SUPREME COURT OF THE TERRITORY OF PAPUA AND NEW GUINEA

IN RE SULKA LAND RESERVE (SULKA No.1)

The Supreme Court (the Chief Justice) on Appeal from the Decision of the Commissioner of Titles at RABAUL, 23rd March, 1961 and at PORT MORESBY, 2nd May, 1961.

Restoration of titles - need for service

After preliminary hearings at Port Moresby on 4th and 7th May, 1958 the Commissioner of Titles conducted hearings at Rabaul on 14th, 15th and 25th May and 23rd June, 1959 and at Sulka on 18th May, 1959 at which J.P. O'Shea, Counsel for certain TOLAI claimants and F.N.Warner Shand, Counsel for the Director of Native Affairs appeared. On 28th July, 1959 the Commissioner made a Final Order declaring the SULKA area to be a Reserve vested in the Director as trustee for the Sulkas. Section 45 requires the Commissioner to forward such Order to certain persons listed in s.34 and also "to any other persons whom he knows to be affected by" it. On 28th August, 1959 a copy of the Order was sent to the Director but not to the unsuccessful Tolai claimants or their Solicitor. Section 54 says "(1) A person aggrieved by a final order may, within thirty days after service on him... appeal to the Supreme Court against that Order ....." Those Tolais saw their Solicitor in Rabaul who filed a Notice of Appeal on 4th November, 1959, but on the previous day - i.e. the 3rd November, 1959 - the Registrar of Titles at Port Moresby had issued a Certificate of Title in pursuance of the Commissioner's Final Order. The question of the effect of that Certificate of Title was not argued, the only question before the Court being whether Notice of Appeal was in time when the appellants had no notice of the Order.

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Held:

(i) The Tolais were entitled to notice of the Final Order - para 20.

(ii) "In default of such a notice, the time for Appeal has not yet expired" - para 20.

(iii) The Appellant Tolais "are therefore properly before the Court " - para 20 - and their "appeal will therefore remain in the list for hearing" - para 22.

(iv) "It would be appropriate before the proceedings go any further, for the parties to seek whatever representative orders may be required to ensure that all possible claimants including absentees, persons under disability and generations as yet unborn, should be represented before the Court, and bound by the Court's determination" - para 21.

Dudley Jones, for the Tolai appellants (Tolililu of Moramar and Tolikum of Ralabang) submitted that the requirements of s.45 were clear and made it necessary to serve his clients individually; the Commissioner knew they would be affected by his Final Order because they had claimed the land at his hearings. Since they had not been so served time had not begun to run and their appeal was therefore in time.

A. Germain, for the Sulkas in whose favour the Final Order appealed against was made, took the preliminary point that service on the Director of Native Affairs was sufficient service on any Native, including the Tolai appellants, and that therefore the appeal was out of time and incompetent. He referred to AMODU TIJANI v The Secretary, Southern Nigeria (1921) 2 A.C. 399.

P.J.Clay, for the Director of Native Affairs, did not argue the preliminary point. He referred to The Victorian Stevedoring and General Contracting Co. Pty. Ltd. v Dignan (1931) 46 C.L.R. 73 on the general question of appeals by way of rehearing.

Cases referred to:-

(i) AMODU TIJANI v THE SECRETARY, SOUTHERN NIGERIA (1921) 2 A.C. 399

(ii) VICTORIAN STEVEDORING AND GENERAL CONTRACTING CO. LTD. v DIGNAN (1931) 46 C.L.R. 73

cur. ad. vult.

On 2nd May, 1961 the Chief Justice read the following judgment at PORT MORESBY:-

MANN C.J.

Mr. Jones, who appeared for the 1.
Appellants, asked me to deal first with a preliminary point which was causing him some difficulty. He had only just been informed that on the 3rd November, 1959 the Commissioner of Titles had in fact registered the title and issued the Certificate of Title Numbered RT126 in terms of the Final Order.

Mr. Jones' principal clients had been notified 2.
of the making of the Final Order through Officers of the Department of Native Affairs and had received no other notice. Upon hearing of the making of the Final Order they promptly communicated with Mr. Jones and gave him instructions whereupon he despatched a Notice of Appeal on the 4th November, 1959 to his Agent in Port Moresby, who on the 5th November sent the Notice of Appeal to the Commissioner of Titles and the Director of Native Affairs.

Mr. Jones knew that there would be some objection raised to the lateness of his clients' Notice of Appeal, but he has been relying on the lateness of the informat on which reached his clients through the Department as an answer, and did not realise that in the meantime a Certificate of Title had been issued. On the assumption that the present Appeal is by way of re-hearing and that the Court should determine the rights and interests of parties as at the date of the hearing of the Appeal, it would appear that the Certificate of Title, having been issued, would constitute conclusive evidence of those interests. Mr. Jones therefore desired time in which to consider his clients' position, and if necessary take some appropriate proceedings to set aside the Certificate of Title upon the ground, inter alia, that it was issued before the expiration of the time specified in Section 47 of the Lands Registration Ordinance 1924-1951. 3.

Mr. Jones therefore asked me to determine as a preliminary question, whether under the New Guinea Land Titles Restoration Ordinance his clients were entitled to receive notice of the making of a Final Order. If so, proper notice has not yet been received, and there can be no objection on the score of the Appeal being out of time. I cannot on the present application determine in the absence of the Commissioner of Titles as a party, whether, if the time has not yet expired, the Appellants are entitled to have the Certificate of Title set aside. 4.

Mr. Jones' contention as to notice is 5.
simply based on the provisions of Section 34(2) of the New Guinea Land Titles Restoration Ordinance 1951 which provides for certain notices to be sent to persons of various descriptions, and the provisions of Section 45 which provides for notices and copies of the Final Order to be sent by registered post to the persons specified in paragraphs (a) to (h) of Section 34(2). Mr. Jones contends that his clients clearly come within the provision of several of the sub-paragraphs of Section 34(2). This point does not appear to be disputed if the Section is to be given its literal interpretation. Mr. Jones then goes on to contend that under Section 54 of the same Ordinance, the time for filing of a Notice of Appeal has not yet expired.

Mr Germain, who appeared by leave for 6.
the Sulka Natives, contended that in such a case a literal construction cannot be placed upon the provisions of Section 34(2), for this would lead to absurd results. Very many Native individuals, clans and other groups of people make all sorts of varying claims, or, even when they made no claim, might still have some connection with the land coming within the literal terms of the Section. It would be absurd to suppose that the legislature intended to impose on the Commissioner the task of discovering the identity of all these claimants and sending to each of them a registered letter containing the required information.

Looking at the matter from the viewpoint of administrative convenience, Mr. Germain contended that no such intention could be attributed to the legislature. He contended that if the Ordinance was looked at as a whole, in conjunction with other legislation and the known situation with regard to Native land in the Territory, it would emerge clearly that the general intention of the Ordinance is to deal with Native interests in land quite differently from the interests of non-Natives, including Europeans. In the case of Native claimants the whole responsibility for representing the Natives rests with the Director of Native Affairs, and under Section 38 the Director takes charge of the proceedings on behalf of natives. The Director therefore is always an essential party, but the other persons described in Section 34(2) are, by inference, persons who are not Natives entitled to or claiming some interest by virtue of Native custom. Mr. Germain referred to a number of definitions and other provisions of this Ordinance and of the Lands Registration Ordinance, parts of which are replaced by the present Ordinance.

Further, Mr Germain contended that the 7.
Laws Repeal and Adoption Ordinance preserves Native customary rights which therefore operate of their own force. He referred to the Amodu Tijani case (1921) 2 A.C. 399.

It is, according to this view, impossible 8.
for any Native to have any legal interest in land which he could assert as a party to any proceedings except

through the Director of Native Affairs. The Natives are regarded as persons under disability, and the Director fulfils functions which they are not capable of fulfilling for themselves.

In his reply Mr. Jones contended that 9.
there was no ambiguity in the provisions of Section 34(2), and that it is clear from the transcript of proceedings before the Commissioner of Titles that some of his clients appeared and gave evidence and were entitled to be directly represented as parties. It is not to be inferred that the Director is intended to take exclusive charge of the interests of all Native contenders, for in many cases including the present one, there are conflicting claims and interests. Division 4 of the Ordinance only puts a duty on the Director - a very necessary and desirable duty for him to perform - but does not expressly or by implication exclude Native claimants from taking proceedings on their own behalf if they see fit.

Looking at the matter as a simple 10.
question of construction, I would not have had any doubt that Mr. Jones' contention was correct. It certainly appears strange that an Ordinance should provide that every contender should receive a registered letter, but on the other hand it does not follow that this is an absurdity. The real defect in the Ordinance seems to me to be that an administrative inquiry as to the existence and contents of lost documents is extended to the determination of claims which should be left to judicial process.

The real force of Mr. Germain's 11.
contention is that it may be seen from this and other Ordinances, notably the Native Land Ordinance of 1952, that the legislation is based on definitions of Native land, Native land tenure and the like, which appear to suppose that Natives hold their interests in land, not by virtue of the general law, but by Native customary rights which operate either from their own force as a species of Native law, or by virtue of the Laws Repeal and Adoption Ordinace.

That such a view has been widely held in 12.
the Territory is clear from a number of official publications of a non-legal character, one of the latest of which is the official publication "Australian Territories" Volume 1, No. 1 of December, 1960, on Page 12 of which appears an article on Land Tenure in Papua and New Guinea. The basis of this viewpoint is derived directly from experience of British Colonial Administrations in Africa and elsewhere. Some discussion on the point of view officially adopted in Africa is included in the Journal of African Administration Volume 7 at page 151, and again in the same Volume there appears at page 197 a Symposium on the Future of Customary Law in Africa, which gives some indication of a shifting viewpoint in relation to Native customary law in more modern times.

In borrowing from experience gained in 13.
British Colonial Administration, it must be remembered not only that the Territory is not being administered as a British or Australian Colony, but that the

Commonwealth has undertaken specific obligations to the Native population inconsistent with the objectives of Colonial Administration in the early days. It must also be borne in mind that the Territory is being administered under a Constitution set out in the Papua and New Guinea Act which observes the notion of a separation of powers, so that the confluence of administrative and judicial functions, which is so apparent in early Colonial Administration, is not appropriate in the Territory. Therefore, any view other than a legal view, even if it be to some extent an official view of what constitutes Native land tenure, cannot prevail in the Courts of the Territory.

A further difference is that whereas it 14.
was found expedient in most of the early colonies to adopt Native laws and tribunals as far as possible in relation to all matters which directly affected the established Native social order, and to build up Native Courts with the aid of a few well-placed legal fictions so that they would become incorporated into the ultimate legal structure of the community, the position in the Territory is and always has been entirely unsuited to such a course. As Sir Hubert Murray pointed out in his notes on Colonel Ainsworth's Report on the Mandated Territory of New Guinea, there never was anything remotely resembling administration of justice amongst Natives of Papua.

Further, there are not simply a few 15.
major Native groups in the Territory. The Natives are divided into many hundred of distinct linguistic

groups and within most of these groups there are very many separate and distinct social systems. The problems are very much akin to those which arise in international law, for no social custom could operate effectively outside the limits of the group, and even within a group itself there was frequently the utmost uncertainty in the observance, or even the recognition, of social customs, for lack of effective sanctions, as well as for lack of anything approaching the concept of a legal right or obligation.

Therefore, in my view, it adds nothing 16.
to the solution of these problems to say that since Native customs are adopted they can operate of their own force, for they never had any legal force, and, in any case, with the ever increasing communications between individual social groups, an increasing proportion of disputes would immediately appear to arise outside the possible scope of any native custom.

In the early days of Papua, Sir Hubert 17.
Murray, who was much impressed by Lugard's theory of "Indirect Rule", tried to create a foundation upon which indirect rule could late be introduced. He fully recognised that indicrect rule as such could not be applied, for there was no form of government which could be adopted, but on humanitarian grounds he thought it appropriate to proceed by the closest analogy practicable, and he appointed village officials to try to establish a starting point. At the same time the policy was formally established that Native lands must be protected, and the protection was sought to be

achieved by analogy with colonial administrative experience obtained elsewhere.

18. The difficulties which have been encountered in more recent times in Africa and other countries indicate that more progress might well have been made and greater protection afforded to the Natives, if, from the beginning, the legal approach had been made to this whole question, and the Natives had been afforded full access to the Courts to determine their disputes. The result, at the present time, is that there is no developed land law in the Territory applicable to Native land, and economic development has brought about an urgent need for it.

19. The only decision which I can recall, dealing with any aspect of Native land, is Geita-Sebea v. Papua (1941) 67 C.L.R. 544, where the High Court of Australia accepted the view of the trial Judge that the interests claimed by the Natives in that case were in the nature of usufructuary rights. This case however does not help to determine the starting point for a legal approach to Native land tenure, for it only concerned a subsidiary title claimed by persons forming a sub-group of a local community.

20. Having regard to the terms of the present constitution and the impossibility of merely adopting Native custom in the Territory as a separate system of land law, I cannot accede to Mr. Germain's proposition that Section 34(2) of the present Ordinance must be interpreted upon the footing that Native rights in

relation to land are something quite separate and distinct in character from rights which would be possessed by non-Natives setting up comparable claims to the same land. I think that all persons, Native or otherwise, coming within the terms of Section 34(2), were entitled to receive the appropriate notice, and that in default of such a notice the time for Appeal has not yet expired and that the Appellants are therefore properly before the Court.

I think I should mention that since this 21.
Appeal appears to be in the original jurisdiction of the Supreme Court, coming by way of re-hearing from an administrative tribunal, it would be appropriate before the proceedings go any further, for the parties to seek whatever representative orders may be required to ensure that all possible claimants including absentees, persons under disability and generations as yet unborn, should be represented before the Court, and bound by the Court's determination.

I have read the whole of the record of 22.
proceedings before the Commissioner of Titles, but I am not concerned at the moment to determine the rights, if any, of any of the parties to this Appeal. All I decide is that the interests of the Appellants, if any, are legal interests in land, and are to be assessed and protected by law, and that their Notices of Appeal were given within the statutory period. The Appeal will therefore remain in the list for hearing.

((end)).

../13

In re. Sulka Land Reserve

Appeal ordered to remain in list

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the Chief Justice and
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Counsel.

Dudley F. Jones, Barrister and Solicitor, Mango Avenue, RABAUL

Anthony Germain, instructed by the Public Solicitor.

Peter J. Clay, instructed by the Secretary for Law.