

IN THE KIRIBATI COURT OF APPEAL]
LAND JURISDICTION]
HELD AT BETIO]
REPUBLIC OF KIRIBATI]

Land Appeal No. 2 of 2011

BETWEEN ISSUES OF TEKOA KAROTU APPELLANTS
AND ISSUES OF TOOMA MANNAUA RESPONDENTS

Before: Paterson JA
Williams JA
Barker JA

Counsel: *Michael Takabwebwe* for appellants
Taoing Taoaba for respondents

Date of Hearing: 26 August 2011
Date of Judgment: 31 August 2011

JUDGMENT OF THE COURT

1. This is an appeal against a decision of the High Court given on 19 February 2010 in High Court Land Appeal No. 1 of 2009 whereby the Chief Justice refused to re-open the earlier decision of the High Court in Land Case Action No. 114 of 2007. The appellants claim to be entitled to recover ownership of two plots of land identified as Tabontawana and Maeu 622i from the respondents. The appellants allege that the respondents' acquisition of the lands involved fraud.

The appellants contend that in Land Case No. 114 of 2007 certain matters of record were not brought before the Court.

2. On 25 September 2009 the High Court dealt with Land Appeal No. 1 of 2009 for the first time. The Court ordered that the appeal be struck out for want of prosecution but gave leave to the appellants "to bring a fresh appeal within 3 months".
3. On 27 November 2009 the appellants filed in the High Court on Notice of Motion to re-open Land Appeal No. 1 of 2009.
4. On 19 February 2010 the High Court dealt with this application. The Court had before it an affidavit on behalf of the appellants explaining why on behalf of the appellants she had not been present when the matter had been previously struck out. Mr Beniata appeared for the appellants and Ms Taoaba for the respondents. The following exchange then took place between the Judge and counsel:

COURT: Mr Beniata and Ms Taoaba. 8th January told Mr Beniata the application to re-open must be supported by affidavit before the Court could consider it. For hearing of application on 5th February. On that day the affidavit was not yet sworn. Mr Beniata warned that unless affidavit was filed and served within good time application will be struck out. Here we are today.

.....

BENIATA: Not really Your Honour. It was sworn on Wednesday.

COURT: It was sworn on the 17th but didn't get to the Court till the 18th and today is the 19th.

BENIATA: I think my learned friend has received a copy but then Your Honour I have a problem with this case.

COURT: Yes, what's your problem?

BENIATA: I have to withdraw from this case and the reason for that Your Honour is that we cannot agree. The client cannot accept the advice that I was advising him and so I asked him to look for another counsel and yesterday afternoon they have taken all their documents and I hope that they will soon find another lawyer.

COURT: This can't go on and on. Struck out on 25th September for want of prosecution. Who is Mauriin Tonika?

BENIATA: That's the lady who's acting for the issues of Tekoa Karotu, the appellant. That's my problem Your Honour I cannot force advice to continue the case --

COURT: What do you say Ms Taoaba?

TAOABA: Your Honour my client really want to have this case heard quickly because the appellants are occupying the land. They've been occupying the land since the case started in 2007 and --

COURT: This is now three years old.

TAOABA: Yes Your Honour.

COURT: Still messing about.

TAOABA: That's right Your Honour. My client had been wanting to go on to the land but this appeal has been preventing them from doing so.

COURT: I think we'll strike the application.

BENIATA: Your Honour I think to be heard fresh.

COURT: No we've got to consider the interests of the respondents as well. This has been going on for three years now. Too long. Ms Taoaba says her clients want

to get on to the land and that's that. Your clients have just messed about and now they're trying to buy more time by sacking you and going to somebody else.

BENIATA: No I told them Your Honour that they have to get their lawyer in two weeks.

COURT: Maybe that's alright to tell them that but it's too late.

BENIATA: And you see Your Honour their case is on ---

COURT: The affidavits are pretty --- we were not present on that day because we were not informed by our lawyer. That was not necessary. A party doesn't have to be here for the case to be heard.

BENIATA: They instructed me Your Honour that Karotu who is their lawyer was transferring their case to Ms Kirata and they believe that Ms Kirata was not really aware of what their case was all about. That's when they complained they didn't turn up because Ms Kirata didn't inform them of the hearing date.

COURT: Application dismissed.

(the underlining was inserted by us for emphasis).

5. It appears from this exchange that His Honour had divined that the appellants were trying to buy more time by changing their legal representatives. There was no evidence of this fact which was disputed by the appellants.
6. His Honour exercised his discretion upon the basis of an alleged ploy by the appellants "to buy time".
7. The Judge exercised his discretion under a misapprehension of fact in that he acted upon the basis of a matter which was not proven when he dismissed the application to re-open the appeal.

8. The proceedings have miscarried.
9. The order of the High Court dated 19 February 2010 will be set aside. The matter will be remitted to that Court for rehearing of the application to re-open (which was filed on 27 November 2009). There will be no order as to costs of the appeal to this Court.



Paterson JA



Williams JA



Barker JA