IN THE SUPREME COURT OF FIJI
APPELLATE JURISDICTION

Civil Petition No. CBV0014/2018
[From Civil Appeal No. ABU0056 of 2012 and High Court of Fiji Action HBJ 15 of 2009.]

BETWEEN: **JEMESA RAMASI**
Petitioner

AND: **NATIVE LANDS COMMISSION**
1st Respondent

AND: **NATIVE LANDS APPEALS TRIBUNAL**
2nd Respondent

AND: **THE ATTORNEY-GENERAL**
3rd Respondent

AND: **ITAUKEI LAND TRUST BOARD**
4th Respondent

Coram: **Gates J**

Counsel: **Mr. I. Fa for the Petitioner**
Ms M. Motofaga for 1st, 2nd and 3rd Respondents
Ms L. Komaitai for 4th Respondent

Date of Hearing: **11th December 2018**

Date of Ruling: **25th April 2019**

RULING ON ENLARGEMENT OF TIME

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[1] The Petitioner seeks an enlargement of time within which to file his petition. His successor as Turaga ni Mataqali has filed a summons and two affidavits in support. The application is opposed.

[2] The Court of Appeal handed down its decision on 12th June 2015. This was within the sitting period of that session of the Court. Owing to a mishap in the registry, no counsel were informed of the delivery of the judgment and so none attended.

[3] When considering whether to grant discretionary relief in this situation the court considers – five factors to ensure a principled approach. **NLTB v Ahmed Khan and Anor.** CBV0002.2013 15th March 2013. These factors are:

> "(i) The reason for the failure to file within time.
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> (ii) The length of the delay.
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> (iii) Whether there is a ground of merit justifying the appellate court's consideration.
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> (iv) Where there has been substantial delay, nonetheless is there a ground of appeal that will probably succeed?
>
> (v) If time is enlarged, will the Respondent be unfairly prejudiced?"

The reason for the failure to file in time

[4] Though no counsel for any of the litigants were called to attend when judgment was delivered, those opposing this application are critical that counsel for the Petitioner did not follow up with the Court of Appeal registry for nearly 3 years. It was said the awaited judgment was also available on the Paclii Website.

[5] The Registry had responded to the Petitioner's solicitors letter of inquiry by informing the solicitors that the person who had prepared the Notice of Judgment had mistakenly sent it to Ram's Law. No other counsel was informed of the judgment either. The Acting Senior Court Officer for the Court of Appeal humbly apologised for this mistake.

[6] The main error clearly lay with the registry not with the Petitioner's solicitor. The mistake was fundamental, and therefore explains the delay.

Length of Delay

[7] Nearly 3 years late was a great length of time, but primarily that was not the Petitioner's solicitors fault.

Whether there is a ground of merit justifying the appellate court's consideration?

[8] On 7th November 1930 the Native Lands Commission "on oath and by consent recorded the land boundaries of the 4 Mataqalis who owned Tokoriki Island." In the High Court the judge noted "The 4 Mataqalis are Vunativi, Vunaivi, Namatua, and Vucunisai. When this record was made, there was no dispute over the boundaries or any land."

[9] A dispute arose only in 2003 between Mataqali Vunativi and Mataqali Namatua. The Native Lands Commission carried out a survey of their land boundaries and gave full ownership of the disputed land to Mataqali Vunativi. According to the Petitioner this was in defiance of the ruling of the Commission in 1930. This is the main contention of this dispute and litigation.

[10] The survey was subjected to an inquiry under the Native Lands Act. The judicial review was brought as a consequence of unfavourable decisions of the Native Lands Commission and the Native Land Appeals Tribunal, the 1st and 2nd Respondents.

[11] It has always been the Petitioner's claim that once the boundaries were determined in 1930, the NLC could not go back on that decision, nor was it empowered by law to make another determination to change the boundaries. It is said the issue became res judicata after the 1930 decision. The argument for the NLC was that the earlier determination was made not **"after a dispute."**

The 2003 matter had however raised a dispute to be determined pursuant to powers under section 6(1) of the Native Lands Act.

[12] The Respondents had argued in the High Court that the applicant had failed to show any breach of natural justice or procedural impropriety on the part of the Native Lands Appeals Tribunal for leave to be granted.

[13] The High Court found there was no breach of natural justice or procedural impropriety. The learned trial judge found that the decision of the 2nd Respondent itself was being challenged, and not the process.

[14] Her Ladyship also found the delay of 2 years fairly excessive, and that this delay was "detrimental to good administration." The application for leave for judicial review was refused, each party to bear their own costs.

[15] The Court of Appeal found that Petitioner sought to challenge the case on its merits, and for that reason was in breach of the ouster clause of section 7(5) of the iTaukei Lands Act: **Kubou v The State, The Appeals Tribunal & Anor.** [2008] FJCA 60; ABU10 of 2006.

[16] In submitting on the res judicata argument, Mr. Fa referred me to paragraphs [38] – [41] in the Supreme Court judgment in **Satala v Bouwalu** [2008] FJSC 20; CBV0005.2006S 30th October 2008. They were:

> "[38] This submission must also be rejected. When the Commission conducts a formal inquiry it is relevantly a "judicial" tribunal whose decisions attract res judicata doctrine: Spencer Bower, Turner and Handley "Res Judicata" 1996 pp 13-15. In Administration of Papua and New Guinea v Daera Guba [1973] HCA 59; (1973) 130 CLR 353 the High Court of Australia considered the effect of a 1954 decision of a Board appointed ad hoc under s 9 of the Land Ordinance 1911-1953 of Papua. It decided that certain land was owned by the Administration. In 1966 the claim was renewed by others in the same interest.
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> [39] The majority, comprising Menzies, Gibbs and Stephen JJ, held that the 1954 decision created a res judicata estoppel which bound the later claimants in the same interest. Gibbs J, whose judgment on the issue was adopted by the others in the majority, considered the question at length (pp 449-456). He said at 453: "The use of the phrase 'judicial tribunal' in this context is convenient as indicating that an estoppel of this kind does not result from a mere administrative decision, but the question whether such an estoppel is raised is not answered by enquiring to what extent the tribunal exercises judicial functions or whether its status is judicial or administrative...The doctrine of estoppel extends to the decision of any tribunal which has jurisdiction to decide finally a question arising between parties, even if it is not called a Court, and its jurisdiction is derived from statute...the Board was appointed to decide the case, and to give a decision and these words, prima facie, and in the absence of any indication to the contrary, import that the Board was to make a binding determination."

[40] Although Ratu Joni himself was not a party to the 1991 inquiry, his father was, and as the eldest son his claim to the title depends on his relationship with Ratu Maleli and is derived through and under him.

[41] Res judicata estoppels bind not only the original parties but also their pivies. In Carl Zeiss Stifung v Rayner & Keeler Ltd (no 2) [1967] 1 AC 853, 910 Lord Reid said:

> "...there is no doubt that the requirement of identity of parties is satisfied if there is a privity between a party to a former litigation and a party to a present litigation...there must be privity of blood, title or interest."

[17] There may be difficulties in bringing this case and its principles to the arguments in the instant case. However, if not a ground that will probably succeed, it is undoubtedly a ground of merit justifying the court's consideration. I disregard for this purpose the length of the delay, which I do not attribute to the Petitioner's solicitors.

[18] Delays can be unfortunate. However the argument if successful is of some importance outweighing any prejudice to the Respondents.

[19] Accordingly, I exercise the discretion in favour of the Petitioner and make the following orders:

(i) Enlargement of time for bringing the petition granted.

(ii) Petition to be lodged and served by **10th May 2019**.

(iii) No order as to costs.

SUPREME COURT OF FIJI SUVA

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The Hon. Mr. Justice Anthony Gates
Judge of the Supreme Court

Solicitors:
Fa & Co. for Petitioner
Attorney-General's Chambers for 1st, 2nd, 3rd Respondents
iTLTB for 4th Respondent

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