IN THE HIGH COURT OF FIJI
(WESTERN DIVISION) AT LAUTOKA
CIVIL JURISDICTION

JUDICIAL REVIEW NO. HBJ -07 OF 2018

IN THE MATTER of an Application by **Ratu Asiveni Dawai** of Narewa Village Nadi, Villager, the substituted Applicant in place of the Late **Ratu Kaliova Dawai**, pursuant to the leave of the Court granted on 23rd January 2023 by way of Inter-parte Summons and Affidavit in support, for Judicial Review.

IN THE MATTER of the ITaukei Lands Act Cap 113 of the Laws of Fiji whereby the ITaukei Lands Appeal Tribunal have endorsed **Ratu Vuniani Navuniuci** to be the holder of the title of Tui Nadi purporting to exercise powers under the ITaukei Lands Act.

BETWEEN : **RATU ASIVENI DAWAI** of Narewa Village, Nadi, the substituted Applicant in place of the Late **RATU KALIOVA DAWAI** pursuant to the Leave of the Court granted on 23rd January 2023.

SUBSTITUTED-APPLICANT

AND : **ITAUKEI LANDS APPEALS TRIBUNAL**, a statutory body set up by law, of 87 Queens Elizabeth Drive, Nasese, Suva

1st RESPONDENT

AND: : **THE ITAUKEI LANDS AND FISHERIES COMMISSION,** a statutory body set up by law, of Carnarvon Street, Suva.

2nd RESPONDENT

AND : **THE ATTORNEY GENERAL OF FIJI** Level 7, Suvavou House, Victoria Parade, Suva

3rd RESPONDENT

AND : **RATU VUNIANI NAVUNIUCI,** of Narewa Village, Nadi

4th RESPONDENT

BEFORE	:	Hon. Mr. A.M. Mohamed Mackie-J.
APPEARANCES	:	Mr. Fa.I (Senior) with Mr. Fa.I. (Junior) for the substituted Applicant.
	:	Mr. Mainavolau for the 1st – 3rd Respondents.
	:	Mr. Filipe. V. for the 4th Respondent
DATE OF HEARING	:	19th March 2024.
W. SUBMISSIONS	:	By the 1st 2nd & 3rd Respondents filed on 31st July 2024.
	:	By the Substituted Applicant filed on 6th September 2024.
	:	By the 4th Respondent filed on 21st November 2024.
	:	By the Applicant (Reply) filed on 2nd January 2025.
DATE OF JUDGMENT	:	On 18th March 2025.

JUDGMENT

A. INTRODUCTION:

1. The proceedings hereof commenced before me on 14th September 2018 by way of Notice of Motion filed on 31st August 2018, along with the supporting affidavit and the statement, by the original Applicant **Ratu Kaliova Dawai ("Kaliova")**(now deceased) seeking *, inter alia*, leave to apply for judicial review.

2. The initial formalities being complied with, during my absence in Fiji, the application for leave was heard before Hon. Mr. Mohamed Ajmeer -J (as he then was) on 21st August 2019, who after entertaining written submission, by his Ruling dated 13th September 2019, granted leave to apply for judicial review, which was to operate as a stay of proceedings to which the application relates.

3. Pursuant to the leave, the original applicant, on 20th September 2019, filed his Notice of Motion for Judicial Review, which was subsequently amended on 30th October 2019.

4. In the meantime, on or about 06th September, 2020, before the substantive matter could be heard, as the original Applicant, namely, **Kaliova** died, the present applicant, namely, **Ratu Asiveni Dawai ("Asiveni"),** made an application seeking for him to be substituted / made a party to the substantive

matter, in order to continue with the same. This application being objected to by the Respondents, after hearing the parties on 20th September 2022, this Court by its Ruling dated 23rd January 2023 allowed the said application and accordingly he (Asiveni) was substituted in place of the deceased Applicant (Kaliova).

5. Accordingly, the substituted Applicant, Asiveni, on 10th March 2023, with the leave of the Court filed the Second Amended Notice of Motion for Judicial Review claiming the following reliefs, as prayed for by Kaliova, on the same grounds, with more particulars thereto.

*1. (a) **AN ORDER FOR CERTIORARI** to remove into the High Court the said decisions of the 1st Respondent dated the 1st of June 2018 and that of the 2nd Respondent dated 5th December 2017 declaring the 4th Respondent to be the rightful Tui Nadi and that the same be quashed;*

*(b) **A DECLARATION** that the decision of the 1st Respondent of the 1st June 2018 and of the 2nd Respondent dated 5th December 2017 is unlawful, void and of no effect.*

*(c) **A DECLARATION** that the decision of the 1st Respondent dated 1st June 2018 and that of the 2nd Respondent dated 5th December 2017 declaring the 4th Respondent to be the rightful Tui Nadi is unreasonable in the Wednesbury sense and as such the decision is unlawful;*

*(d) **A DECLARATION** that the 1st Respondent had acted in bad faith and in a manner which was unfair to the Applicant by proceeding to hear and upholding the decision of the 2nd Respondent that the 4th Respondent is the holder of the title of Tui Nadi when at the relevant time there was a lawful order of this court that was made on the 12th of May 2005 that prevented the 2nd Respondent from undertaking an inquiry into the rightful holder of the title of the Tui Nadi and a further order of this court of 27thJanuary 2007 that clearly set out the composition of the Commission and also a required terms of reference; (**the date of Ruling above should be read as 24th January 2007)***

*(e) **A DECLARATION** that the 1st Respondent's declaration of the 4th Respondent as the rightful holder of the title of Tui Nadi is irregular, void and of no effect.*

*(f) **An Order** for damages and costs;*

*(g) **SUCH FURTHE DECLARATION** and other reliefs as to the court may seem just.*

2. That the grounds upon which the Applicant is seeking reliefs against the Respondents are as follows;

a) That the decision by the 1st Respondent to declare the 4th Respondent to be the Tui Nadi pursuant to their Ruling of the 1st June, 2018, and pursuant to the Ruling of the 2nd Respondent dated 5th December,2017 was in breach of the rules of natural justice, in that amongst other matters; the Applicant was denied a fair hearing in that the 1st Respondent failed to address the illegality of the proceedings before the 2nd Respondent: -

1) That the 2nd Respondent failed to provide a term of reference for the Commission of inquiry into the Tui Nadi dispute pursuant to the Orders of the High court of the 27th January, 2007; (**the date should be read as 24th January 2007).**

2) That the 2nd Respondent failed to appoint an independent Commission for the Commission of Inquiry of the 22nd of November 2011 to determine the Tui Nadi dispute in accordance with Orders of the High Court of the 27th January,2007; (24th January 2007)

3) That the 2nd Respondent was biased against the Applicant in that the 1st to 3rd Respondents failed to provide the Applicant with a term of reference that the Commission of inquiry would base its inquiry into, and

4) That the 2nd Respondent had taken into account as evidence in the inquiry matters which were not placed before it.

5) That the 1st Respondent being aware of the above proceeded to accept the 2nd Respondent's decision without addressing the same.

b) That the decisions 1st Respondent and the 2nd Respondent were decisions that were made on evidence of the customs and traditions of the Vanua of Nadi and of section 17 of the Native Land Act that was discredited and rejected by the High court of Fiji in the case of ***Ratu Isireli Rokomatu v Josefa Saronicava Waqairatu & 5 Ors: HBJ 0021 of 1997L:***

c) That the 1st and 2nd Respondents had made a predetermination in arriving at their decisions to declare the 4th Respondent to be the Tui Nadi as it was aware that the procedures set out by the High Court in consent Orders of the 24th January, 2007 to ensure fairness and compliance with the rules of natural justice was complied with yet refused to comply with these procedures.

d) That the 1st and 2nd Respondents in arriving at their decisions had: -

1) Taken into account irrelevant considerations and matters, by failing to comply with the consent orders of the High Court of the 24th January 2007, which are set out below:

i. That each party nominate a member for appointment as Commissioners;

ii. The Minister is to appoint the Chairman of the Commission who is to be qualified for appointment as a judge or otherwise suitable by qualification and experience;

iii. The term of reference for the Commission is to be determined in accordance with the custom of Vanua of Nadi as to who should be the holder of the title Tui Nadi.

iv. Each party is to given natural justice;

v. Adjourn to 23rd February, 2007 for resolution of Commissioners;

vi. Failing to take into account the relevant custom and traditions of the Vanua of Nadi that the succession to the chiefly title of Tui Nadi is by way of election from the members of the iTokatoka Nakuruvakaruva of the Mataqali Navatulevu of the Vanua of Nadi;

vii. Failing to take into account that the majority of the members of the itokatoka Nakuruvakarua of the mataqali Navatulevu of the Yavusa Navatuevu had elected Ratu Kaliova Dawai to be the holder of the title of Tui Nadi

2) <u>Acted in breach of the rules of natural justice</u>, by failing to comply with the consent orders of the High Court of the 24th of January 2007 which are set out below;

"(i) That each party nominate a member for appointment as Commissioners;
(ii) The Minister is to appoint the Chairman of the Commission who is to be qualified for appointment as a judge or otherwise suitable by qualification and experience;
(iii) The term of reference for the Commission is to be determined in accordance with the custom of Vanua of Nadi as to who should be the holder of the title Tui Nadi.
(iv) Each party is to given natural justice;
(v) Adjourn to 23rd February, 2007 for resolution of Commissioners;"

e) **Acted illegally, unlawfully and in a unreasonable manner** by**:**

a. Failing to comply with the consent orders of the High Court of the 24th January 2007 which are set out below;

"(i) That each party nominate a member for appointment as Commissioners;
(ii) The Minister is to appoint the Chairman of the Commission who is to be qualified for appointment as a judge or otherwise suitable by qualification and experience;
(iii) The term of reference for the Commission is to be determined in accordance with the custom of Vanua of Nadi as to who should be the holder of the title Tui Nadi.
(iv) Each party is to given natural justice;
(v) Adjourn to 23rd February, 2007 for resolution of Commissioners"

b. Failing to take into account;

i. The relevant customs and traditions of the Vanua of Nadi that the succession to the chiefly title of Tui Nadi is by way of election from the members of the itokatoka Nakuruakarua of the Mataqali Navatulevu , Yavuasa Navatulevu of the Vanua of Nadi,

ii. That the majority of the Members of the itokatoka Nakuruakarua of the Mataqali Navatulevu of the Yavusa Navatulevu had elected Ratu Kaliova Dawai to be the holder of the title of Tui Nadi.

c. That the 1st and 2nd Respondents were estopped in law from proceeding to conduct an inquiry in to the rightful holder of the Tui Nadi Title contrary to the Consent Orders of the Court dated 24th January, 2007.

d. That the applicant had legitimate expectation that the 1st and 2nd Respondents, in undertaking the Commission of Inquiry into the Tui Nadi dispute, would comply with the Consent Orders of the 24th of January 2007 whereby;

"(i) That each party nominate a member for appointment as Commissioners;
(ii) The Minister is to appoint the Chairman of the Commission who is to be qualified for appointment as a judge or otherwise suitable by qualification -and experience;
(iii)The term of reference for the Commission is to be determined in accordance with the custom of Vanua of Nadi as to who should be the holder of the title Tui Nadi.
(iv) Each party is to given natural justice;
(v) Adjourn to 23rd February, 2007 for resolution of Commissioners;"

e. That the 1st and 2nd Respondents breached the Applicant's legitimate expectation by proceeding to conduct the Commission of Inquiry into the rightful holder of the Tui Nadi title by failing to comply with the consent Orders of the Court dated 24th January 2007.

f. That the 1st and 2nd Respondents breached the Applicant's legitimate expectation by proceeding to determine the rightful holder of the title of Tui Nadi contrary to the customs and traditions of the Vanua of Nadi that succession to the title is by election from the members of the itokatoka Nakuruakarua and that the members thereof had elected the applicant to the title of Tui Nadi.

***AND** costs of this Application be paid to the Applicant by the 1st – 4th Respondents.*

B. DOCUMENTS RELIED ON:

6. The substituted Applicant relies on the following Affidavits for the purpose of this judicial review;

i. Affidavit of **Ratu Kaliova Dawai (**Original Applicant**)** deposed and filed on 31st August 2018.

ii. Affidavit of **Ratu Kaliova Dawai** (Original Applicant) deposed and filed on 24th December 2019.

iii. Affidavit of **Ratu Kaliova Dawai** (Original Applicant) deposed to and filed on 28th January 2020.

iv. Affidavit of **Ratu Asiveni Dawai** (Substituted Applicant) deposed and filed 26th July 2023 in response to the 1st to 3rd Respondents' affidavit deposed and filed on 19th August 2020.

v. Affidavit of **Ratu Asiveni Dawai** (Substituted Applicant) deposed and filed on 26th July 2023 in response to the Affidavit of 4th Respondent deposed on 18th August 2020 and filed on 19th August 2020.

7. The 1st to 3rd Respondents, in opposing the application for judicial review, relied on the following documents/ Affidavits.

i. The Notice of opposition filed on 13th September 2018.

ii. The Affidavit in response deposed to by **Anasa Tawake** on 13th January 2019 and filed on 04th January 2019.

iii. The Affidavit of **Anasa Tawake** deposed to on 24th December 2019 and filed on 30th December 2019.

iv. The supplementary Affidavit of **Anasa Tawake** deposed to on 26th February 2020 and filed on 26th February 2020, and

v. The Affidavit of **Anasa Tawake** in response to the Affidavit of Ratu Kaliowa Dawai deposed to and filed on 19th August 2020.

8. The 4th Respondent, in opposing the Application for Judicial review, relies on the following documents.

i. The Affidavit of Opposition of **Ratu Vuniani Navuniuci** deposed to on 14th November 2019 and filed on 15th November 2019.

ii. The Affidavit in Response of **Ratu Vuniani Navuniuci** deposed to on 18th August 2020 and filed on 19th August 2020.

C. BACKGROUND FACTS:

9. This is a prolonged legal battle fought for nearly 30 years by and between the members of two families, namely the **Tokatoka Nakubukubu family,** of which the substituted Applicant **Asiveni**, his late Father, **Rokomatu**, his late uncle **Kaliova** (the original Applicant hereof) are members, and the **Nawaitaci Family** of which **Vuniyani**, the 4th Respondent and his cousin Ratu Napolioni Naulia Ragigia Dawai are members.

10. In this action commenced by the original Applicant **Kaliova** in the year 2018, which is now being continued by the substituted Applicant, and in the former proceedings, namely**, HBJ-02 0f 1995, HBJ-21 of 1997, HBJ 04 0f 2005L and HBJ- 4 of 20**13, the core is and was none other than; ***As to what is the appropriate custom applicable to determine the rightful Tui Nadi?***

11. In 1996, the Court of Appeal in exercise of its Appellate jurisdiction on the decision that had been made by Justice Lyons on 4th December 1995 in ***Ratu Isireli Rokomatu Namulo v The Native Land & Fisheries Commission & 4 others HBJ 02 of 1995***, with the consent of the parties quashed the appointment of Ratu Napolioni Naoulia Ragigia Dawai as Tui Nadi, on the basis, inter alia, that there

had been total absence of due process by the 2nd Respondent NLFC on that appointment . The Appellant thereof, **Ratu Isireli Rokomatu Dawai** was also granted leave by the Court of Appeal pursuant to Order 53 Rule 3 of HCR to apply for judicial review to review the purported decision of the NLFC dated 30th November 1994. .

12. Subsequently, in ***Ratu Isireli Rokomatu Namulo V Josefa Saronicava Wagairatu & 5 others HBJ-21 of 1997 ,*** the Applicant **Ratu Isireli Rokomatu Namulo** , who is the elder brother of the Original Applicant hereof namely, **Kaliova** , claimed that he was entitled to be the Tui Nadi by virtue of custom and tradition of the Vanua of Nadi, as he was elected to this position by the majority of the members of the Tokatoka Nakuruvakarua , he was the senior member of Tokatoka Nakuruakaruwa and he was from an elder line.

13. **Ratu Napolioni Naulia Ragigia Dawai** , who is the cousin of the 4th Respondent hereof and who was named as the 6th Respondent in the said action No HBJ- 21 of 1997 , having accepted that he was not elected by the majority of the members of the Tokatoka Nakuruakarua , had claimed that that he is entitled to the title of Tui Nadi by virtue of the title belonging to the **Nawaitaci family** of which he was a member and the 2nd Respondent NLFC agreed with him.

14. The NLFC accepted his evidence on custom and tradition and rejected the evidence of **Ratu Isireli Rokomatu Namulo** on custom and tradition and subsequently declared **Ratu Napolioni Naulia Ragigia Dawai** to hold the title of Tui Nadi.

15. The said deceased **Ratu Isireli Rokomatu Namulo,** the Father of the substituted applicant and the elder brother of the original Applicant hereof , in his aforesaid Judicial Review Application No-**HBJ 21 of 1997** having named the chairman of the NLFC **Josefa Saronicava Waqairatu** as 1st Respondent, the **NLFC** as 2nd Respondent and 4 others as 3rd to 6th Respondents, had alleged that the 2nd Respondent NLFC unlawfully declared **Ratu Napolioni Naulia Ragigia Dawai** , the 6th Respondent therein, to be the Tui Nadi .

16. After hearing the above matter (HBJ-21 of 1997) , **Hon. Townsly -J** (as he then was) by his extensive judgment dated 16th March 2000 made the following Orders;

"(1). *That a Writ of Certiorari issue to bring up to this High court the purported decision of a Commission of inquiry of 4th October , 1997 of the 2nd Respondent Native Lands Commission through its agent the 1st Respondent ; Josefa Saronicava Waqairatu appointing the 6th Respondent Ratu Napolioni Naulia Ragigia Dawai the Turaga Tui Nadi and the said "decision" be quashed forthwith on its removal into this Court on the grounds that the said "decision" is unlawful , void and of no effect:-*

*(i) For denial of natural justice to the Applicant **Ratu Isireli Rokomatu Namulo** by denying him a fair hearing in concealing the intended basis of decision from him and ignoring the evidence before the inquiry;*

(ii) For reasonably apprehended bias in the commission of inquiry towards the said applicant;

(iii) For excess of jurisdiction in regard to the purported "decision".

(iv) For unreasonableness in the Wednesbury sense in reaching the purported "decision"

(2). That an injunction issued against the 2nd and 4th Respondents their servants or agents or otherwise howsoever debarring them from paying monies or benefits, payable to the holder of the office of Tui Nadi to any person until further order of an appropriate Court.

(3). That the Respondents do pay the Applicant's costs to be taxed, if not agreed.

17. When quashing the decision of the 2nd Respondent NLFC as above , Hon. Townsley -J, had , inter alia, observed and criticized the then decision of the 2nd Respondent NLFC on several points, as shown in pages 64, 65 and 68 of his judgment dated 16th March 2000, which are reproduced below for easy reference;

At page 64;

"Instead of deciding on the plainest of evidence, the 1st Respondent went away and as he called it, did his own private research and came up with a doctrinaire, theoretical approach which he called "seniority in the family line.

I have not counted the number of times the 1st Respondent in "hi" decision, and in his affidavit, evidence kept harping on these words, like a priest reciting a mantra on his beads, especially whenever clear evidence came up in the affidavits supporting the Applicant that challenged his approach.

The 1st Respondent totally ignored the plainest evidence from those in the best position to know that the title of Tui Nadi did not automatically go from father to son if there were a more senior agnate in another family that the majority were happy to elect.

The 1st Respondent also ignored the clear evidence from the elders of the Vanua of Nadi that the 6th Respondent's family only ever "got into the act" as it were, of holding the title be a generous self-sacrificing act on the part of the Applicant's father, Ratu Tevita Nawaqa II ceding the title to the forebear of the 6th Respondent.

Quite clearly, the majority of the Vanua of Nadi voted electively that the title should now come back to the Applicant's family, where he holds senior status. Furthermore, the Applicant is in a father-son situation as far as the 6th Respondent is concerned."

At page 65:

"... I find therefore that the 1st Respondent did not decide on the evidence at all, but went off on a frolic of his own, consulting "records" of the NLC which have not been scrutinized. Some of the applicant's witnesses' evidence tends to very credibly suggest that those NLC records" might not withstand scrutiny. But they were never produced at the hearing of the Commission on 13 September 1997. The "hole in corner" method used by the 1st Respondent gives considerable weight to the Applicants suggestion that the so-called "records" may have been selectively manipulated to the Applicant's detriment..."

At page 68:

".... Here I agree with the Applicant's submission that, in effect, the 1st Respondent and through him the 2nd Respondent went on a frolic of their own, cut across the uncontradicted evidence provided by the Applicant that election was the custom and tradition relevant to the Vanua of Nadi, and other land units in the Ba area, and superimposed a creation of custom of their own namely, "seniority in the family line" which they repeated like a religious chant."

18. In order to avoid such a situation in future, Townsely -J added further as follows;

> "***Commissioners from a totally neutral ground, never employed by the native Lands Commission and given specific terms of reference were well within the 3rd Respondent Minister of Fijian Affairs' power to appoint. Yet this was not done despite repeated warning by the Applicant and his Solicitors that they were objecting to anything less. The names of the proposed Commissioners could have been submitted to both sides (as with the assessors in a criminal trial), and agreement obtained that they were acceptable. A member of the judiciary could have been appointed to preside. There would have been nothing to prevent this."***

19. Pursuant to Townsely -J's judgment quashing the decision of the 2nd Respondent NLFC declaring **Ratu Napolioni Naulia Ragigia Dawai to** be the Tui Nadi, the 2nd Respondent in May 2005 held an inquiry into the Tui Nadi dispute pursuant to Section 17 of the iTaukei Lands Act 1905 to determine the rightful holder of the title of Tui Nadi. The Applicant alleged that in convening the said inquiry, the 2nd Respondent NLFC totally disregarded the criticism of the Court about the 2nd Respondent's conduct of its above mentioned earlier inquiry and the recommendations given by the Court on how a future inquiry should be conducted.

20. Accordingly, **Ratu Kaliowa Dawai** , the uncle of the substituted Applicant hereof and the younger brother of Ratu Isireli Rokomatu Namulo dawai (the Applicant in the said former action No-HBJ 21 of 1997) (now deceased) filed a Judicial Review Application under the name and style of ***Ratu Kaliowa Dawai V Native Land and Fisheries Commission and 2 others- HBJ 04 of 2005L ,*** against the 2nd Respondent for its failure to take heed of the criticism of the Court in the former case about its earlier conduct and recommendations to cure defects of any future inquiry.

21. Having heard the application on 12th May 2005, the Court (Hon. John Connors- J) immediately granted the Applicant, Ratu Kaliowa Dawai, Leave to Apply for judicial Review by making the following orders;

> (i***). Leave is granted to apply for judicial review;***
>
> (ii). ***The 1st Respondent be restrained from commencing any Commission of Inquiry or continuing any Commission of Inquiry already commenced for the purposes of determining the holder of Tui Nadi until further order of the Court.***

22. Subsequent to the hearing of the substantive matter in the said HBJ-04 of 2005 , with the representation all parties through their respective counsel, Hon. John Connors -J by his **consent** judgment dated 24th January 2007, made the following Orders on how the future conduct by the 2nd Respondent Commission should be on any inquiry under Section 17 of the iTaukei Lands Act 1905 concerning the Tui Nadi dispute;

> ***"1. That each party nominate a member for appointment as Commissioner;***
>
> ***2. The Minister is to appoint the Chairman of the Commission who is to be qualified for appointment as a judge or otherwise suitable by qualification and experience.***
>
> ***3. The terms of reference for the Commission is to be determined in accordance with the custom of the Vanua of Nadi as to who should be the holder of the title Tui Nadi;***
>
> ***4. Each party is to be given natural justice".***

23. It is stated that the very purpose of the aforesaid consent Orders was to avoid and/ or cure any future defects of the 2nd Respondent's inquiry and decision thereof, in the light of the unlawful conduct of the 2nd Respondent Commission as highlighted by the Court in ***Ratu Isireli Rokomatu Namulo V Josefa Saronicava Waqairatu & 5 others HBC No 21 of 1997.***

24. It is the aforesaid 1 to 4 reliefs / rights granted by way of consent Order dated 24th January 2007 in the aforesaid action No- HBJ 04 of 2005 , the applicant hereof seeks to enforce in this present Judicial Review proceedings before this Court.

25. The Applicant in this matter claims that these rights are binding on the Respondents hereof, including the 4th Respondent by virtue of privy of blood, title and interest, as the 4th Respondent's claims to the title of Tui Nadi is also based on the same claim made by his cousin **Ratu Napolini Naulia Ragigia Dawai**, they being the members of **Nawaitaci** family.

26. The Applicant also claims that the aforesaid Court orders are binding on the 1st to 3rd Respondents, as they were the Respondents in the aforesaid ***Ratu Isireli Rokomatu Namulo v Josefa Saronicava Wagairatu & 5 others HBJ 21 of 1997*** and ***Ratu Kaliowa Dawai v Native Land and Fisheries Commission and 2 others HBJ 04 of 2005*** and it was their (the 1st and 2nd Respondent's) decision that was impugned and quashed by the Court. It is stated that these consent judgment and Orders therein are binding on the substituted Applicant as well as his uncle's (Ratu Kailova Dawai's) claim and the claim made by his Father Ratu **Isireli Rokomatu Namulo,** were under the principle of privity of blood, title and interest.

27. The original Applicant, **Ratu Kaliova Dawai**, in his attempt to seek the enforcement of the consent judgment entered on 24th January 2007 in HBJ 04 of 2005, made an application seeking for Leave to issue Committal proceedings against the 1st and 2nd Respondents. After hearing this application ex-parte on 30th November and 7th December 2011, Hon. Sosefo Inoke -J(as he then was) by his Ruling dated 8th December 2011 dismissed the application on the following, purported, grounds;

> *"[13] It seems to me beyond argument that the power to decide the rightful holder of the Tui Nadi title is vested in the Commission whose members can only be appointed in accordance with the Act. That is to say, such powers are vested exclusively in a Commission appointed strictly in accordance with the Act, namely, a Commission appointed by the Minister for iTaukei Affairs*.
>
> *[14] Secondly, the parties cannot bypass the Act by agreement sanctioned by the Court. Put simply, the parties cannot by agreement circumvent the law and have it sanctioned by the Court. Putting it in another way, the Court cannot order the parties to do something that is not allowed by the law even if they agreed to it. And if by trick or misconception they have so agreed, they cannot expect the Court to assist them in enforcing their illegal agreement; the loss lies where it falls: Stephens v Fisher [2009] FJHC 240; HBC163.2008L (22 October 2009); Latchman v Prasad [1960] 7 FLR 90.*
>
> *[15] In the present case, the parties have not been able to agree as to who the title holder should be. They have instead agreed as to who should decide for them. That is not provided for in the Act and therefore, with the greatest of respect, this Court cannot order it to be done in a way which is not so permitted by the Act.*
>
> *[16] I therefore conclude that the two orders made by this Court on 12 May 2005 and 24 January 2007 were made without jurisdiction and are of no effect".*

[17] It automatically follows that there was nothing to enforce in the first place and no persons to commit either.

28. On careful perusal of the above Ruling dated 8th December 2011 pronounced by Hon. Sosofe Inoke-J , it appears that his Lordship (as he then was), by sitting as a judge in the same Court , has found that the consent judgment pronounced by Hon. John Connors -J (as he then was) on 24th January 2007, is not valid and cannot be enforced .

29. Subsequently, there were two applications by the Applicant, **Ratu Kaliowa Dawai**, seeking leave to apply for judicial review, namely **HBJ -02 of 2012 and HBJ -04 of 2013** before then judges Hon. -Nawana – J and Hon. Lal Abeygunaratne-J respectively, and after hearing those applications, the leave in both the said applications was refused by fully relying on the decision made by S. Inoke J on 8th December 2011 in the action No- HBJ-04 of 2005.

30. It is after the 2nd Respondent proceeded to hold the hearing into the issue of appointing Tui Nadi and appointed the 4th Respondent as the Tui Nadi by its decision dated 5th December 2017, which was confirmed by the 1st Respondent on 1st June 2018 , **by disregarding and violating the restraining Order dated 12th May 2005 and the consent judgment dated 24th January 2007 both made by Hon. John Connors -J** , the Original Applicant, KALIOVA, on 31st August, 2019 filed the present Application seeking Leave to apply for judicial review, on which Mohamed Ajmeer -J on 13th September 2019 granted leave. The decision sought to be quashed by this Application are the decision of the 2nd Respondent made on 05th December 2017 and that of the 2nd Respondent made on 01/06/2018.

D. THE HEARING:

31. At the hearing into the substantive matter held before me on 19th March 2024, Counsel for the substituted Applicant made extensive oral submissions. Counsel for the 1st to 3rd Respondents did not opt to make any oral submissions, while the Counsel for the 4th Respondent made a short oral submission reserving the right to file the written submissions. Accordingly, all parties, including the 4th Respondent, have filed their respective written submissions as aforesaid, for which I am thankful to them.

E. DISCUSSION:

32. In the aforesaid former Application No HBJ 21 of 1997 in the High Court, in the Appeal wherein Judge **Lyone's** Judgment against the former Applicant was set aside, in the Appeal in relation to the aborted contempt proceedings and in the present proceeding before this Court, much have been argued, discussed and number of Rulings and Judgments have been handed-down time and again by the respective Courts, out of which the consent judgment dated 24th January 2007 will play the crucial role in the determination of this Application..

33. I find that, had the consent judgment dated 24th January 2007 been duly enforced and obeyed by the Respondents , the necessity for the prolongment of this issue before the 1st and 2nd Respondents and the Courts at the expenses of substantial sum of money , time and resources could very- well have been avoided.

34. As a result, the core issue between the parties yet remains unresolved, and this Court, once again through these proceedings, has been called upon to examine the propriety of the purported decision-making process that has taken place before the 2nd Respondent, at the end of which the impugned decision dated 5th December 2017 has been made declaring the 4th Respondent to be the Tui Nadi. This decision has been subsequently confirmed by the 1st Respondent by its purported decision dated 1st June 2018.

35. As I observed above, on careful perusal of both the oral and written submissions made and the other contents of the record, including the Affidavit evidence adduced, it is clear that the only issue that seeks adjudication through this matter is, as to what is the appropriate method/ mechanism to be applied and adopted in determining / choosing as to who should succeed as the holder of title of Tui Nadi.

36. It is also apparent that the tussle hereof is between two (2) families, the first one being the **Tokatoka Nakubukubu,** out of which the deceased original Applicant Kaliova, his deceased elder brother, Rokomatu, and the Substituted- Applicant, being the Son of Rokomatu are, undisputedly, hailing from. The other one is the Nawaitaci Family, out of which the 4th Respondent hereof, namely, **Vuniani Navuniuci** and his cousin **Ratu Napolioni Naulia Dawai** (now deceased) hail from.

37. The facts that the Substituted - Applicant, **Asiveni,** is the son of said **Rokomatu**, who was the Applicant in the former Action No HBJ-21 of 1997 and the step son of the deceased Applicant hereof, namely, **Kaliova**, are also not in dispute. Another argument of the substituted Applicant is that like the 4th Respondent claims to be the holder of the title for Tui Nadi through his Privity of blood of his family, he too should be able to claim under the Privity to blood of his family.

38. All what the deceased Applicant in this matter, namely, Kaliova and the Substituted Applicant wanted was the due procedure to be followed, in terms of the consent judgment entered on 24th January 2007 in the former action No- HBJ 04 of 2005, for the process of electing the Tui Nadi.

39. The deceased Applicant's main allegation was that the 1st Respondent had failed to address the illegality of the proceedings before the 2nd Respondent, where the 2nd Respondent, inter-alia, alleged to have failed to provide a terms of reference, failed to appoint independent Commissioners, had taken into account irrelevant considerations, acted in breach of the Rules of Natural Justice, acted illegally, unlawfully & willfully and breached the Court Orders and the legal rights of the Applicant by failing to comply with the consent judgment entered on 24th January, 2007 in **HBJ- 04 of 2005**.

40. The pertinent question that arises is, Whether the consent judgment/ orders of the High Court dated 24th January, 2007, delivered conferring rights to the Applicant and those who are privity to the blood, title and interest to have a proper mechanism to be followed at the future hearing before the 2nd Respondent, which had and still has binding on the 1st to 4th Respondents, should continue to be observed in breach?

41. In my view, as alluded to and argued by the learned Counsel for the Applicant, the High Court's consent judgment entered on 24th January 2007 still remain intact as it has not been set aside, altered or varied so far by a competent Court. Contrary to this, what this Court can see is the continued will-full and deliberate violation of it by the 2nd Respondent, perhaps with the blessings and covering approval of the 1st Respondent.

42. The opportunity, the deceased Applicant had to deal with the 1st and 2nd Respondents by way of committal proceedings for not enforcing and violating the Consent Judgment dated 24th January 2007, was deprived by the Ruling dated 8th December 2011 by which the leave sought for committal proceedings was refused. If not, this prolonging issue would have seen the light of the day, compelling the 2nd Respondent NLFC to enforce and abide by the terms of the consent judgment, for which the then Applicant and all the Respondents had agreed through their respective Counsels.

43. The Respondents, for reasons best-known to them, did nothing for several years to have the consent judgment set aside or varied, by filing an appropriate action before the High Court for that purpose, if they had found that the compliance with those orders in the consent judgment was impractical or inimical to them. Instead, they seem to have found that acting in breach of those orders was much more convenient to them.

44. The Respondent's breach was not limited to the consent judgment dated 24th January 2007 alone, but also extended to the restraining Order made on 12th May 2005 by the same judge in the same action No-HBJ-04 of 2005 as well (vide paragraph 21 (ii) above). It is observed that the Order dated 12th May 2005 had restrained the 1st Respondent NLFC in the said action from commencing any Commission of inquiry or continuing with any inquiry already commenced for the purposes of determining the holder of the title of Tui Nadi until further Order of the Court. This restraining Order, which was ingrained in the subsequent consent judgment, has also been blatantly violated.

45. When the intended committal proceedings failed, on account of the refusal of leave thereto by Inoke -J on 8th December 2011, the original Applicant Kaliova Dawai, in order to arrest the situation, where the Respondents continued to act in violation of the consent judgment, filed two separate Applications bearing Nos; **HBJ -02 of 2012 and HBJ-04 of 2013** before Hon. Nawana-J and Lal Abeygunaratne -J (as they were then) respectively, seeking leave to commence judicial review proceedings. However, the leave was refused by both the judges by, predominantly, relying on the Ruling dated 8th December 2011 pronounced by Inoke-J, wherein the leave for intended committal proceedings had been refused.

46. An Application being made to the Court of Appeal, seeking leave for the enlargement of time for filing of Notice and the Grounds of Appeal against the said Ruling dated 8th December 2011 pronounced by Inoke-J, after hearing the matter , His Lordship W.D. Calanchini-J, by judgment dated 7th November 2014, having granted the extension of time and other orders, granted time to file and serve the Notice and grounds of Appeal within 21 days.

47. Unfortunately, as the above orders were not adhered to by the Applicant, the Appeal became abandoned. Thereafter, an application being made to re-instate the Appeal, same was dismissed by the Court of Appeal on certain grounds. However, it is to be observed that though the Court of Appeal had dismissed the said Application for reinstatement, His Lordship Calanchini, had made some adverse remarks about the criticisms that Hon. Inoke -J had made in his judgment in relation to the consent judgment dated 24th January 2007.

48. I shall reproduce bellow the salient parts of the His Lordship's Judgment in **Dawai v Native Lands and Fisheries Commission [2014] FJCA 194; Mis. 02. 2012 (7th November 2014),** which will highlight the propriety of the judgment dated 8th December 2011.

> *[24] In this case the learned High Court Judge has proceeded to determine the application for an order at the leave stage and in my judgment has clearly exceeded his jurisdiction in doing so. When he ordered that the application for leave to apply for an order of committal be refused, the learned Judge had considered and in effect determined the issues that were relevant to the substantive application. He has not considered the matters that were relevant at the leave stage under Order 52 Rule 2.*
>
> [25] *However, having noted the jurisdictional error of the learned Judge, it should be stated that it is not the function of this Court to determine whether the learned Judge had erred in his judgment. Given the nature of the application that was before him and what must have been extremely limited affidavit material in support of that application, it is not clear from what sources the learned Judge obtained the factual material that formed the basis of his judgment. The point is that the learned Judge has embarked upon an inquiry which he was neither entitled nor required to do.*
>
> [26] *The procedure followed by the Judge was not in accordance with Order 52 Rule 2. The question for determination is whether leave to appeal out of time should be granted to appeal the interlocutory judgment. As stated earlier that will depend upon whether a substantial injustice would result if leave were refused. In answering that question, it is relevant to consider whether the order made by the learned Judge is one of practice and procedures or affects substantive legal rights [See: Thompson v. Thompson (1942) 59 WN (NSW) 219 at 220 and In re Will of FB Gilbert (deceased) [1946] NSWStRp 24; (1946) 46 SR (NSW) 318 at 323). Certainly it can be said that in one sense the order that is the subject of the application for leave to appeal is concerned with the mechanics of the pre-trial process. In that sense the scales are likely to be weighed against the grant of leave (See: Johnson Tiles Pty Ltd –v- Esso Australia Pty Ltd [2000] FCA 1572; (2000) 104 FCR 564 at 584. Furthermore, as Counsel for the Respondent urged, the principle of finality also works against granting the application.*
>
> [27] However *there are in my judgment two further considerations in this case that justify a different outcome. The first is that the learned Judge has purported to review two orders made on different occasions by the High Court. It is not for one High Court Judge to review and reject earlier orders made by the High Court. There is a presumption that the decision is right and should be obeyed unless and until it is stayed or set aside by either the court that made the order or a competent appellate court.*
>
> *[28] The second consideration relates to the purpose of contempt proceedings commenced under Order 52. It is in the public interest that court judgments and orders are enforced and that deliberate noncompliance will be subject to enforcement proceedings. One of the proceedings available to a litigant to enforce an order made by the Court is to commence proceedings under Order 52 for what is called a civil contempt of court i.e. noncompliance with an order (albeit a consent order) to do or to be restrained from doing an act. Given the penal nature of contempt proceedings, there ought to be strict compliance with the procedure prescribed by Order 52. Failure to comply strictly with procedural requirements may render any order made invalid.*

49. At this juncture, it is not proper for this Court to make any comments on the said Judgment of Inoke-J. Instead it should be left for further scrutiny only by a higher forum. However, with all due respect, I beg to disagree with Hon. Inoke -j on his view in relation to the consent judgment dated 24th January 2007 and the view of Hon. Nawana-J and that of Hon. Lal Abeygunaratne -J, who had largely relied on Judge S. Inoke's Judgment, for the purpose refusing the Applicant's (Ratu Kaliowa Dawai's) two Applications for leave to apply for judicial review, namely, the Application Nos **HBJ-02 of 2012 and HBJ- 04 of 2013.**

50. The only ground adduced and relied on by the Respondents to avoid and/or escape from their obligation of complying with the consent judgment dated 24th January 2007 is the judgment of Hon. S. Inoke-J dated 8th December 2011, which they claim to have invalidated and/ or annulled the consent judgment dated 24th January 2007. In my view, the consent judgment still remains intact without being interfered

with. If the Respondents were aggrieved by the consent judgment or by any part of it, the most prudent way at their disposal was nothing but filing a separate action before the same forum seeking to set aside or vary the said judgment.

51. It is unfortunate, that the Respondents, who were represented by senior Counsels, have resorted to take up this kind of flimsy and unsound stance for them to continue to defy the Court Orders that remains in force without being duly challenged and set aside or varied. In my view, the consent judgment dated 24th January 2007 remains intact demanding its immediate compliance by the Respondents for the resolution of this long-drawn dispute.

52. By the impugned consent judgment dated 24th January 2007, the 2nd Respondent was required and mandated to make changes in its composition in order to ensure the fair-play in the election process. The Judgment dated 16th March 2000 pronounced by **Hon. Townsly -J** in HBJ-21 of 1997 also highlights the denial of natural justice, reasonably apprehended bias on the part of NLFC, excess of jurisdiction and unreasonableness meted out to the then Applicant **Rokomatu**. This also demands the immediate compliance of the Consent Judgment dated 24th January 2007.

53. In my considered view, the implementation of the consent judgment will not amount to infringe the Sections 4, 17 or any other Sections of the iTaukei Lands Act (Cap-133) or usurp the power of the Minister in charge of the subject. The very consent Order itself, in paragraph 2 thereof, has recognized and reserved the authority of the subject Minister to appoint the Chairman of the Commission. This is almost in harmony with the relevant Act and provisions thereof. I view this as similar to the act of constituting a different bench in a Court proceeding to ensure the fair-play and to rule out any possible prejudice, bias, unreasonableness and denial of natural justice.

54. The Respondents have not advanced any valid argument or a similar instance for the 2nd Respondent to be excused or for it to have evaded from the duty of due compliance with the consent judgment entered on 24th January 2007. The Judgments delivered by Courts are meant to be implemented by the parties concerned, unless such party is absolved from that duty by a method known to the Law.

55. As per the Amended Notice of Motion filed on 10th March 2023, there are 8 main grounds from (a) to (h), with number of ancillary grounds thereto, on which the judicial Review is sought. I find that, none of these grounds can be discussed by disregarding the consent judgment and the impact it should have had on the Respondents, particularly, the 2nd Respondent. As long as the consent judgment remains unenforced, no valid proceedings could have taken place before the 2nd Respondent NLFC, in respect of the dispute between the Applicant and the 4th Respondent, who are fighting for the title of Tui Nadi.

56. Since the proceedings before the 2nd Respondent NLFC had been tainted with illegality and unlawfulness on account of the non- enforcement of the consent judgment to its strict compliance, no sound and impartial decisions could have come out of the purported proceedings before the 1st and 2nd Respondents. This Court cannot engage in any exercise of examining the propriety of the, purported, proceedings before the 1st and 2nd Respondents or that of their respective decisions challenged before this Court. If this Court engages in such an exercise, by disregarding the non-compliance of the consent judgment by the NLFC, it could, undoubtedly, be wrongly interpreted that the Court has given some recognition to the illegal proceedings before the 1st and 2nd Respondents and their impugned decisions.

57. The Applicant could not have expected and enjoyed the rights of natural justice, impartiality, reasonableness, the observance of due process and the fulfillment of his legitimate expectations before the 1st and 2nd Respondents, when the consent judgment had been observed in breach. Thus, I find all the grounds adduced by the Applicant are with full of merits.

58. This non-compliance alone is more than sufficient, for this Court to quash the 2nd Respondent's impugned decision dated 5th December 2017 and that of the 1st Respondent dated 1st June 2018 by which the 1st Respondent's impugned decision was, purportedly, confirmed. Thus, this Court has no alternative, but to quash the 2nd Respondent's purported decision dated 5th December 2017 and that of the 1st Respondent dated 1st June 2018 and to grant the declarations as prayed for in the Amended Notice of Motion filed on 10th March 2023.

F. COSTS:

59. This proceeding was commenced by the deceased Applicant with the filing of the Application seeking for leave on 31st August 2018. It has taken more than 6 years for the Applicant to obtain the reliefs sought for. The original Applicant **Kaliowa Dawai** and his deceased elder brother **Rokomatu Namulo,** during their lifetime, had left no stone unturned to achieve what they aspired to. What they basically wanted was and the substituted Applicant also moves for is not to appoint them to the title of Tui Nadi, but to employ an appropriate election procedure. If not for the Respondent's deliberate disregard for the enforcement of and adherence to the consent judgment, this prolonged legal battle could have been easily avoided. Hence, imposition of a sum of $7,500.00 as summarily assessed costs of this Application payable by the 1st, 2nd and 4th Respondents, in my view is justifiable.

G. CONCLUSION:

60. The consent judgment entered on 24th January 2007 in HBJ-04 of 2005, which has its effects and implications in this Application, remains intact warranting its immediate enforcement to enable a lasting solution to the dispute over the mode of electing for the title of Tui Nadi.

The Respondents have deliberately avoided the enforcement of the consent judgment and the 2nd Respondent has continued with the purported proceedings before it in relation to the dispute hereof by disregarding the restraining order made on 12th May 2005 and the consent judgment entered into on 24th January 2007. Thus, in defiance to the consent judgment, no valid proceedings could have taken place before the 2nd Respondent for it to make its purported decision dated 5th December 2017 and for the 1st Respondent to confirm the same by its purported decision dated 1st June 2018.

For the reasons adumbrated above, this Court decides to make orders in terms of the Amended Notice of Motion filed on 10th March 2023.

H. FINAL ORDERS:

A. The Application for the Judicial Review, as per the Second Amended Notice of Motion filed on 10th March 2023, succeeds.

B. A Certiorari Order, in terms of paragraph (a) of the prayers to the Amended Notice of Motion filed on 10th March 2023, is hereby issued.

C. Declarations, in terms of paragraphs (b), (c), (d) and (e) of the prayers to the Amended Notice of Motion filed on 10th March 2023, are hereby granted.

D. The 2nd Respondent shall forthwith enforce and abide by the consent Judgment entered on 24th January 2007 in the action No- HBJ-04 of 2005.

E. The Substituted Applicant shall co-operate with the 2nd Respondent for the constitution of the panel of Commissioners by his timely nomination of a Commissioner of his choice in terms of the consent judgment.

F. The 1st, 2nd and 4th Respondents shall pay the substituted Applicant $2,500.00 each, totaling to a sum of $7,500.00 (Seven Thousand Five Hundred Fijian Dollars) being the summarily assessed costs of this Application.

G. These Orders shall be sealed and served on the Respondents forthwith.

At the High Court of Lautoka (Civil) on this 18th day of March 2025.

HIGH COURT OF FIJI
LAUTOKA

A.M. Mohamed Mackie.
Judge
High Court (Civil Division)
Lautoka

SOLICITORS:

For the Substituted Applicant. Messrs. Fa & Company - Barristers & Solicitors.

For the 1st – 3rd Respondents. Office of the Hon. Attorney General.

For the 4th Respondent- Messrs. Redwood Law- Barristers & Solicitors.