Today you should all know that Maika Nariro is a true member of Tokatoka Nacobowale, Nailaga. You are not separate people as you both come from the same family tree. It is the money that is causing the dispute amongst you and your money will be frozen from today; you go and reconcile first before the money is release."

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<sup>10</sup>As he deposes:

13. .... but later in 1940 when the Native Lands Commission set at Nailaga, Ba it was confirmed to it that Maika Nariro's father was Josateki Naisau and that he was living then at his father's village in Nailaga and accordingly he was registered and confirmed his father's Mataqali and Yavusa and this has been the status of the book of descendants, Vola ni Kawa Bula (VKB) details to date.



22. Notably, according to *i*-TLC (see affidavit of Buadromo below), Nariro was first registered in his father's *tokatoka* in 1914. In the 1930s, he was registered in his mother's unit (because of policy restraints on the registration of illegitimate *i*-taukei children in their father's unit). Later, in the 1940s, he was re-registered into his father's unit.

*Applicant Gathers Evidence After First Hearing*

23. The applicant apparently, expected a decision to be handed down by *i*-TLC after the first "hearing". His lawyer wrote to *i*-TLC on 10 February, 2010 to query as to when its decision would be handed down.

24. Interestingly, whilst expecting a decision from *i*-TLC, the applicant would continue to gather evidence to support his case after the first hearing as is clear from paragraphs 36, 37 and 40 of his affidavit.

36. That our lawyer wrote to the Registrar of Births by letter dated 4<sup>th</sup> March, 2010 which is annexed marked "SS 18" asking for birth certificates of Maika Nariro but he did not receive a reply.

37. That I did go with my lawyer Mr Kitone Vuataki to the Respondent's office in Suva and their officer that we saw asked us to go and get Maika Nariro's birth certificate and we go to the Registrar of Births in Suva and after the Registrar had carried out a search she did confirm to us that Maika Nariro had no birth certificate. We asked her to confirm that by letter to Respondent which she did and this letter was given to us sealed in an envelope which we gave to Respondent at their Suva Office.

.....

40. That on 14 January, 2011 we wrote a letter to Respondent enclosing testimonials from five gentleman of Nacula Village in Yasawa confirming that Maika Nariro and his descendants are from Nacula Village and their house site is there. Annexed marked "SS 19a" is a copy of the said letter in English translation and "SS 19b" is a true copy of the said letter in Fijian.

25. Even more interestingly, it appears that the applicant had every expectation that *i*-TLC would take into account the evidence that he had gathered after the first hearing, as is clear from paragraphs 38 to 42 of his affidavit. The evidence in question are, namely, that Nariro's birth was never ever registered with the Registrar of Births, Deaths and Marriages and, as Mr. Vuataki had disclosed to *i*-TLC vide his letter of 27 January 2011:

(a) Maika Nariro "was included in the year 1934 into the Book of Living Descendants of Tokatoka Nakorosewa, Mataqali Navitabua NLC 3/225 and was included in Nailaga in 1941 without cancellation in Yasawa. It was not in accordance with correct procedure that no one should be recorded twice."

- (b) "Secondly, the instruction of the Governor of 30<sup>th</sup> September 1926 to only use Birth Certificates and no other source whatsoever was supposed to be followed."
- (c) "You are requested to consider the above advice and give your decision on it."

### *Second Meeting – July 2011*

26. The second meeting happened on the above date at Koronubu House in Ba town. On this occasion, Ilaitia Buadromo attended on behalf of *i-TLC*. The applicant describes the meeting in paragraph 44 as follows:

44. That Ilaitia Buadromo said and I believe that Maika Nariro was born out of wedlock and his descendants would be counted with him. He said he would go and write a letter to Chairman of Respondent to give his decision and that he would write to *i-Taukei Land Trust Board* to release Nacobowale lease monies to the trustees of Nacobowale and that both letters would be copied to us.

27. Naviko describes the second meeting as follows at paragraph 16 of his affidavit:

16. That the second sitting was held on 18/03/2010 at Koronubu House in Ba. Before that, a telephone call was received requiring the attendance of us the descendants of Maika Nariro to another NLC sitting, again at the request of the appellant. So far as I can remember the proceedings was conducted as follows:

- (1) It was afternoon at about 4pm when everyone was seated and our case was called. A different person, and not Viliame Tagivetaua, who I now know as Ilaitia Buadromo conducted proceedings., a prayer was said, he welcomed us all and then he opened a book and began to explain that in 1940 the person who was sworn an oath to verify that Josateki Naisau was the biological father of Maika Nariro was Opeti Naio.
- (2) The applicant then said, we do not know or recognise that person and Mr Buadromo replied – "If you disagree with him you go and retrieve his skeleton and bring him here to put your dispute to him because we acted upon his evidence when there was no objection."
- (3) The applicant then said nothing after that but his son then questioned "On what year did Opeti Naio actually made the sworn statement?" then one officer accompanying Buadromo asked him , "Were you born at that time?" to which he replied no, and he answered therefore you must not dispute the authenticity of the statement.
- (4) The NLC official then said, "Today you must know that you are from one family tree." He then repeated what was stated to all at the first meeting that Maika Nariro was born in Nacula, Yasawa, and was registered under his mother's Mataqali because his biological father was not known. Later in the 1940 an NLC sitting was conducted at Nailaga, Maika Nariro's biological father was confirmed to be Josateki Naisau who is a member of Tokatoka Nacobowale, Nailaga and thereafter, Maika Nariro has been registered under his father's Tokatoka at Nacobowale.

### *What Transpired After Second Meeting*

28. The applicant deposes at paragraphs 45 to 53 what happened after the second meeting:

45. that we waited for the copies of the two letters and none arrived, so I went to Suva on 8<sup>th</sup> August 2011 and met with Ilaitia Buadromo at Respondent's office and he told me and I believe that he was about to write to Chairman of Respondent
  - a. to release Nacobowale lease monies by letter to iTaukei Land Trust Board;
  - b. to confirm that Maika Nariro was included in Nacobowale VKB through information received from one Opeti Naio who was not of Nacobowale.
46. That I know that Opeti Naio was from Tokatoka Korocula of Mataqali Navunirewa and not from my Tokatoka. He is registered as 2/570 in said unit.
47. That I therefore expected Respondent to take this inclusion by Opeti Naio in giving its decision in our petition.
48. That after meeting with Ilaitia Buadromo in Respondent's office in Suva I went to iTaukei Land Trust Board to ask whether Nacobowale lease funds have been released.
49. That it was at iTaukei Land Trust Board that I discovered that one Litia Kenona a granddaughter of Maika Nariro 17/565 wrote a letter dated 18<sup>th</sup> February, 2011 to the General Manager of iTaukei Land Trust Board to cease all lease extensions of Nacobowale lands and this was supported by 13 descendants of Maika Nariro.
50. That led us to send a letter dated 12<sup>th</sup> August, 2011 to Respondent setting out nine problems caused to us by the descendants of Maika Nariro. Annexed marked "SS 21a" is a copy of the said letter in English translation and "SS 21b" is a true copy of the said letter in Fijian.
51. That because by early September 2011 no decision was still made by Respondent I asked my lawyer to write a letter to Respondent setting out a history of the steps taken in the Respondent hearing our petition and the major grounds why we thought the Respondent had been in error in including Maika Nariro and his descendants into Nacobowale VKB. Annexed marked "SS 22a" is a copy of the said letter in English translation and "SS 22b" is a true copy of the said letter in Fijian.
52. That the Assistant Roko Tui Ba Sivo Nadumu came to see me on the 30<sup>th</sup> day of September, 2011 and told me and I believe that Respondent would come and give its decision on 4<sup>th</sup> October, 2011 at Koronubu House in Ba.
53. That on the last week of September 2011 I heard on the radio in the iTaukei language a message from Chairman of Respondent that those iTaukei without birth certificates be returned to the place they were first written into. This message was also written in local dailies.

### *Third Meeting Where The "Decision" Was Purportedly Made*

29. The third meeting happened on 04 October 2011. The applicant describes it as follows in paragraphs 54 to 58 of his affidavit:

54. That on 4<sup>th</sup> October, 2011 both descendants of Jone Sito and Maika Nariro were present to hear the Respondent's decision on our petition.
55. That I expected such decision would be in writing in their promise of depth of study of the issues raised as well as on the written reasons we had given for the removal of Maika Nariro and his descendants from Nacobowale VKB.

56. That the decision given by the Chairman of Respondent orally in the vernacular was

*"Kemudou na Sito dou vinakata me bokoci o Maika. Ia o Maika sa bokoci mai Yasawa ka vakataudeitaki vei Josateki. Dou duri dou lako yani"*

57. That I asked my lawyer to translate it which translation is that

*"You Sito you wanted Maika removed. But Maika has been removed from Yasawa and confirmed to Josateki. You stand and go".*

58. That by the words from Respondent that "we stand and go" and I know that we descendants of Jone Sito have exhausted all possible avenues of remedying this decision of Native Land Commission and ask for review of the said decision and remedies sought.

30. Naviko describes the third sitting in the following words at paragraph 17 of his affidavit:

That the third sitting was held again at the Koronubu House on 4/10/2011. So far as I can recall, the proceeding went as follows:

- i. Our party was notified through the Roko's office. It was late afternoon about 4.30pm and we were the only case before the commission.
- ii. We all entered together, there was a welcome prayer as proceedings started. The Native Lands Commissioner then asked, "Are you all here," we answered yes then he continued. "Are you the Nariro faction present", and we answered yes. He asked, "What about you the Jone Sito faction, Are you also present?" And they answered yes. He saw that we were all seated together and he said "Now you seat according to your faction at different sides in the room.
- iii. The respondent, Native Land Commission added, "This will be our final sitting. Today I will give my decision about Maika Nariro's previous registration in his mother's Tokatoka and Mataqali in Yasawa. We Native Fijians are registered only under our father's land owning unit. Maika Nariro's father was confirmed later to be Josateki Naisau. He then looked down and pointing to the book in front of him continued and said, "Josateki Naisau is a member of Tokatoka Nacobowale of Nailaga, Ba. Today you should all know that Maika Nariro is also a member of Tokatoka Nacobowale in Nailaga, Ba. Since his father is from the same land owning unit".
- iv. He then turned to the appellant who was sitting in front and asked, "What about you, do you have any question?, and the appellant shook his head. Then the respondent said, "Now you stand up and leave".

### **WHAT RESPONDENT SAYS ABOUT THE MEETINGS**

31. *i-TLC*, rightly or wrongly, understood the applicant's letter as one written merely "to seek clarification and confirmation of VKB Records on Maika Nariro's dual registration"<sup>11</sup>. By an affidavit sworn by Ilaitia Buadromo on 11 December 2013, he deposes that the three sittings were informal meetings,

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<sup>11</sup> This is how Ilaitia Buadromo (see footnote 1 above) would describe it in his affidavit.

the purpose of all of which was merely to inform the parties as to what was recorded in the VKB<sup>12</sup>.

32. Buadromo says that whenever *i*-TLC conducts a formal hearing, it would adhere strictly to certain set procedures. These, it did not follow in this case because, as far as *i*-TLC was concerned, the applicant had merely requested a confirmation of the VKB entries. He identifies the following set-procedure:

23. That ..... this was an informal sitting of the Commission to confirm VKB records to parties. That this was not a hearing under sections 16 & 17 of the Act requiring that:

- Notice of the Sitting is gazetted.
- Advertisement in the newspapers.
- 30 days' notice given to parties.
- Proceeding and evidence recorded.
- Written decision.

As an example, I annex hereto and mark as Annexure "IB-3" a copy of the Fiji Government Gazette No 63, Volume 14 (page 2376).

### *What The VKB Records Say*

33. Buadromo deposes that *i*-TLC did inform the parties of the following at the third meeting:

24. That parties were informed of the VKB records showing that:-

(a) Maika Nariro was first registered under Josateki Naisau (1/565) in 1914.

Note shows that Maika requested to be registered under Josateki (father).

(b) He had lived most of his life in Nailaga.

(c) In 1925 Sereana Mataka registered Maika Nariro of the yavusa Drola, mataqali Navitabua, tokatoka Nakorosewa in Nacula, Yasawa. Refer to Annexure 2 of Defendants Bundle of Documents.

(d) That due to an illegitimate regulation during the 1930s Maika Nariro and his children were deleted from the original VKB and entered into the list of Illegitimate Register of tokatoka unit no 565A. Refer to Annexure 3 of Defendants Bundle of Documents.

(e) In 1940 the same regulation was amended or quashed and illegitimate children were allowed to be registered back into the original VKB. Therefore Oveti Naio in 1941 swore under oath Maika Nariro's re-entry into the VKB under Josateki Naisau. Refer to Annexure 5 of Defendants Bundle of Documents.

(f) That the Mataqali had agreed to his registration to Josateki Naisau because the latter was his paternal father.

25.....the Commission from those facts deduced that Maika Nariro and family be registered to their grandfather Josateki Naisau in Nasolo, Ba.

26. .... parties were informed of VKB records as highlighted above.

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<sup>12</sup> As he deposes:

15. That ..... the Commissions became aware of the dispute between the applicant and the interested party through their letter to the commission dated 22.5.09. (Petition) seeking clarification and confirmation of the VKB records on Maika Nariro's dual registration.

29. .... the decision had already been confirmed to parties on the hearing date where parties had accepted what was on the VKB.
30. .... I can confirm receiving the said letters but further state that the inquiry and confirmation of records had already been relayed to parties.
31. .... that there were at least two meetings held with parties before 14 January 2010. The first was in 2009 where the Commission met with Sakuca and his son and they complained about the Nariro family's animosity towards them. Later the same year another meeting took place at Koronubu House in Ba where Sakuca and the Nariro family were present. That during these two meetings Sakuca complained about the double registration and the harassment to his son. The Nariro family said that their grandfather .. had spent his whole life in Ba and he only left for Yasawa to visit their grandmother in Yasawa. That the Sakuca family was small in number and the Nariro family had outnumbered them, although parties knew each other as relatives.
32. .... the dispute only came to light when some of Nariro's sons had decided to return and settle in Ba after retiring from their respective jobs. And the issue of lease monies and trustees was the major cause of disputes. The Nariro family had indicated that they be fairly shared the lease monies.
33. That paragraph 46 & 47 of the affidavit is admitted as these factors were all taken into consideration by the Commission.
39. That in regards to paragraph 55 of the affidavit this was a decision under section 10 of the Act whereby the chairman does not have a statutory duty to provide a written decision and/or reasons.

### OBSERVATIONS

34. The applicant wants Nariro's name removed from the VKB register of *tokatoka* Nacobowale for three reasons. The first is the fact that Nariro's birth was never ever registered in the official Register of Births. This fact is crucial because the appearance of an *i-taukei* father's name on his child's birth certificate is the primary reference point by which *i-TLC* will trace and determine the child's patrilineage and *tokatoka*. Hence, because Nariro's birth was never ever registered with the Registrar of Births, he never did have a birth certificate from which *i-TLC* could validly register him to any patrilineage in the VKB.
35. The second is the fact that Nariro was registered into *tokatoka* Nacobowale on the basis of an oral testimony of one Opeti Naio during an *i-TLC* inquiry in the 1940s. *i-TLC's* reliance on Naio's oral testimony, as the applicant argues, was contrary to the **Hutson Instruction 3 of 1926** (of Governor Eyre Hutson)(see below). The applicant adds that Opeti Naio was not even a member of Naisau's *tokatoka* or *mataqali* and as such, had no authority to speak for the registration of Nariro into the said *tokatoka*, let alone, to purport to certify that Nariro was a son of Naisau.

36. The third reason is the fact that Nariro was already registered in his mother's *tokatoka* Na-Korosewa, *mataqali* Navitabua and *yavusa* in yasawa prior to *i-TLC* entering his name into Naisau's *tokatoka* in Ba. This meant that he was dually registered from that point on which violated the principles in section 18(3) and section 27(1) of the *i-Taukei* Lands Act. The argument goes that *i-TLC* did not have powers to register Nariro concurrently under two proprietary units.
37. This is now a non-issue because Buadromo has confirmed that Nariro was de-registered from his mother's unit. The applicant's case, however, rests ultimately on the seriousness with which the Hutson Instruction is to be held in the grand scheme of things so to speak. Instructions 3,6,7 and 13 which are the most relevant parts, are reproduced below:

**INSTRUCTIONS AS TO ENTRIES IN THE REGISTER OF NATIVE LANDOWNERS**

3. Entries to be made in this Register can only be taken from the **Register of Births and Deaths** of the particular province to which this Register relates **and from no other source whatsoever.**

6. Children of illegitimate birth should be entered in their father's *tokatoka* and the letter B set against their names in the column headed "Veika tale eso". To further distinguish this class of entry the names should be enclosed within the red brackets, thus "(Tomasi Madigi)."

7. In cases where the **father's name is unknown** they should be entered in the mother's *tokatoka* marked B and, in the column headed "Tamana." The words father not known or the Fijian equivalent written.

.....

13. If these instructions are carefully followed it will at once be apparent that only the names of (a) the legitimate issue of the persons recorded by the Native Lands Commission entitled to share in the ownership of the lands of the proprietary unit to which they belong and (b) the illegitimate who are subject to the provisions of section 33 of Ordinance No 1 of 1905 will be added to this Register.

**DISCUSSION**

*i-TLC Powers To Register Illegitimate Birth In Either Mother's or Father's Proprietary Unit*

38. Nariro was an illegitimate child<sup>13</sup>. He was first registered in his father's unit in 1914. His mother then registered him into her unit in the 1920s as necessitated by a change in the then colonial government policy with regards to the registration of *i-taukei* children of illegitimate birth. Then in the 1930s, he was removed from his father's unit following a change in government

<sup>13</sup> As Buadromo's affidavit says in paragraphs 30 to 32 above.

policy regarding the registration of *i-taukei* children of illegitimate birth. Then in the 1940s, he was re-registered into his father's unit when that policy was revised yet again<sup>14</sup>.

39. I query whether, in re-registering Nariro back to his father's unit in the 1940s, *i-TLC* was acting in exercise of a discretion conferred to it by then applicable Native Lands Ordinance. Neither counsel addressed me on this point. Under section 21 of the *i-Taukei Lands Act* which is now in force, *i-TLC* has a discretion "**as may seem just and equitable**" to record an *i-taukei* child of illegitimate birth in either the mother's or the father's proprietary unit.

*Illegitimate children to be tribal land-owners and recorded as such*

21.-(1) Notwithstanding anything contained in the Legitimacy Act all Fijians of illegitimate birth shall be deemed to be owners of native lands and may be recorded as may seem just and equitable as members of the proprietary units of either their father or mother.

40. I presume that the corresponding statutory provision applicable in the 1940s conferred a similar discretion. Henceforth, I shall discuss *i-TLC's* position on the assumption that it had acted in the 1940s on the basis of a discretion similar to that which now exists through section 21. But even if I am wrong in assuming that *i-TLC* did have a discretion, this court would still be constrained anyhow in law in terms of the range of remedies it can make in the circumstances of this case.

*Assuming There Was A Section 21-like Discretion*

41. Assuming there was such a discretion, then guided by section 21, it means that the Commission did act in exercise of that discretion when it decided to register Nariro into *tokatoka* Nacobowale. Was the Hutson Instruction intended then to be a strict, hard and fast code applicable in every case concerning the registration of every illegitimate child into his father's proprietary unit? I accept that the Instruction was of some authority then.

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<sup>14</sup> As Buadromo deposes:

(e) In 1940 the same regulation was amended or quashed and illegitimate children were allowed to be registered back into the original VKB. Therefore Oveti Naio in 1941 swore under oath Maika Nariro's re-entry into the VKB under Josateki Naisau. Refer to Annexure 5 of Defendants Bundle of Documents.

(f) That the Mataqali had agreed to his registration to Josateki Naisau because the latter was his paternal father.



However, for one to overlay the said Instruction as a complete code upon a statutory discretion<sup>15</sup> would disable *i*-TLC of that very discretion.

42. As De Smith<sup>16</sup> at page 183 says:

A tribunal entrusted with a discretion must not, by the adoption of a general rule of policy, disable itself from exercising its discretion in individual cases. Thus, a tribunal which has power to award costs fails to exercise its discretion judicially if it fixes specific amounts to be applied indiscriminately to all cases before it.

.....

Again, a factor that may properly be taken into account in exercising a discretion may become an unlawful fetter upon discretion if it is elevated to the status of a general rule that results in the pursuit of consistency at the expense of the merits of individual cases.

(see also **R v Flintshire C.C. County Licensing Committee, ex p Barrett** [1957] 1 Q.B. 350.

43. De Smith goes on to say at page 185:

But there seems no sound reason why the courts should not apply a similar principle to other functions of public bodies, without drawing artificial analogies with tribunals.

#### *General Policy 'Affecting Discretion*

44. Section 21 does not expressly set out what factors are relevant in the exercise of the discretion. The Courts in Fiji however have repeatedly said that *i*-TLC is required to perform its functions under the Act in accordance with *i-taukei* custom as evidenced by usage and tradition (as per section 3 of the Act, and as per Tuivaga CJ in **Bulou Eta Kacalaini Vosailagi –v- Native Lands Commission and Others** (1989) 35 F.L.R. 116 at page 130; see also Fiji Court of Appeal decision in **Native Land Trust Board v Kaukimoce** [2012] FJCA 17; ABU0043.2008 (21 March 2012). I think the same principle must be amongst the foremost in the mind of *i*-TLC whenever it is called upon to exercise its discretion under section 21.

45. In my view, there is a clear and a strong policy reason behind the Hutson Instruction. However, the Instruction was intended to apply only to the clearest of cases which fall within its contemplation. Otherwise, in cases not within the Instruction's contemplation, *i*-TLC was to be left to exercise its discretion under section 21 (or its equivalent in the 1940s).

<sup>15</sup> (assuming the Commission had a discretion and had registered Nariro in exercise of that discretion)

<sup>16</sup> *Judicial Review of Administrative Action* (1959) Stevens & Sons, London.

## Cases Within/Cases Outside Hutson

46. Paragraph 13 of the Instruction, on my cursory reading of it, appears to present a code which would fetter even the modern day section 21 discretion to *i*-TLC .

*13. If these instructions are carefully followed it will at once be apparent that only the names of (a) ..... (b) the illegitimate who are subject to the provisions of section 33 of Ordinance No 1 of 1905 will be added to this Register.*

47. As I have said, one way to curtail the potential fettering effect of the Instruction on section 21 (or its earlier equivalent) is by limiting its application strictly to cases within its contemplation. By clearly defining such cases where the Instruction will apply, one will automatically have defined that space in which *i*-TLC may exercise its discretion<sup>17</sup>.
48. Clearly, those cases within the contemplation of the Instruction would be those where the illegitimate child has a birth certificate but in which there is no mention of paternity. In such cases of course, the Instruction would dictate that the child cannot be registered into any purported father's proprietary unit, unless of course, steps are taken as happened in **In re Application for Judicial Review by Taniela Naika Varo** [2011] FJHC 796; Judicial Review 02.2008 (8 December 2011), (per Madam Justice Wickramasinghe)<sup>18</sup>.
49. The Hutson Instruction would also apply to forbid the registration of a child (legitimate or otherwise) into a proprietary unit of a father other than the one named in the birth certificate, unless remedial steps have been taken to rectify the birth certificate, in circumstances where it is still possible to rectify it.
50. I think in such cases, the Hutson Instruction would serve its purpose quite well in ensuring a principled approach to the preservation of the integrity of

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<sup>17</sup> Keith Hawkins, 'The Use of Legal Discretion: Perspectives from Law and Social Science' in Keith Hawkins (ed), *The Uses of Discretion* (1992) 11, 11 defines discretion as:

...the space ... between legal rules in which legal actors may exercise choice.

<sup>18</sup> In this case, the illegitimate *i*-taukei child in question had a birth certificate that did not name his father. He was entered initially into his mother's unit. Later however, he was registered in his father's unit on the basis of his amended birth certificate which had then named his father. Notably, the birth certificate was only amended after a joint affidavit of both the father and the mother to the Registrar of Births deposing (i) firstly, to confirm the child's paternity and (ii) secondly, to the fact that the father had approached the child's mother's people in accordance with *i*-taukei protocol firstly to seek their forgiveness and secondly to request that the elders thereof consent to the child being re-registered under his (father's) *tokatoka*.

the VKB as a register of multi-generational group of *i-taukei* relatives related by patrilineal descent.

51. However, having said that, the birth-certificate rule in the Hutson Instruction, as one would imagine, may not have been intended *willy nilly* to enable the registration of a child into his or her adoptive father's proprietary unit, where the said father is named on the child's birth certificate after a formal adoption process.
52. There are a myriad of other situations where to insist strictly on the letter of the Hutson Instruction may be harsh. What of the illegitimate child whose birth, for one reason or another, was never registered in the Registrar or Births, Deaths & Marriages Act, who had lived with his father his entire life, and who was acknowledged and recognised by his father and his *tokatoka/mataqali* as a biological offspring of the father, and was seeking registration at a time when he had reached a mature age when both parents had passed on and could not swear an affidavit as happened in **Taniela Naika Varo** (see footnotes)? Does *i-TLC* have a discretion to consider these other factors in the absence of a birth certificate?
53. These are questions which I cannot answer in this application before me right now. However, they are questions which *i-TLC* could have addressed when called upon by the applicant to exercise its corrective power under section 10 in this case.

#### **JURISDICTION OF THIS COURT**

54. In the Fiji Court of Appeal case of **Native Land Trust Board v Kaukimoce** [2012] FJCA 17; ABU0043.2008 (21 March 2012), one of the points raised on appeal was whether or not the learned High Court judge sitting at first instance had usurped the jurisdiction of *i-TLC* when he declared that a certain *mataqali Navau* which was described in the Native Land Register as being extinct, was actually still in existence.
55. The plaintiff in that case had filed an Originating Summons in the High Court seeking a declaration under section 10 of the *i-Taukei Lands Act* that the Native Land Register was wrong, erroneous and contrary to custom and tradition in that regard. He also sought a declaration that *mataqali Navau* still existed and an Order that *i-TLC* correct the Native Lands Register

accordingly. The alleged errors were made after an *i*-TLC inquiry in the late 1930s following a dispute between some rivalling factions.

56. The issue of usurpation was raised because the High Court judge had exercised his original jurisdiction to make the declarations in question, which declarations were made purportedly pursuant to section 10 of the *i*-Taukei Lands Act, and which section confers corrective powers only to the Chairman of *i*-TLC.
57. The Fiji Court of Appeal began by examining sections 4, 8,9,10, 16 & 17 of the *i*-Taukei Lands Act. The court observed that the legislature intended that the functions conferred by these provisions should be performed by *i*-TLC being the body established under section 4 for that purpose and that *i*-TLC is required to carry out these functions in accordance with *i*-Taukei custom as evidenced by usage and tradition as per section 3 of the Act.
58. The Court then went on to say that under section 10(1), only the Chairman of *i*-TLC has the power to determine whether or not an error has been made in compiling the VKB. If he is so satisfied, then he shall direct the Registrar of Titles to correct that error. The High Court does not have the jurisdiction to make a finding that an error has been made in an entry in the VKB, or to order that the VKB be corrected.

18. However, in its first ground of appeal, the Appellant challenges the decision on the basis that the learned Judge erred by usurping the jurisdiction vested exclusively in the Appellant under the Act. It is convenient now to turn to the relevant provisions of the Act. However, before doing so, it is necessary to clarify the correct use of terminology. Pursuant to section 3 of the Native Lands (Amendment) Decree 2011, the principal Act (the Native Lands Act) is amended by deleting the word "*native*" wherever it appears and inserting "*iTaukei*". Since the events and the judgment at first instance occurred prior to this amendment, the word "*native*" will be used in this decision with occasional alternative reference to the word "*iTaukei*".

19. Under section 4 of the Act the Native (*i*Taukei) Lands Commission (the Commission) is appointed by the Minister. The Commission may consist of one or more Commissioners each of whom has the powers of the Commission. Under section 4 the Commission is charged with the duty of ascertaining what lands in each province are the property of native owners. In other words what lands are native lands and whether the same are held by mataqali or some other division or sub-division of the people.

20. Pursuant to section 6 of the Act the Commission shall inquire into the title of all lands claimed by mataqali or other divisions or sub-divisions of the people (i.e. the title to all native land) and shall describe in writing (1) the boundaries and situations of such lands and (2) the names of the members of the respective communities claiming to be owners of the land so described and situated.

21. Section 8 of the Act requires the Commission to establish a Register of Native Lands (the Register), in which the Commission is required to record the boundaries and situation of lands that have been ascertained as native lands.

22. Section 9 requires the Commission to record in the Register the boundaries of land the ownership of which has been decided and also to record in the Register the names of persons comprising the land owning unit of that land.

23. Section 10 is of particular relevance to this appeal and as a result its terms are stated in full:

24. Sections 16 and 17 of the Act also make provision for the performance of certain functions by the Commission in the case of a dispute arising (a) in connection with land and (b) in connection with the headship of any division or sub-division of the people having the customary right to occupy and use native lands.

25. When the Act is read as a whole it is quite clear that it was the intention of the legislature that the statutory functions that have been outlined above should be performed by the Commission being the statutory body that was established by section 4 of the Act. It is also quite clear that when performing its various functions under the Act the Commission is required to do so in accordance with i Taukei (native) custom as evidenced by usage and tradition. Apart from being mandated by virtue of section 3 of the Act, there is an additional reason why this should be so as was explained by Tuivaga CJ in Bulou Eta Kacalaini Vosailagi –v- Native Lands Commission and Others (1989) 35 F.L.R. 116 at page 130:

"Fijian custom and tradition has its own in-built method of resolving even the hardest of disputes. It is called "vei sorosorovi" and it is invoked to restore peace and harmony to village life and in a larger context to the life of the vanua. It, of course, requires a huge helping of magnanimity, wisdom and understanding. It is only when Fijian custom and tradition is ignored or gives way to expediency that disputatious situations will arise in Fijian society".

26. As the learned Judge noted at page 20 of the judgment:

"The Plaintiff's application is simply for the Commission's record to be corrected on the ground that there has been an error made. That is all."

27. Under the Act, a reference to the Commission's record must be taken to be a reference to the "*Register of Native Lands*" in which is recorded by the Commission a description of the boundaries and situation of land recorded and settled according to native custom as evidenced by usage and tradition. Also recorded in "*Register of Native Lands*" do the names of the persons comprise the proprietary unit in respect of the land thus recorded and settled. The "*Register of Native Lands*" is referred to in Fijian as the "*Vola Ni Kawa Bula*" and abbreviated in everyday usage to "VKB."

28. Under section 10 (1) the volumes of the VKB are deposited with the Registrar of Titles for safe keeping. It is section 10 (2) of the Act which deals with errors that may have been made in compiling the 'VKB'. Whether an error has been made is a matter for the Chairman of the iTaukei Lands Commission. If the Chairman is satisfied that an error has been made he shall direct the Registrar of Titles to correct that error. It is only the Chairman of the Commission who has jurisdiction to determine whether an error has been made and if so to direct the Registrar of Titles to correct that error.

29. The Respondent sought a declaration that there was an error in the Commission's records and an order by the Court to correct that error. It required the Court to perform a function that was not given to it under the Act. In my judgment it is clear that whether a mistake has been made and whether the Register should be corrected are matters for

the Commission and more particularly the Chairman of the Commission. The jurisdiction to consider a submission that an error has been made is not given to the Court. The learned judge has exercised a jurisdiction that is vested in the Commission. This is the effect of his observations on pages 19 and 20 of the judgment. It is the Chairman of the Commission and not a Judge of the High Court who is charged with directing that the Registrar of Titles correct an error in either the Register of Lands or the Register of Native Land Owners regardless of whether the Registers are kept as one or separately.

59. Having said the above, the Fiji Court of Appeal then went on to say that, when exercising its supervisory jurisdiction over statutory body, which is what I am being asked to do now:

33. .... the jurisdiction to grant a declaration is limited as a remedy to issues that relate to the decision - making process of the initial decision – maker. (See Judicial Review of Administrative Action Fifth Edition; de Smith, Woolf and Jowell at pages 737 – 738).

And

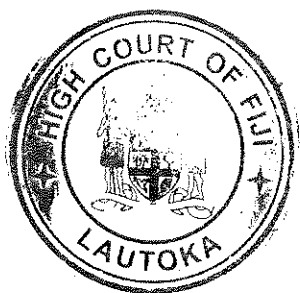
37. In the present appeal the Appellant, the Commission, has been established by legislation. It has a number of expressly stated functions to perform under that legislation. One of those functions is to record the names of the members of land-owning or proprietary units. A further function is expressly stated that upon a finding of an error the Chairman of that statutory body may direct the Registrar of Titles to correct the error. To be correctly recorded in the Register (in this case in the VKB) is to become a member of proprietary unit and hence to acquire a beneficial interest in the native land held by the proprietary unit. Although there is indeed a private law element in respect of a claim to a beneficial interest in property under the Act, whether or not that right is acquired is dependent upon (1) the Commission performing its function under section 9 and (2) correcting any error under section 10(2). In my judgment both are public law functions being performed by a statutory body created by legislation. Since the decision of the House of Lords in O'Reilly –v- Mackman [1983] 2 AC 237 there is no longer any requirement to establish that the statutory body was under a requirement to act judicially in order to invoke the public law procedure of judicial review and to seek the remedies available under the procedure.

38. When a decision is taken or made by a person designated by a statutory provision to perform a statutory function the High Court has a supervisory jurisdiction to ensure that the decision maker has not exceeded or abused his powers and that he has performed his duties.

## CONCLUSION

60. The Chairman of the *i*-TLC in this case before me has only confirmed to the parties what is recorded in the VKB. He was called upon to exercise his statutory power under section 10 to determine whether or not the addition of Nariro's name in the VKB in the 1940s was made in exercise of a discretion and if so, whether or not that discretion was exercised correctly.

61. Once he has determined those questions, then the Chairman may direct the Registrar of Titles accordingly to correct the VKB records in question.
62. It is not for this Court to determine these questions. Accordingly, I now dismiss all the declaratory orders as well as the Order for certiorari sought.
63. However, I do grant Order in Terms of the following prayers for a mandamus, namely, that the Chairman of *i-TLC* is to reconsider the petition of the applicants by directing its mind to the following:
- (i) on whether Maika Nariro was registered in error in the Register of Native Owners of tokatoka Nacobowale and whether his descendants are recorded in the proper unit as hereditary owners.
  - (ii) on the relevant factors for deciding that issue.
  - (iii) written reasons on the above
64. Parties to bear their own costs.



Anare Tuilevuka  
**JUDGE**  
22 November 2016.