

BULOUE ETA KACALAINI VOSAILAGI

v.

NATIVE LANDS COMMISSION
RATU SAKIUSA KURUICIVI MAKUTU
NATIVE LAND TRUST BOARD

[HIGH COURT, 1989 (Tuivaga CJ) 22 June]

Revisional Jurisdiction

Customary law- entitlement to chiefly title- judicial review of decision of the Native Lands Commission- Native Lands Act (Cap. 133) Section 17 (1).

The Native Lands Commission held an enquiry in order to resolve a dispute between rival claimants to a chiefly title. The Commission's decision was challenged by judicial review. The High Court examined the background to the dispute, explained the limited purpose of judicial review and discussed the place of customary law in the general law of Fiji. The Court quashed the Commission's decision and HELD: (i) that the Commission was not empowered to hold an enquiry where a dispute had not been referred to it for settlement and (ii) that there was a reasonable perception that there was a likelihood of bias on the part of the Commission.

Cases cited:

Chief Constable of North Wales Police v. Evans [1982] 1 WLR 1155
Metropolitan Properties Ltd v. Lannon [1968] 3 All ER 304
R v. Sussex Justices, ex-parte McCarthy [1924] 1 KB 256

A. Rabo for the Applicant
Ratu J. Madraiwiwi for the First Respondent
K.R. Bulewa for the Second Respondent
Ratu E. Tavai for the Third Respondent

Tuivaga CJ:

This is an application for judicial review under Order 53 of the High Court Rules brought by Bulou Eta Kacalaini Vosailagi (hereafter called "Bulou Eta") against the decision of the Native Lands Commission (hereafter called "the Commission") made on 18 November, 1988 declaring Ratu Sakiusa Kuruicivi Makutu (hereafter called "Ratu Sakiusa") as the person rightfully entitled by seniority of lineage to be the Ka Levu and Tui Nadroga which is the paramount or seniormost Chiefly title in "Vanua Yavuasuna" the traditional state of Nadroga.

The decision in favour of Ratu Sakiusa was made following an inquiry on 11 November, 1988 at Cuvu, Nadroga by the Commission which was constituted by its Chairman and two other Commissioners who served as assessors. The inquiry was held under Section 17(1) of the Native Lands Act (hereafter called "the Act"). The Section states as follows:-

A "17.-(1) In the event of any dispute arising between native Fijians as to the headship of any division or subdivision of the people having the customary right to occupy and use any native lands, the Commission may inquire into such dispute and after hearing evidence and the claimants shall decide who is the proper head of such division or subdivision, and such person shall be the proper head of such division or subdivision:

B Provided that if the claimants agree in writing in the presence of the Chairman of the Commission as to who is the proper head of such division or subdivision it shall not be necessary for the Commission to hear evidence or further evidence as the case may be."

The main thrust of the Commission's decision appears from the following excerpt:-

C "On the death of Ratu Imanueli Louvatu Vosailagi in 1982 the position of Ka Levu fell vacant, he having held the position since 1974 when he succeeded Ratu Tevita Makutu. Ratu Tevita Makutu was the father of Ratu Sakiusa Makutu.

D It is clear from the evidence presented before us by both parties that the vanua decided that Bulou Eta Vosailagi, the sister of the late Ka Levu who died in 1982, temporarily assume the position. This Tribunal has confirmed that compromise and it is not the first time that this matter has been raised. In delegations to the office of the Native Land Commission from both parties, that supporting Bulou Eta and that supporting Ratu Sakiusa, it was urged on several occasions that Bulou Eta occupy the position of Ka Levu temporarily as Ratu Sakiusa was untried in leadership. In reconciliation talks held here on 14 September 1988, Ratu Meli Qaniuci Gonewai clearly stated the following:

F "I know that Ratu Sakiusa is of the rightful chiefly lineage but he is still young. We have already requested him to support his aunt Bulou Eta Vosailagi's installation and to undergo further apprenticeship. However, when Bulou Eta dies Ratu Sakiusa's position should then be confirmed."

G It is likewise acknowledged from evidence given before us that during the entire period in which Bulou Eta acted in the position of Ka Levu she creditably performed all its duties, traditional, religious and governmental. For those reasons as submitted by her representative, together with her age 75 as being older than Ratu Sakiusa and her considerable support, it was proper that she was installed as Ka Levu on 4 November 1988, following the installation of Ratu Sakiusa by the other faction on 7 October 1988. It is not denied in the Yavusa Louvatu and throughout Nadroga that Ratu Sakiusa Kuruicivi Makutu is of the senior lineage and that Bulou Eta belongs to the younger lineage. At the time of Ratu Timoci's death in 1967, Ka Levu and father of Bulou Eta, Ratu Timoci's eldest

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child, Ratu Imanueli Louvatu was alive having been born in 1911. In its petition of support, the Yavusa Louvatu, Mataqali Leweinadroga and the Matanitu supported Ratu Tevita Makutu, although he was younger than Ratu Imanueli having been born in 1914, and stated as follows:

A

"We the Yavusa Louvatu, Mataqali Leweinadroga and the heads of the Yavusa of Nadroga have agreed and decided that the following be done:

1. That Ratu Tevita Makutu assume the position of Tui Nadroga "Na Ka Levu" as he is of the senior lineage and the title is rightfully his.
2. That he take the monies due to the late Ka Levu.
3. That he decide on the monies concerning Yanuca.

B

In witness whereof we have affixed our names..."

C

On the death of Ratu Tevita Makutu in 1973, we accept the evidence of the representative that Ratu Sakiusa was first informed traditionally that Ratu Imanueli Louvatu was to assume the position in view of his youth. Ratu Sakiusa was 26 at the time. In August 1974 he wrote to the Minister for Fijian Affairs supporting the installation of Ratu Imanueli as Ka Levu (NLC 10/4II F100) although there was a letter of opposition to Ratu Louvatu's installation (NLC 10/4II Folio 80-81) by those who supported him. Some of those who supported Ratu Sakiusa at the time have changed their minds and now support Bulou Eta Vosailagi. This Tribunal does not recognise practice and procedure which allows time counting of support.

D

From Bulou Eta's evidence, it is clear, that it was the choice of the vanua that she was elected to drink the ceremonial bilo of Ka Levu na Tui Nadroga: however, she could not demonstrate any rightful claim as to why she should assume this important position.

E

However, from Ratu Sakiusa's evidence supported by his representative, it is quite clear that there existed a traditional understanding that he would be installed upon the death of Ratu Imanueli Louvatu Vosailagi. From his manner and the family from which he comes, it is strikingly evident that he is a true descendant of the lineage of Ratu Tevita Makutu I, the seniormost lineage.

F

His taking the oath last year to confirm the entry of those that were not registered and the deceased, at the time Bulou Eta Vosailagi was temporarily in charge, is an illustration of his right and authority over the vanua Yavuasuna.

G

It is true that Bulou Eta Amata Vosailagi's representative raised several grounds and ideas but the Tribunal is of opinion that these are all weak

grounds in the consideration of the installation of a Ka Levu.

A As it is not chiefly custom in this vanua for there to be two Ka Levu at anyone time, it would be difficult for the Commission to accept both of them in this important position.

Therefore as matters stand, I have decided that Ratu Sakiusa Makutu occupy the chiefly position of leadership of Ka Levu na Tui Nadroga to replace Ratu Imanueli Louvatu Vosailagi who had died."

B As may be expected the decision was not well received by Bulou Eta and her supporters. It is claimed that Bulou Eta has the majority of members of the chiefly Yavusa Louvatu and chiefs of vanua Nadroga on her side in the dispute over the Ka Levu title. It is said that she is well respected for her qualities as a chief and leader of the people. Since 1982 she has been accepted as Ka Levu and Tui Nadroga after the death of her brother, Ratu Imanueli Vosailagi. According to her supporters she enjoys the respect and affection of her people. Whereas by contrast it is said Ratu Sakiusa's personal and leadership qualities leave much to be desired in comparison with Bulou Eta. It is further said that Bulou Eta belongs to the senior generation in the Ka Levu dynasty and therefore has every right to stay on as Ka Levu until her death. This would be consistent with custom and tradition of the Fijian chiefly system which accords precedence and deference to the senior generation.

Bulou Eta is seeking redress in this Court from the decision of the Commission.

E This Court's jurisdiction to adjudicate in this matter arises under Order 53 of the High Court Rules which provides a procedure for the High Court to review the decision of an inferior Court or a tribunal created by an Act of Parliament. Bulou Eta, is seeking a number of reliefs, namely:

- (i) a Declaration that the decision of the Native Lands Commission of 18 November, 1988 that Ratu Sakiusa Kuruicivi Makutu is Ka Levu is invalid and of no effect;
- F (ii) an Order of Mandamus to compel the Native Lands Commission to perform its statutory functions under Section 17(1) of the Native Lands Act;
- (iii) an Order of Certiorari that the decision of the Native Lands Commission of 18 November, 1988 aforesaid be removed to this Court so that it may be quashed;
- G (iv) an Injunction restraining the Native Land Trust Board from making further rent payments to Ratu Sakiusa Makutu;
- (v) unspecified Damages.

At this point it should be made clear that this Court has no jurisdiction to decide the merits of the Ka Levu dispute. The Court has no function in that regard. The

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Court's function is to ensure that the process by which the Commission arrived at its decision in the inquiry under Section 17(1) of the Act was done in accordance with the law. In other words, it is the decision-making process of the Commission as a statutory tribunal which is under review by this Court and not the merits of the decision itself.

A

As was said by Lord Hailsham L.C. in Chief Constable of North Wales Police v. Evans [1982] 1 W.L.R. 1155 at page 1160:-

"It is important to remember in every case that the purpose of the remedy of judicial review is to ensure that the individual is given fair treatment by the authority to which he has been subjected and that, at it is no part of that purpose to substitute the opinion of the judiciary or individual Judges for that of the authority constituted by law to decide the matters in question."

B

A note in The Supreme Court Practice 1988 - Volume I commences on that case as follows:-

C

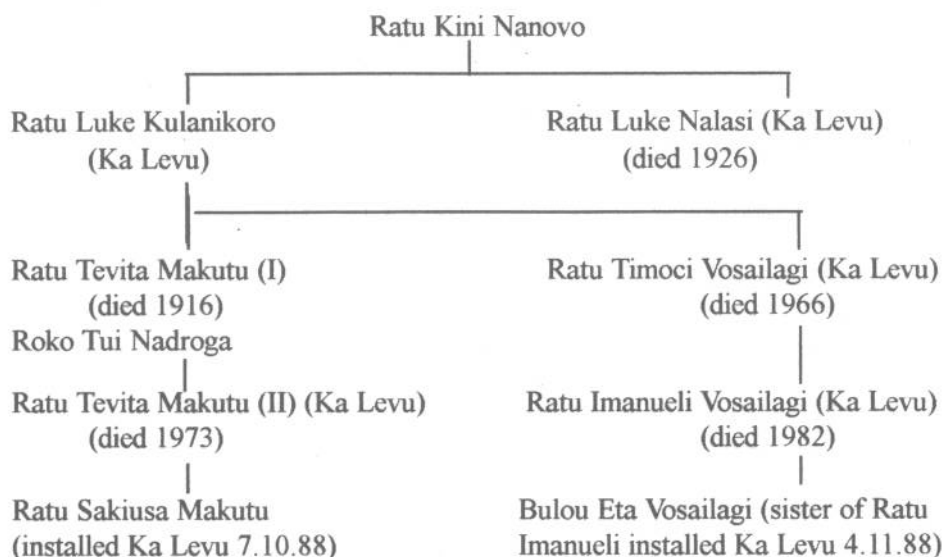
"Thus, a decision of an inferior court or public authority may be quashed (by an order of certiorari made on an application for judicial review) where that court or authority acted without jurisdiction or exceeded its jurisdiction, or failed to comply with the rules of natural justice in a case where those rules are applicable" (emphasis is mine)

D

For an appreciation of the background to the Ka Levu dispute and the role played by the Commission in relation to the dispute, it is necessary for me to outline the basic facts in this case.

The following chart shows the Ka Levu dynasty which goes back as far as to Ratu Kini Nanovo, a signatory to the Deed of Cession in 1874:-

E



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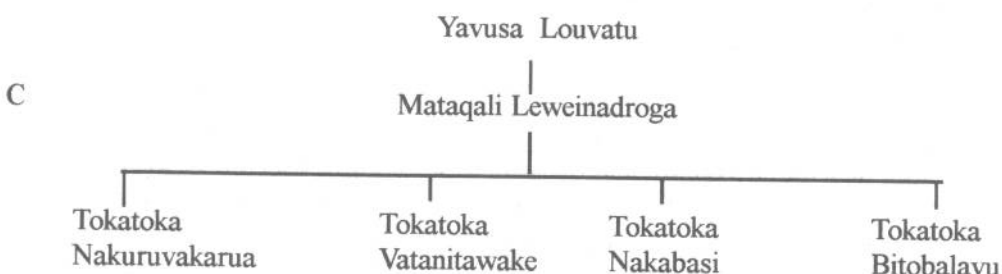
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HIGH COURT

- A Members of the Ka Levu dynasty belong to the chiefly Tokatoka (lineage unit) Nakuruvakarua within Mataqali (sub-clan) Leweinadroga in the Yavusa (the widest patrilineal kinship unit) Louvatu.

As Members of the Ka Levu dynasty belong to the chiefly Tokatoka (lineage unit) Nakuruvakarua within Mataqali (sub-clan) Leweinadroga in the Yavusa (the widest patrilineal kinship unit) Louvatu.

- B As a formal social structure, the Yavusa Louvatu comprises a group of people who trace their descendants agnatically to a common ancestor or ancestral god. The following chart shows the structure of the social organisation which constitutes the chiefly Yavusa Louvatu.



- D Ratu Sakiusa is 42 years of age and Bulou Eta is 75; a whole generation separating them. Both are blood relations and stand in a nephew/aunt relationship to one another. The dissension between the opposing groups over the Ka Levu succession appears to have started after Ratu Tevita Makutu II died in 1973.

- E In 1974 when the question of a successor of the Ka Levu title was raised those supporting Ratu Sakiusa strongly voiced their feeling that he should succeed to his father's title while those supporting Ratu Imanueli Vosailagi considered that at the age of 26 he was too young and inexperienced in chiefly leadership. The dissension over the Ka Levu succession was resolved only after Ratu Sakiusa himself intervened by writing a letter to the Minister for Fijian Affairs early in August 1974. The English translation of the letter reads as follows:-

- F "I am writing to you Sir concerning the proposed meeting which was scheduled to be held here in Cuvu on Monday, 19 August, to discuss the dispute concerning the succession to the late Ka Levu, Ratu Tevita Makutu.

- G I should like to mention Sir that I do not wish to be involved in this dispute since I am in full agreement with the traditional election which has nominated Ratu Imanueli Vosailagi to be Ka Levu and Tui Nadroga."

In 1974 Ratu Imanueli Vosailagi assumed the title of Ka Levu and Tui Nadroga. He occupied the position until his death in 1982. As noted already Bulou Eta took over from her brother the role of Ka Levu and Tui Nadroga. Since that time Bulou Eta has been accorded precedence in all traditional matters affecting the

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vanua Yavuasuna. About mid-1986 the dispute over the Ka Levu title broke out again. Many leading members of the Tokatokas Nakuruvakarua Vatanitawake and Nakabasi were most upset by the activation of the dispute by a small group of people. On 11 August, 1986 they signed a letter to the Chairman of the Commission in which they deprecated those people who were conspiring to have Bulou Eta displaced as Ka Levu. The letter pointed out that Bulou Eta's role was for the rest of her life and there should be no change in that situation. The letter drew attention to the fact that as senior representatives of these Tokatokas it is their traditional prerogative to decide and elect the Ka Levu. The letter is annexed to Bulou Eta's affidavit and is marked EKV2.

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B

The political upheaval of 1987 overshadowed the Ka Levu dispute which remained dormant for several months.

During 1988 the Ka Levu dispute again became the subject of intense debate. It reached a stage where the Commission found it necessary to hold a conciliation meeting with the two opposing groups. The meeting was held on 14 September, 1988 at Cuvu, Nadroga. Both sides remained intractable in their attitude to the dispute. For Bulou Eta it was emphasised that she had the majority of traditional support on her side due to her personal popularity and being of the senior generation within the chiefly housing of Nakuruvakarua. It was suggested by one of Bulou Eta's supporters that Ratu Sakiusa should wait his turn to be Ka Levu and meanwhile should use his time to learn about leadership qualities. That suggestion provoked Ratu Sakiusa into making a sharp retort.

C

D

The English translation of what he said, is as follows:-

"How many times are they going to tell me to wait and gain experience. When my father Ratu Tevita died the Nakuruvakarua elders brought a tabua (whale's tooth) with which they besought me that Ratu Louvatu should drink the chiefly cup and that I should wait my turn until the death of Ratu Louvatu, and yet after the death of Ratu Louvatu they again want me to wait so that Bulou Eta could drink the chiefly cup. I cannot see any good reason why I should not drink the chiefly cup."

E

F

At the conclusion of the conciliation meeting The Ka Levu dispute remained polarised as ever between the two groups. The Commission urged those at the meeting to do all they could to help settle the dispute. The Roko Tui Nadroga was requested to arrange a meeting between Bulou Eta and Ratu Sakiusa to discuss the problem facing the vanua. The Commission explained to the meeting that if no solution to the dispute could be found, the Commission should be informed so that a special sitting of the Commission may be convened to decide the dispute.

G

No sooner had the conciliation meeting of 14 September ended, Ratu Sakiusa's group commenced arrangements for his installation as Ka Levu. On 6 October the Commission sent an urgent letter to Ratu Sakiusa's representatives requesting

them not to go ahead with the proposed installation ceremony. The request was refused.

A On the same day, 6 October, 1988 Bulou Eta and her supporters went to Suva and urged the Chairman of the Commission to stop the installation of Ratu Sakiusa. At the same time she handed a petition to the Commission. The petition which is noteworthy is set out hereunder:-

B "1. Your Petitioner has been declared and accepted as the head of the division of the people having the customary occupancy and use of the native lands owned by Yavusa "Louvatu", Matagali Leweinadroga, Tokatoka Nakuruvakarua for the last 5 1/2 years or so. She has been accorded recognition in fact and in the Fijian Customary manner during all relevant ceremonies.

C In fact she has been accepted as the "Ka Levu" in a traditional manner for the last 5 years or so as aforesaid.

This fact is known to Roko Tui Nadroga/Navosa and the relevant members of the Yavusa, Mataqali, Tokatoka.

D 2. During the last 5 1/2 years, no person ever claimed or disputed your Petitioner's position as the head of the Yavusa, Mataqali and Tokatoka aforesaid.

E However since the 5th August, 1988 Ratu Sakiusa Kuruicivi Makutu of Cuvu, Nadroga has been claiming to be the head of the Yavusa, Mataqali and Tokatoka aforesaid. In so doing he is claiming the position of "Ka Levu".

F 3. Since the 5th August, 1988, numerous representations have been made to the Honourable Minister for Fijian Affairs, the Commissioner Roko Tui Nadroga/Navosa and it is a known fact that no legally constituted body yet inquired into the dispute and validly made a decision on the subject.

G 4. Whilst your Petitioner has been and still claiming to be the Head of the said Yavusa, Mataqali and Tokatoka as aforesaid, Ratu Sakiusa Kuruicivi Makutu made an attempt to install himself as the "Ka Levu" on the 2nd September, 1988 but he failed to do so. Your Petitioner understands that he is now making arrangements to install himself as the "KA LEVU" on Friday the 7th October, 1988 at Cuvu Village and that relevant arrangements for the ceremony are taking place.

5. Your Petitioner says that despite the requests made by herself or through her representative since 5th August, 1988 no valid

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steps have been taken to resolve the dispute in accordance with requirements of the law.

6. Your Petitioner draws your attention to the solemn duty imposed by law in your Commission to inquire into this dispute. A
7. The overwhelming majority of the relevant Yavusa, Mataqali and Tokatoka have already made known as to their stance to you on the 14th September, 1988 at Cuvu Village when an informal meeting took place and when time dispute as to the position of "Ka Levu" was discussed. A photocopy of their Declaration containing 494 signatures was then handed to you. Needless to say that they are able and willing to testify on oath at the inquiry referred to under Section 17 of the Act. B
8. Your Petitioner submits that the position of "Ka Levu" necessarily implies the inclusion of the Headship of the relevant Yavusa, Mataqali and Tokatoka. C
9. Your Petitioner wishes to make it abundantly clear that the necessity to invoke Section 17 of the Act has only arisen because of the inaction on the part of the Commission to bring about a settlement in the traditional manner. It is with reluctance, but taking into account of the proviso in Section 17 she is obliged to submit Petition so that you would kindly act in accordance with the requirements of the law and to mete out justice to all the parties concerned." D

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The petition is marked as EKV4 in Bulou Eta's affidavit.

On 7 October, 1988 Ratu Sakiusa was installed as Ka Levu and Tui Nadroga at a ceremony at Nageledamu, Cuvu, Nadroga. The installation attracted much adverse comment in that it lacked proper dignity and ceremonial pomp that should reflect the solemn nature and importance of the occasion. In three important aspects Ratu Sakiusa's installation is said by Bulou Eta's supporters to be a disgrace to the vanua Yavuasuna. These were: - F

- (1) the marked absence at the ceremony of the majority of chiefs of vanua Nadroga;
- (2) the venue of the ceremony was held unobtrusively at Nageledamu away from the village green where such installations would normally be held; G
- (3) the customary traditional warriors of Nadroga were not in attendance to perform guard duty.

On 27 October, 1988 the Chairman of the Commission wrote to Ratu Sakiusa a letter of which the English translation reads as follows:-

- A "My respectful greetings to you Sir, the chief of Nakuruvakarua. This Sir is from your office of the Native Lands Commission.

It was a great honour for us to receive the letter confirming your assumption to the high title of Ka Levu.

- B Today Nakuruvakarua is in your care. Both their misfortune and good fortune are held in your hands.

Conveying to you Sir the good wishes of this your department that you may receive abundant blessings and more so the vanua may be blessed abundantly.

- C Your office is standing by ready and willing to carry out your bidding if this is desired.

Thank you very much."

- D On 31 October, 1988 the Chairman of the Commission wrote to the Accounts Section of the Native Land Trust Board advising them that Ratu Sakiusa had been installed as Ka Levu and enclosing a copy of his congratulatory letter to Ratu Sakiusa in confirmation of the event. On 3 November, 1988 on the basis of that letter the Native Land Trust Board released to Ratu Sakiusa rent moneys from lease of native land which had been accruing for the Ka Levu since 1982 amounting to \$76,700.

- E On 4 November, 1988 Bulou Eta was installed as Ka Levu in what has been described as a most colourful, solemn and dignified chiefly ceremony. The venue of the installation was the village green at Cuvu where there were no less than three hundred traditional warriors on guard duty. It was attended by thirty one out of thirty five "Tuis" (high chiefs) of Nadroga as well as many ranking chiefs from the Yasayasa Vakara Confederacy. The installation of Bulou Eta was also
- F attended by many dignitaries of the Western Division.

After Bulou Eta was installed as Ka Levu the Commission decided to institute an inquiry under Section 17(1) of the Act. The inquiry was held on 11 November, 1988 at Cuvu, Nadroga. Representatives from both groups attended the inquiry and made submissions to the Commission.

- G On 18 November, 1988 the Commission delivered its decision declaring Ratu Sakiusa Ka Levu and Tui Nadroga. The main thrust of its decision has already been noted.

Before the hearing of this application written submissions were prepared for the Court by counsel. These submissions have been helpful in clarifying the factual and legal issues in this case.

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Counsel for Bulou Eta stated at the hearing that he was relying mainly on two issues.

The first issue relates to the transfer by the Commission of Ratu Sakiusa's name from his mother's Tokatoka in the Vola-ni-Kawa to the chiefly Tokatoka Nakuruvakarua. Counsel submits that it was unlawful because it was not authorised under the terms of a similar legislation to Section 21 of the Act. Section 21 of the Act provides as follows:-

"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.

(2) It shall be lawful for the Commission to prepare a supplementary register recording the names of all members of proprietary units found by the Commission under the provisions of subsection (1) to be members of their respective proprietary units, and such register shall be transmitted to the Registrar of Titles and preserved by him in the same manner as the register referred to in section 10."

When Ratu Sakiusa was born in 1947 his birth was registered under his mother's name alone because he was born out of wedlock and paternity was not formally acknowledged. His name was first recorded under his mother's Tokatoka Sitobalavu. Counsel contends that apart from the wrongful transfer of Ratu Sakiusa's name to the Tokatoka Nakuruvakarua there was no evidence to show that Ratu Sakiusa was the issue of Ratu Tevita and therefore there was no basis for him or anyone else on his behalf to press his claim for the Ka Levu title.

The second issue avers that the Chairman of the Commission breached the rules of natural justice when he conducted the inquiry into the Ka Levu dispute on 11 November. Counsel submits that as there was a real likelihood of bias on his part his decision to hold an inquiry under Section 17(1) of the Act was ill-advised. Counsel refers to the two letters; the letter of 27 October, 1988 (to Ratu Sakiusa) and the other of 31 October, 1988 (to the Accounts Section, Native Land Trust Board). He claims that the letters clearly compromised his impartiality in such an inquiry as they tend to indicate partisanship toward Ratu Sakiusa. Counsel submits that in these circumstances the Chairman should not have sat on the inquiry and in the interest of fairness he should have disqualified or excused himself from it. Counsel submits that justice was not seen to have been done and the resulting breach of natural justice was such as to vitiate the Commission's decision of 18 November, 1988.

As to the first issue both counsel for the Commission and for Ratu Sakiusa submit that the entry of Ratu Sakiusa's name in the Vola-ni-Kawa under the Tokatoka

- Nakuruvakarua was carried out lawfully in accordance with the powers vested in the Commission by a similar legislation to the present Section 21 of the Act.
- A According to Counsel it was usual practice for the Commission to visit the various districts throughout Fiji to inquire about illegitimate births so that the children concerned may be entered under their respective Tokatokas as the Commission may decide according to Fijian custom and tradition.

The Commission's ruling on this issue was as follows:-

- B "In the evidence of the representative the fact that Ratu Sakiusa Kuruicivi Makutu was born outside marriage was flourished before this Tribunal. However it is confirmed that he was entered as the issue of Ratu Tevita Makutu II pursuant to a Native Lands Commission decision which inquired into the ownership of land by those born outside marriage and which was held at Cuvu on 17
- C June 1952. This decision was based on the authority conferred by section 21 of Native Lands Act of 1952. It is true that one Emitai Karatu disputed this point but the basis of his dissent was because the child's father, that is Ratu Tevita Makutu II, did not provide any funds for his upbringing".
- D Ratu Sakiusa's birth certificate shows that he was born on 9 May, 1947 and registered under his mother's name whose Tokatoka was Bitobalavu in the Mataqali Leweinadroga. The recording of his name in the Tokatoka Nakuruvakarua as noted above was made during the Commission's sitting in 1952 at Cuvu, Nadroga. Ratu Tevita Makutu II died in 1973, twenty-one years after the entry of Ratu Sakiusa's name in the Vola-ni-Kawa under Tokatoka
- E Nakuruvakarua. As head of Yavusa Louvatu, Ratu Tevita Makutu II could reasonably be supposed to have known about the entry of any illegitimate child in the Tokatoka of which he was head and even more so if the child concerned happened to his own issue. In any event neither Ratu Tevita nor any member of Tokatoka Nakuruvakarua raised any objections at the time against this particular entry in the Vola-ni-Kawa. The presumption of regularity applies to all official
- F actions and records. The presumption may of course be displaced by proper proof to the contrary. The onus is on those who seek to displace the presumption. In my view after a time interval of thirty-seven years it becomes virtually impossible to discharge such onus.

- G In these circumstances I find no basis in the contention that the entry of Ratu Sakiusa's name in the Vola-ni-Kawa under the Tokatoka Nakuruvakarua was unlawful or improper. There is ample evidence to show that Ratu Sakiusa has always been acknowledged and regarded by members of Yavusa Louvatu as the natural son of Ratu Tevita Makutu II.

On the second issue raised on behalf of Bulou Eta Counsel for the Commission with whose submissions Counsel for Ratu Sakiusa fully agreed submits that there was no basis for the claim of breach of natural justice on the part of the

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Commission. Counsel contends that Bulou Eta and her representatives were aware of the two letters written by the Chairman (27th October and 31 October, 1988) and yet raised no objections during the inquiry on 11 November, 1988 to his competence or fitness to sit on the inquiry. Counsel put the case for the Commission succinctly in these words:-

“Here, the applicant and her representatives were aware of the facts constituting alleged bias and yet made no mention of the same before the Commission. It is respectfully submitted that as the applicant has taken the chance of a decision in her favour, she must now be precluded from raising bias as an issue. Therefore as the order of certiorari is a discretionary remedy, the Court is respectfully invited to decline the application for relief.”

A number of authorities were cited in support of his contention. Counsel submits that the decision of the Commission was unexceptionable in that it was made in accordance with the rules of customary succession to headship of a Yavusa which is based on seniority of lineage and determined agnatically i.e. through the male line. Counsel further submits that Ratu Sakiusa's lineage within the chiefly house of Nakuruvakarua was senior to that of Bulou Eta's and therefore the Commission was perfectly correct in deciding the dispute in favour of Ratu Sakiusa.

As already noted it is not for this Court to decide the merits of the Ka Levu dispute. That decision belongs elsewhere. The function of this Court is to ensure that the Commission as a statutory tribunal acted in accordance with the law in relation to the inquiry held under Section 17(1) of the Act. Whether the Commission came to the right or wrong decision according to Fijian custom and tradition is not for the Court to say. Without expressing any opinion upon the matter this Court is interested to note that the Draft Constitution envisages legislation to make Fijian customary law part of the general law of the land. Section 85 of the Draft Constitution provides as follows: -

“85.-(1) Parliament shall make provision for the application of laws, including customary laws.

(2) In making provision under this section, Parliament shall have particular regard to the customs, values and aspirations of the Fijian people.

(3) Until such time as an Act of Parliament otherwise provides, Fijian customary law shall have effect as part of the laws of Fiji:

Provided that this subsection shall not apply in respect of any custom that is, and to the extent that it is, inconsistent with a provision of this Constitution or a statute, or repugnant to the general principles of humanity.”

Only when those provisions are made part of the municipal law i.e. ordinary law of the land, will the Court be competent to adjudicate on matters pertaining to Fijian customary law.

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It is probably true to say that the Ka Levu dispute, saddening as it is for all concerned, would not have arisen if customary law relating to chiefly succession was in place. Disputes over headship of Yavusas have been a common feature of the Fijian chiefly system since the Cession. This trend was responsible for the amendment of the Act in 1961 which introduced Section 17 to the general law of Fiji. In moving the amendment Bill in the Legislative Council, the law-making body at the time, the then Chairman of the Commission (Mr. J.S. Thomson) explained its purpose as follows:-

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"The purpose of this Bill is to give the necessary authority to the Chairman of the Native Lands Commission to settle disputes that may be referred to him by land owning units or groups of land owning units over the headship of the units. Disputes of this nature have been referred for some years now to the Native Lands Commission and these have usually been settled after discussion. There are, however, some disputes which cannot be settled by conciliation methods. Unfortunately, these appear to be becoming more common. In many cases large sums of rent moneys from the leasing of Native Lands are involved, and in such cases the Chairman of the Native Lands Commission is asked by the disputing parties to decide on the question of the headship of the unit involved. At the moment, Sir, he has no legal authority to settle disputes. The reason for the proposal to vest the necessary authority in the name of the Chairman of the Native Lands Commission is that in recording the ownership of Native Lands and the membership of the various land owning units in the Colony the Native Lands Commission has recorded the history of every yavusa in Fiji (the yavusa being the basic social unit in Fijian Society).

The Commission has also recorded the names of the leaders of those units. Those records are in the custody of the Chairman of the Native Lands Commission. It is customary practice for the units to choose their own leader; normally the units choose the nearest agnate descendants to the founder of the unit.

This Bill does not seek to change that practice. It is only in cases where a dispute exists that the Chairman of the Native Lands Commission will decide on the headship of the units involved. He will reach that decision on the basis of the evidence which is available to him from the records in his custody. There are some disputes outstanding, awaiting the passing of this Bill." (see Fiji Legislative Council Debates, 1961 page 72).

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A point of interest is whether Mr. Thomson's predecessor in office, the late and illustrious Ratu Sir Lala Sukuna who died in 1958 would also have felt the same need for such an amendment to be made to the Act. Questions may well be asked whether the amendment inasmuch as it purports to confer power on the Commission to decide the incumbents of disputed chiefly titles is consonant with Fijian customary law. It appears that under Fijian customary law it is generally the senior members of the Yavusa concerned who decide by consensus the person to be head of the Yavusa when such a position becomes vacant. It also appears that where no consensus could be reached on the selection of a chief the matter would be left in abeyance until a more auspicious occasion arises when the matter would be settled. It may therefore seem somewhat strange to a purist in traditional matters particularly when the title of a paramount chieftainship of a vanua is concerned that this should be decided by an outside agency.

Fijian custom and tradition has its own in-built method of resolving even the hardest of disputes. It is called "vei sorosorovi" and is invoked in order 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.

So far as customary law relating to chiefly succession is concerned, Mr. Thomson has gone to some extent to clarify the position when he said:

"It is customary practice for the units to choose their own leader; normally the units choose the nearest agnate descendants to the founder of the unit."

Since Cession at any rate, it appears that two different concepts have ruled the selection of the chief of a vanua. The Ka Levu dispute is a classic illustration of the inter-play of these concepts.

The first would base succession on seniority of lineage within the chiefly house of Nakuruvakarua. This is favoured by Ratu Sakiusa's supporters.

The second would base succession on seniority of generation within the chiefly house of Nakuruvakarua. This is favoured by Bulou Eta's supporters.

The question of which of these concepts approximates more closely to Fijian customary law often results in constant debate. However, it is true to say that the customary practice of choosing a leader has see-sawed between these two concepts. Much depends on the political winds that might be blowing at any given time or the political perceptions of the senior members of the Yavusa concerned.

Turning to the application of Section 17(1) of the Act, it should be noted that the section does not cast any obligation or duty upon the Commission to hold an inquiry whenever a dispute over headship of a Yavusa arises. The words of the section "the Commission *may* inquire into such a dispute" suggest that

A the holding of an inquiry is discretionary and not mandatory on the part of the Commission. Given the very delicate and sensitive nature of the Ka Levu dispute in which feelings have run high it might have been a better option for the Commission to have left and encouraged the vanua to resolve the dispute within the traditional machinery for settling disputes which exists in Fijian society. In such a case as this which deals with the selection of a paramount chief it would seem that discretion was the better part of valour.

B I turn now to the second issue raised on behalf of Bulou Eta which is that the inquiry held on 11 November under Section 17(1) of the Act was vitiated by the fact that there was a real likelihood of bias on the part of the Commission. The starting point in discussing this issue is undoubtedly the case of R. v. Sussex Justices, ex-parte McCarthy [1924] 1 KB 256 where Lord Hewart, Lord Chief Justice of England and Wales stated:-

C "It is not merely of some importance, but it is of fundamental importance that justice should not only be done but should manifestly and undoubtedly be seen to be done."

D That case was decided in 1924. Since then the law in this area has developed along two parallel concepts, one of them speaks of "reasonable suspicion of bias" and the other of "real likelihood of bias". In Metropolitan Properties Ltd. v. Lannon [1968] 3 All ER 304 Lord Denning M.R. interwove the two concepts. His views of the law which I respectfully adopt appear at page 310 where he states as follows:-

E "In considering whether there was a real likelihood of bias, the court does not look at the mind of the justice himself or at the mind of the chairman of the tribunal, or whoever he may be, who sits in a judicial capacity. It does not look to see if there was a real likelihood that he would, or did, in fact favour one side at the expense of the other. The court looks at the impression which would be given to other people. Even if he was as impartial as could be, nevertheless if right-minded persons would think that, in the circumstances, there was a real likelihood of bias on his part, then he should not sit. And if he does sit, his decision cannot stand. Nevertheless, there must appear to be a real likelihood of bias. Surmise or conjecture is not enough. There must be circumstances from which a reasonable man would think it likely or probable that the justice, or chairman, as the case may, would, or did, favour one side unfairly at the expense of the other. The court will not enquire whether he did, in fact, favour one side unfairly. Suffice it that reasonable people might think he did. The reason is plain enough. Justice must be rooted in confidence; and confidence is destroyed when right-minded people go away thinking: "The judge (or tribunal) was biased." "

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The test of whether a given set of circumstances may give rise to a real likelihood of bias is objective as is clear from Lord Denning's judgment. In examining the present issue the Court is not concerned with the explanation or reasons why the Commission had acted in the manner it did in relation to the letters of 27 October and 31 October respectively or in relation to other actions or non-actions leading up to the inquiry of 11 November. The Court is concerned with what a reasonable person is likely to think in the particular circumstances of the case. For the same reasons, the absence of a formal objection to the membership of the tribunal cannot in my view affect the legal position.

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The Court has no doubt that the Commission acted with a high sense of duty and integrity in its adjudication of the Ka Levu dispute. However this Court feels certain reservations about the decision of the Commission to hold an inquiry under Section 17(1) of the Act as it did on 11 November. Events had by then moved in a way which made it inappropriate for the Commission to be concerned further with the dispute between Bulou Eta and Ratu Sakiusa. By then it is clear that neither of them was personally interested in such an inquiry. Each of them was more concerned about consolidating his or her position. In any event neither of them requested the Commission for such an inquiry to be held.

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It would seem that a prerequisite to an inquiry under Section 17(1) of the Act is that a dispute must be referred to the Commission for settlement by those concerned. The Commission's jurisdiction to exercise the power conferred upon it under the section is dependent on such a reference. The Commission could not act unilaterally in the matter.

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The circumstances prevailing on or about 11 November, 1988 did not show that an inquiry under the section was being sought.

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As for Ratu Sakiusa he has had his installation as Ka Levu performed on 7 October. On 27 October he received a congratulatory letter from the Chairman of the Commission which was virtually tantamount to an official recognition of his position. On 3 November he received a cheque for \$76,700 being the share of lease moneys standing to the credit of the Ka Levu. In Ratu Sakiusa's situation an inquiry would be the last thing he would want.

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As for Bulou Eta she had petitioned the Commission on 6 October for an inquiry under Section 17(1) of the Act but no response was given or action taken on her petition at the time. This was unfortunate and was no doubt a factor which led to Bulou Eta's installation as Ka Levu by her supporters.

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In those circumstances the Commission might have thought it prudent to refer the matter back to the "vakavanua" (traditional) method of settlement of the Ka Levu dispute. Indeed if ever there was a case that demands settlement in the traditional way it is the Ka Levu dispute which apart from being essentially a family dispute between very close relatives within the chiefly house of Nakuruvakaua, concerns the wider interest of the vanua Yavuasuna.

HIGH COURT

A Be all that as it may, on an objective assessment all the circumstances surrounding the conduct of the inquiry under Section 17(1) of the Act it would be difficult for a reasonable person to avoid the impression that there was a real likelihood of bias and partisanship on the part of the Commission in relation to the Ka Levu dispute. The Commission clearly had a duty to act fairly at the inquiry. Only by doing so can it satisfy the standard required by the law that must be seen to be done. This Court is satisfied that the Commission's decision in awarding the title of Ka Levu to Ratu Sakiusa was made in breach of the rules of natural justice and was therefore null and void.

B In these circumstances the Court will grant the reliefs for a declaration, an order of certiorari and an injunction in the terms sought in the application.

C The decision of the Commission which was given on 18 November, 1988 in favour of Ratu Sakiusa cannot stand and must be quashed.

D There will be an order for costs against the respondent only.

(Declarations granted; certiorari issued.)

D [Editor's note: the draft Constitution referred to on page 128 was promulgated on 25 July 1990 as the Constitution 1990, Section 100. It was repealed on 27 July 1998 by Section 195 of the Constitution of the Fiji Islands 1997.]

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