

IN THE HIGH COURT OF FIJI AT SUVA
CIVIL JURISDICTION

Civil Action No. HBM 92 of 2014

IN THE MATTER of the Constitution of the
Republic of Fiji

AND

IN THE MATTER Section 23, 26 & 56 of
the Constitution of the Republic of Fiji.

AND

IN THE MATTER of Section 23 of the
Electoral Decree 2014

AND

AND THE HIGH COURT (Constitutional
Redress) Rules 1998

BETWEEN : **MAKERETA WAQAVONOVONO**
Plaintiff

AND : **CHAIRPERSON OF FIJIAN ELECTORAL**
COMMISSION
First Defendant

AND : **SUPERVISOR OF ELECTIONS**
Second Defendant

AND : **ATTORNEY GENERAL OF FIJI & MINISTER**
FOR ELECTIONS
Third Defendant

BEFORE : Hon. Justice Kamal Kumar

COUNSEL : Plaintiff in Person
Mr. S. N. Sharma and Mr. N. Chand for the 2nd
and 3rd Defendants

DATE OF HEARING : 28 July 2014

DATE OF RULING: 1 August 2014

RULING

1.0 Introduction

1.1 On 11 July 2014 the Plaintiff filed Notice of Originating Motion pursuant to Section 44 of the Constitution of the Republic of the Fiji Islands (2013) upon grounds contained in Plaintiff's Affidavit sworn on 10 July 2014 seeking following relief:

1. *A declaration that the definition of 'ordinarily resident in Fiji' and 'a person that has been out of Fiji for official Government business or duties' provided in section 23(5) of the Electoral Decree 2014 is invalid because it unlawfully discriminates against the political rights of citizens and infringes on their right to a fair and free election because it restricts their options and they will not be able to vote for the candidate of their choice under section 23 (2) of the Constitution.*

2. *A declaration that the definition of 'ordinary resident in Fiji' and 'a person that has been out of Fiji of official Government business or duties' provided under section 23(5) of the Electoral Decree 2014 is invalid because it unlawfully discriminates against the Plaintiff and infringes on her political right to be a candidate for the public office guaranteed by section 23 (3) (c) of the Constitution.*

3. *A declaration that the definition of 'ordinary resident in Fiji' and 'a person that has been out of Fiji for official Government business or duties' under section 23 (5) of the Electoral Decree 2014 is invalid because it unlawfully discriminates against the Plaintiff and infringes*

on her right to equality before the law and right to equal protection, treatment and benefit of the law under section 26 of the Constitution.

4. An injunction restraining the First Defendant and the Third Defendant, whether by themselves, their subordinate officers, servants or agents or otherwise howsoever, from interfering with the Plaintiff's right to be a candidate in the 2014 General Elections in the Republic of the Fiji Island.

5. An order that the Defendants pay the Plaintiff's costs on full indemnity basis.

6. Such further or other relief as shall be just."

- 1.2 Notice of Motion was listed to be called on 22 July 2014, when Plaintiff was represented by her Counsel and Second and Third Defendants were represented by their Counsel.
- 1.3 On 22 July 2014 Counsel for Second and Third Defendants raised the issues that this Court does not have jurisdiction in respect to matters raised in the Notice of Originating Motion and also that this Court cannot usurp the powers of the Electoral Commission and nor can it grant injunction against the State.
- 1.4 Leading Counsel for the Plaintiff sought an early hearing date as a matter of urgency.
- 1.5 This Court in view of the nature of the subject matter gave following directions:
 - (i) Defendants are at liberty to file and serve Affidavit in Opposition to the Notice of Originating Motion by 24 July 2014.
 - (ii) Second and Third Defendants to file and serve Application to strike out Action by 23 July 2014.
 - (iii) Plaintiff is at liberty to file and serve Affidavit in Reply by 25 July 2014.
 - (iv) Hearing on preliminary issue on Jurisdiction, Striking Out Application and Notice of Originating Motion dated 10 July 2014 be adjourned to 28 July 2014 at 10.00am.
- 1.6 Parties were also directed to file their submissions on date of hearing.

- 1.7 On 24 July 2014, Second and Third Defendants filed and served Summons to Strike Out Notice of Originating Motion and Affidavit in Response to Plaintiff's Affidavit in Support.
- 1.8 On 25 July 2014, Plaintiff attempted to file Amended Notice of Originating Motion and Supplementary Affidavit when I directed the Registry to inform the Plaintiff that she will need to obtain leave of this Court prior to filing of such documents.
- 1.9 On 28 July 2014, Plaintiff by her Counsel made Oral Application to Amend Notice of Originating Motion and handed in a copy of the Amended Notice of Originating Motion dated 25 July 2014.
- 1.10 Proposed Amend Notice of Originating Motion seeks following relief:

1. A declaration that on the proper meaning and application of the phrase 'ordinary resident' in section 23(4)(c) of the Electoral Decree 2014 includes Fiji citizens who are temporarily absent from Fiji for brief periods whether for non-government business or other activities;

2. A declaration that on the proper meaning and application of the phrase 'ordinary resident' in section 56 (2) (c) of the Constitution includes Fiji citizens who are temporarily absent from Fiji for brief periods whether for non-government business or other activities;

3. A declaration that the phrase 'on government business or duties' in section 23(5) of the Electoral Decree 2014 as applied to those prospective candidates deemed to be ordinarily resident in Fiji unlawfully discriminates against those individuals who are temporarily absent from Fiji on non-government business or other activities and therefore infringes on the Plaintiff's constitutional and political right to be a candidate for public office as guaranteed by section 23 of the Constitution;

4. A declaration that the phrase 'on government business or duties' in section 23 (5) of the Electoral Decree 2014 as applied to those prospective candidates deemed to be ordinarily resident in Fiji unlawfully discriminates against those individuals who are temporarily absent from Fiji on business or other activities and therefore unlawfully discriminates against the Plaintiff on grounds of her personal circumstances and infringes on her right to equality before the law and right to equal protection treatment and benefit of the law under section 26 of the Constitution;

5. A declaration that the Plaintiff is entitled (or qualified) to be a candidate in the general elections scheduled for 17 September 2014

under the provisions of section 23 of the Electoral Decree 2014 and section 56 of the Constitution.”

- 1.11 Application to amend Notice of Originating Motion was opposed by the Second and Third Defendants.
- 1.12 At the close of submissions Plaintiff’s Counsel informed the Court that Plaintiff does not challenge the Constitutional validity of the provisions of the Electoral Decree 2014 (Decree No. 11 of 2014) but wants the Court to define the term “Ordinary Resident in Fiji for at least 2 years immediately before being nominated” in Section 23 (4) (c) of the Electoral Decree 2014.

2.0 Background Facts

- 2.1 Electoral Decree 2014 (Decree No 11 of 2014) commenced on 28 March 2014, being date of publication in the Government of Fiji Gazette.
- 2.2 Section 23 of the Electoral Decree provides as follows:

“23 - (1) A person is not eligible to be elected as a member of Parliament unless duly nominated as a candidate in the election.

(2) A candidate for election to Parliament may be nominated by a registered political party or nominated as an independent candidate in accordance with the procedures prescribed in this Decree.

(3) A person is not eligible to be nominated as a candidate unless he or she is a registered voter, and a person who has been disqualified from voting by an order of a court under section 151 shall for this purpose be regarded as not registered to vote.

(4) A person is eligible to be nominated as a candidate for election to Parliament only if person -

- (a) is a citizen of Fiji, and does not hold citizenship of any other country;*
- (b) is registered in the Register of Voters;*
- (c) **is ordinarily resident in Fiji for at least 2 years immediately before being nominated;***
- (d) is not an undischarged bankrupt;*
- (e) is not a member of the Electoral Commission, and has not been a member of that Commission at any time during the 4 years immediately before being nominated.*
- (f) is not subject to a sentence of imprisonment when nominated.*

- (g) *has not, at any time during the 8 years immediately before being nominated, been convicted of any offence under any law for which the maximum penalty is a term of imprisonment of 12 months or more; and*
- (h) *has not been guilty of any offence under a law relating to elections, registration of political parties or registration of voters, including any offence prescribed under this Decree.*

(5) For the purposes of subsection (4) (c), a person is deemed to be ordinarily resident in Fiji if that person has been out of Fiji for official Government business or duties or has been holding an official Government position in any other country.”
(emphasis added).

- 2.3 On 14 May 2014 National Federation Party wrote to the Chairman of Electoral Commission seeking an “interpretation from the Commission on the definition of “Ordinarily Resident” for the purposes of candidacy for the 2014 General Elections.”
- 2.4 On 19 May 2014 Electoral Commission responded to aforesaid letter advising that “it is not for the Commission to give legal opinion to political parties or to interpret - statutory words on hypothetical basis.
- 2.5 On 9 June 2014, Plaintiff wrote to the Chairperson of Electoral Commission raising her concern regarding Section 23 (4) (c) of the Electoral Decree 2014.
- 2.6 On 11 June 2014 the Electoral Commission wrote to the Plaintiff advising her that her letter has been referred to Solicitor General and Supervisor of Elections.
- 2.7 On 23 June 2014 Plaintiff wrote to the Chairperson stating that she has not heard from Solicitor General’s Office, raising her concern as to why letter was sent to Solicitor General and advising of her intention to take the matter further.

3.0 Application to Amend Notice of Originating Motion

- 3.1 Leading Counsel for the Second and Third Defendants submitted that this Court cannot allow Amendment of the Notice of Originating Motion prior to determining the jurisdiction.
- 3.2 In **Ex-parte McCardle** 74 U.S (7 walls) 506 (1868) the Chief Justice of Supreme Court of United States stated as follows:

“Without jurisdiction the Court cannot proceed at all in any cause. Jurisdiction is power to declare the law, and when it ceases to exist, the only function remaining to the court is that of announcing the fact and dismissing the cause. And this is not less clear upon authority than upon principle.”

In **Ex-parte McCardle** the congress enacted an Act granting several Court of the United States power to grant writ of habeas corpus in all cases where persons liberty is restrained in violation of the Constitution. Final decision of any Court inferior to Circuit Court, may be appealed to Circuit Court of the United States of the District and from Judgment of the Circuit Court to the Supreme Court of the United States.

Petitioner was held by military for trial before a military commission who caused writ of habeas corpus to be issued and upon hearing the petitioner, he was held in military custody. Petitioner appealed to Supreme Court and whilst the appeal was pending congress amended the above Act to remove the right to appeal to Supreme Court. Supreme Court of United State dismissed the appeal for want of jurisdiction.

3.3 It is well established that if the Court does not have jurisdiction to grant relief sought then the matter ends at that point.

3.4 In **Padarath & Anor v. His Excellency the President of Fiji & Ors** [2013] FJHC 116; HBC 33 of 2013 (14 March 2013) her Ladyship Justice Wati stated as follows:

“Whether the Court has powers to consider any proposed application for leave to amend the originating summons or give directions to the registry to accept the amended originating summons the Court must first establish that it has jurisdiction on the existing substantive cause. If the Court does not have any jurisdiction to hear the substantive cause, it cannot hear any oral or formal application for leave to amend. Hearing the application for leave to amend or giving directions for filing of amended process will tantamount to exercising of jurisdiction. It was therefore prudent that the preliminary issues on jurisdiction be heard and determined.”

3.5 In **Padarath’s** case the Plaintiff sought an injunction against Registrar of Political Parties from de-registering Fiji Labour Party under the Political Parties (Registration, Conduct and Disclosure Decree 2013). At the date of hearing of the Application for injunction Counsel for the Plaintiffs informed the Court that Plaintiffs intend to amend their Application and that Application to Amend has been filed in Court Registry.

At that point in time Counsel for the Defendants raised the issue that Court has to first decide the preliminary issue of jurisdiction and if Court holds

that, it does not have jurisdiction to grant relief in the Original Application then it cannot allow the Amendment.

- 3.6 It is therefore imperative that this Court will first need to determine as to whether it has jurisdiction to grant relief sought in Notice of Originating Motion dated 10 July 2014, and if this Court finds that it does not have jurisdiction to grant relief sought in the said Notice of Originating Motion then it cannot deal with Amendment Application.

4.0 Jurisdiction

- 4.1 Leading Counsel for the Second and Third Defendant's submitted that pursuant to Section 173(4) of 2013 Constitution and Sections 5(3), (4), (5), (6) and (7) of the Administration of Justice Decree 2009 this Court does not have jurisdiction to deal with the unconstitutionality and unlawfulness of the provisions of the Electoral Decree 2014.

- 4.2 Section 173 of the 2013 Constitution provides as follows:

“(4) Notwithstanding anything contained in this Constitution, no court or tribunal (including any court or tribunal established or continued in existence by the Constitution) shall have the jurisdiction to accept, hear, determine, or in any other way entertain, or to grant any order, relief or remedy, in any proceedings of any nature whatsoever which seeks or purports to challenge or question:

(a) the validity or legality of any Promulgation, Decree or Declaration, and any subordinate laws made under any such Promulgation, Decree or Declaration (including any provision of any such laws), made or as may be made between 5 December 2006 until the first sitting of the first Parliament under this Constitution;

(b) the constitutionality of any Promulgation, Decree or Declaration, and any subordinate laws made under any such Promulgation, Decree or Declaration (including any provision of any such laws), made or as may be made between 5 December 2006 until the first sitting of the first Parliament under the Constitution;

(c) any Promulgation, Decree or Declaration, and any subordinate laws made under any such Promulgation, Decree or Declaration (including any provision of any such laws), made or as may be made between 5 December 2006 until the first sitting of the first Parliament under this Constitution, for being

inconsistent with any provision of this Constitution, including any provision of Chapter 2 of this Constitution; or

(d) any decision made or authorised, or any action taken, or any decision which may be made or authorised, or any action which may be taken, under any Promulgation, Decree or Declaration, and any subordinate laws made under any such Promulgation, Decree or Declaration (including any provision of any such laws), made or as may be made between 5 December 2006 until the first sitting of the first Parliament under this Constitution, except as may be provided in or authorised by any such Promulgation, Decree or Declaration (including any provision of any provision of any such laws), made or as may be made between 5 December 2006 until the first sitting of the first Parliament under this Constitution.

(5) Notwithstanding anything contained in this Constitution, despite the repeal of the Administration of Justice Decree 2009, subsections (3), (4), (5), (6) and (7) of Section 5 of the Administration of Justice Decree 2009 shall continue to apply to any Promulgation, Decree or Declaration (including any provision of any such laws), made or as may be made between 5 December 2006 until the first sitting of the first Parliament under this Constitution.”

4.3 Section 5(3) to (7) of Administration of Justice Decree 2009 provides:

“5(3) Notwithstanding anything contained in this Decree or any other law, no court shall have the jurisdiction to accept, hear and determine any challenges whatsoever (including any application for judicial review) by any person to the Fiji Constitution Amendment Act 1997 Revocation Decree 2009 (Decree No. 1) and such other Decrees made or as may be made by the President.

(4) Notwithstanding anything contained in this Decree or any other law, no Court shall have the jurisdiction to accept, hear and determine, or in any other way entertain, any challenges whatsoever (including any application for judicial review) by any person to the validity or legality of any Decrees made by the President from 10 April 2009 and any Decrees as may be made by the President.

(5) Any proceedings of any form whatsoever, as well as any application of any form whatsoever in a proceeding, seeking to challenge the validity or legality of the Fiji Constitution Amendment Act 1997 Revocation Decree 2009 (Decree No. 1) or any other Decrees made by the President from 10 April 2009 or as may be by the President, shall wholly terminate immediately upon the commencement of this

Decree, and a Certificate to that effect shall be is issued by the Chief Registrar to all parties to the proceedings.

(6) Where any proceeding of any form whatsoever, as well as any application of any form whatsoever in a proceeding, seeking to challenge the validity or legality of the Fiji Constitution Amendment Act 1997 Revocation Decree 2009 (Decree No. 1) or any other Decrees made by the President from 10 April 2009 or as may be made by the President, is brought or made before a judicial officer or a Tribunal, then the judicial officer or the Tribunal, without hearing or in any way determining the proceeding or the application as the case may be, shall immediately transfer the proceeding or the application to the Chief Registrar, for termination of the proceeding or the application and issuance of Certificate under subsection (5).

(7) In this section, ‘judicial officer’ includes Judge, Master of the High Court, Chief Magistrate and resident magistrate.” (emphasis added)

- 4.4 Reliefs 1, 2 and 3 in the Notice of Originating Motion dated 10 July 2014 challenges the validity of provision of Section 23 (5) of the Electoral Decree 2014.
- 4.5 Provisions of Section 173 (4) of the Constitution and Section 5 (3) to (7) of Administration of Justice Decree ousts the Court jurisdiction to deal with any action challenging the validity of the provision of Electoral Decree. These provisions are drafted in very wide terms.
- 4.6 Relief 4 in Notice of Originating Motions seeks injunctions against the State and its officers which is specifically prohibited by Section 15(2) of Crown Proceedings Act which provides as follows:

“15(2) The Court shall not in any civil proceedings grant any injunction or make any order against an officer of the Crown if the effect of granting the injunction or making the order would be to give any relief against the Crown which could not have been obtained in proceedings against the Crown.”

- 4.7 Fiji Court of Appeal in **Bainimara v. Heffernan** [2008] FJCA 78 Civil Appeal No. ABU0034 of 2007S stated as follows:-

“44. No Court will knowingly make an order beyond its power and any judge would need to be satisfied that he or she had the power before making an unusual or novel order.

45. However here there was no analysis by the trial judge of the submission by Dr. Cameron. The trial judge in his decision to

grant the injunction did so knowing that it was only “arguable” that the Court had the power to do so and therefore that it was only “arguable” that the Court was not committing an illegal act.

46. *This is a matter which ought to have tipped the balance beyond reason. At the very least the trial judge ought to have satisfied himself that it was more likely than not that the Act did not prevent him from ordering the injunction. He did not do this but took the risk in a case that could not justify such a risk, in a case where there seemed little urgency and where there was doubtful utility in granting the injunction.*

47. *In failing to properly take into account this highly relevant material consideration the trial judge made a serious error in the exercise of his discretion.”*

4.8 In any event this relief is a clear abuse of Court process in that there is not any frailest of evidence that the Defendants and/or its officers servants or agents or otherwise whosoever have in any way interfered with Plaintiff’s right to seek nomination as a candidate.

4.9 At the close of submission on 28 July 2014, Plaintiff by her Counsel informed the Court that Plaintiff is not challenging the validity, lawfulness or Constitutionality of the Electoral Decree but moves the Court to define the phrase “*Ordinary Resident*” in Section 23(4)(c) of the Electoral Decree.

4.10 It must be noted that even though this court has unlimited original jurisdiction to hear and determine any civil or criminal proceeding under any law or matters arising under the Constitution or involving its interpretation as provided for in Section 100(3) and (4) of 2013 Constitution the jurisdiction to determine matters relating to election is special jurisdiction.

4.11 Jurisdiction/Power to determine the pre-election matters such as registration of voters, registration of political parties and nomination of candidate and so on are granted to Supervisor of Elections and Electoral Commission whereas jurisdiction to determine dispute post-election is granted to Court of Disputed Return which is the High Court of Fiji (Part 5 - Electoral Decree 2014).

4.12 In **Prasad v. Singh** [2002] FJHC 8:HBC 0 269 of 2011 (8 February 2002). His Lordship Justice Gates (as he then was) the current Chief Justice in dealing with post-election dispute stated as follows:

“It is clear the Court of Disputed Return exercise a special jurisdiction allowed by the Constitution and under the Electoral Act which legislation is in the nature of a code Osborne v, Shepherd [1981] 2

NSWLR 277 at p208G: Josefa Rusaqoli v. Attorney - General & Anor. (unreported) Suva High Court civil Action No. 0149 of 1994S; 6 June 1994 at p6.”

- 4.13 No jurisdiction has been granted to this court in respect to pre-election matters.
- 4.14 The rationale for the special jurisdiction is that matters relating to pre-election issue and post-election issue must be determined expeditiously. (see **Prasad v. Singh** supra)
- 4.15 During the course of finalising this Ruling I was referred to Electoral (Amendment) (No. 2) Decree 2014 (Decree No. 26 of 2014) published in yesterday’s Government of Fiji Gazette by Counsel for 2nd and 3rd Defendants which repealed subsection 5 of Section 23 of the Electoral Decree 2014 and substituted the following:-

“(5) For the purpose of subsection (4)(c), a person shall only qualify to be ordinarily resident in Fiji for at least 2 years immediately before being nominated, if that person has been present and living in Fiji for an aggregate period of not less than 18 months out of the 2 years immediately before being nominated.”

Amendment Decree also inserted the following subsection after subsection (5):-

“(6) Notwithstanding anything contained in subsection (5), any person who has been out of Fiji for official Government business or duties or has been holding an official Government position in any other country, shall be deemed to be ordinarily resident in Fiji for the purposes of subsection (4)(c).”

- 4.16 Subsection 6 has the same effect as Subsection 5 in the Electoral Decree 2014 prior to the amendment and as such for all intent and purpose Plaintiff’s Notice of Originating Motion is deemed to challenge subsection 6 of Section 23 of the Electoral Decree.
- 4.17 I hold that this Court does not have jurisdiction to deal with or grant the relief sought by the Plaintiff in the Notice of Originating Motion dated 10 July 2014.
- 4.18 It follows that this Court cannot therefore deal with Plaintiff’s Oral Application to amend Notice of Originating Motion dated 10 July 2014.
- 4.19 If the Plaintiff and/or her legal advisors are of the view that this Court has jurisdiction to grant the relief in the Proposed Amended Notice of Motion

then Plaintiff should seek such reliefs in a separate action and not by amending the motion in this proceedings.

5.0 Costs

- 5.1 Second and Third Defendants seeks costs on indemnity basis but has not made any submissions on to why indemnity costs should be awarded.
- 5.2 Even though the Plaintiff sought reliefs which could not be sustained or dealt with in light of the Section 173 of 2013 Constitution, Section 5 of Administration of Justice Decree 2009 and subsection 15(2) of the Crown Proceedings Act, I am inclined to award cost on party-party basis.

6.0 Conclusion

I make the following orders:

- (i) Plaintiff's Notice of Motion dated 10 July 2014 and this action is dismissed and struck out for want of jurisdiction;
- (ii) Plaintiff is to pay Second and Third Defendants costs jointly assessed in the sum of \$3,000.00.




.....
Kamal Kumar
JUDGE

At Suva
1 August, 2014

Plaintiff in Person
Office of the Attorney General for the Second and Third Defendants