

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

Land Appeal No. 2 of 2019

BETWEEN NAWAIA BWEBWENTEKAI AND OTHERS APPELLANTS

AND SUSAN REUE AND OTHERS RESPONDENTS

Hearing: 23 November 2021

Before: Blanchard JA
Hansen JA
Heath JA

Counsel: Ms T Timeon for Appellants
Mr T Tentau for Respondents

Judgment:

JUDGMENT OF THE COURT

The appeal

[1] This appeal concerns the boundary between two properties (the disputed land), known as Teabanimate 779-i and Tabweao 780-a, situated in Teaoaraereke, South Tarawa. The boundary was based on a survey undertaken in 1975, which was, on an application for rectification of the boundary marks between the two areas of land, confirmed by the Magistrates' Court on 22 September 2011.

[2] Susan Reue and other owners of Tabweao 780-a sought and obtained an eviction order from the Magistrates' Court to remove Nawaia Bwebwentekai and other occupants from the disputed land, which lies to the east of the line of survey pegs marking the boundary between Tabweao 780-a and Teabanimate 779-i. Nawaia Bwebwentekai appealed against that order. The High Court dismissed the appeal, the consequence of which was that the eviction order remained in place. A second appeal is now brought to this Court.

Procedural background

[3] The application for an eviction order was made on 1 October 2016, and heard on 31 October 2016. The application was opposed on the grounds that the boundary determined by

the Magistrates' Court in 2011 was, in fact, in the wrong place. Nawaia Bwebwentekai's position was that he and his family were (and always had been) on their own land, Teabanimate 779-i.

[4] A translation of the minutes of a hearing on 31 October 2016 indicates that while there had been some dispute about timing, the eviction order was made by consent. We draw that conclusion from the following exchange between the Magistrate and counsel for the occupants:

Counsel: Your Worship, *having talked with my clients, they agree to vacate the land but they ask for time to remove their properties. I ask for three months, maybe.*

Court: What are their properties?

Counsel: They have lots of properties Your Worship such as their houses and other things.

The Court hereby decides that the defendants and their companions should vacate the land owned by the plaintiffs, and to have their houses removed within two months. Due date 31st December 2016.

(Emphasis added)

[5] The High Court appeal was filed on 13 February 2017 but did not come on for hearing until April 2019. Sadly, Nawaia Bwebwentekai died on 15 January 2018, between the date of the Magistrates' Court's order of 31 October 2016 and the hearing of the High Court appeal in 2019. The appeal was pursued by Nawaia Bwebwentekai's co-appellants, who were also occupants of Teabanimate 779-i.

[6] The appeal took an unusual turn. Lambourne J, in "the interests of bringing this dispute to an end", ordered that the Director of the Land Management Division of the Ministry of Environment, Lands and Agricultural Development (the Director) make arrangements for a qualified surveyor to go onto the site and plant survey pegs, spaced regularly from lagoon to ocean, along the boundary between Teabanimate 779-i and Tabweao 780-a, relying on the 1975 survey on which the Magistrates' Court had based its 2011 decision. This order was made without opposition from either party.

[7] The Director caused a survey to be completed in a manner consistent with the Judge's direction. On 18 July 2019, Lambourne J ordered that the Director make available copies of

all material relating to the survey, to the expert instructed by the appellants, Tebutonga Ereata. In so doing, the Judge was giving the appellants an opportunity for their surveyor either to agree with or object to the result of the survey undertaken on behalf of the Director on 1 May 2019.

[8] Tebutonga Ereata, undertook two forms of audit:

- (a) The first involved reviewing and checking all calculations and paperwork to confirm that they had been done in accordance with appropriate survey standards and were accurate;
- (b) The second, undertaken through a site visit on 31 July 2019, was to confirm that the boundary markers placed on the ground were correct and justified.

[9] In a report to counsel for the appellants, dated 1 August 2019, Tebutonga Ereata confirmed that the boundary between Teabanimate 779-i and Tabweao 780-a had been correctly identified by the Director's survey, which was consistent with the 1975 survey on the basis of which the 2011 order had been made.

[10] On 16 August 2019, based on the information then available to him, including the survey undertaken at the Director's request and the report of the appellants' expert, Lambourne J (without opposition) made the following orders to dispose of the appeal:

- (a) *The appellants and all other persons presently in occupation of land Teabanimate 779-i (that is, to the east of the line of survey pegs marking the boundary between that land and Tabweao 780-a) must vacate Teabanimate 779-i and remove all possessions and structures (whether permanent or temporary) no later than 4.00pm on 12 September 2019.*
- (b) Any person remaining in occupation of Teabanimate 779-i after that date risks being found to be in contempt of this order, and the Court may order such person to be arrested and imprisoned so as to enforce compliance with this order;
- (c) Any thing or structure remaining on Teabanimate 779-i after that date will be taken to have been abandoned by its former owners, and will be liable to removal and/or destruction.

(Emphasis added)

[11] As a result of those orders, the appeal was dismissed.

Analysis

[12] We are asked to reverse the High Court's order. Notwithstanding the unchallenged terms of the 2011 order and the agreement between the surveyors who reported to Lambourne J, the appellants continue to press their proposition that the boundary is in the wrong place.

[13] Ms Timeon, for the appellants, raises two grounds of appeal:

- (a) First, the High Court Judge failed to address the specific point on appeal. Instead, he embarked upon an inquiry into the boundary of the two properties without giving the appellants an opportunity to "cross-examine the Surveyor". This process, it is said, created an unfair hearing.
- (b) Second, the only named party on whom the decision could have been binding was the late Nawaia Bwebwentekai. That notwithstanding, the High Court ordered that (unnamed) others in occupation of the land be evicted. It is said that people who were not parties to the proceeding had no opportunity to be heard on that order.

[14] For the following reasons, there is no merit in either of the appeal points:

- (a) This is a case in which Nawaia Bwebwentekai "and his companions" consented to an order for eviction in the Magistrates' Court. Those who prosecuted the High Court appeal on behalf of the late Nawaia Bwebwentekai (who may be assumed to be the "companions" to whom the Magistrate was referring) acquiesced in the process undertaken by Lambourne J to establish the boundary and did not object to that being done. Once the appellants' expert agreed to the location of the boundary, Lambourne J had no option but to dismiss the appeal and uphold the eviction order. That order was made without opposition from the appellants. Indeed, there was no basis on which the order could have been opposed given the agreement between the surveyors engaged by the Director and the appellants respectively.
- (b) There was no need for either surveyor to be cross-examined in the High Court. There was no disagreement between the surveyor instructed by the Director

and the surveyor engaged by the appellants. No question of unfair trial can arise in those circumstances.

- (c) The fact that the High Court's order extended to "all other persons presently in occupation of Teabanimate 779-i" was plainly intended to encompass the co-appellants; siblings who were resident on the land, as well as others in occupation who may properly be regarded as within the group of "companions" to whom the Magistrate directed the order of 31 October 2016. In any event, the effect of the High Court's order is to fix the boundary in a way that would result in any person in occupation of the disputed land without the consent of the owners of Tabweao 780-a becoming a trespasser.

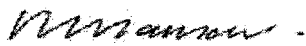
[15] Ms Reue and her family had brought the eviction application on the basis of the 1975 survey and the 2011 order confirming it. There was no appeal from the 2011 order. Notwithstanding the authoritative status of that order, Lambourne J permitted an additional inquiry to be made into its location. A surveyor engaged by the Director and one instructed by the appellants agreed that the boundary was correctly located. In those circumstances, no further challenge to the boundary location can be justified. The appeal must fail.

Result

[16] For those reasons, the appeal is dismissed with costs. In the absence of agreement, they shall be fixed by the Registrar.



Blanchard JA



Hansen JA



Heath JA

