SC 604

IN THE SUPREME COURT)
)
OF THE TERRITORY OF)
)
PAPUA AND NEW GUINEA)

CORAM : MINOGUE C.J.

Wednesday,
9th December 1970

RE APPLICATION BY THE ENDUGWA GROUP
FOR ORDER NISI FOR CERTIORARI

1970

Dec 8, 9.
KUNDIAWA.

Minogue CJ.

This is an application for an Order Nisi directed to Mr. M.B. Orken who in 1962 was a Commissioner appointed under the Native Land Registration Ordinance of 1952 whereby he should be ordered to show cause why a Writ of Certiorari should not issue compelling him to bring up into this Court the record of the Native Land Titles Commission touching certain claims by the Endugwa and the Kamanegu Groups in the Chimbu District to the ownership of land, and why the proceedings of the Native Land Commission or the order made in those proceedings should not be quashed.

To understand how the application is founded it is necessary to go back to the year 1962, to note the relevant legislation in existence at that time in order to see what it was that the Commission was set up to do and what it purported to do in this case.

In mid-1952 the Native Land Registration Ordinance of 1952 came into operation. That Ordinance was expressed to be "An ordinance to provide for the ascertainment and registration of the ownership of native land." Under it there was set up a Native Land Commission consisting of a Chief Commissioner and such other Commissioners as the Administrator considered necessary (Sec.6(1)) and each Commissioner was to have and exercise alone all the powers and functions conferred upon the Commission (Sec.6(3)). The Commission's major function was set out in Sec.8. It was to enquire into and determine -

(a) what land in each district of the Territory is the rightful and hereditary property of natives or native communities by native customary right;

(b) the natives or native communities by whom and the shares in which that land was owned.

Division 2 of Part II was headed "Proceedings". By Sec.10, without prejudice to the general operation of the Ordinance, a native claimant could apply to the Commission to have his land dealt with under the provisions of the Ordinance, and by Sec.12 a native or native community claiming to be entitled to possess native customary rights in relation to land was to -

(a) mark out and define the boundaries of that land; and
(b) notify the Commission of the claim in the prescribed manner.

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If there was no dispute as to ownership of the land so marked out Sec.13 applied and directed the Commission unless it had good grounds to the contrary to record the native claimants as the native owners of the land described within the boundaries set out in the claim. If there was a dispute as to ownership Sec.14 directed the Commission to enquire into the dispute and after hearing all parties interested who desired to be heard empowered it to determine the question of ownership and record its decision. The section also made provision for boundaries as the result of a compromise being recorded and for the Commission to act as mediator. By Sec.15 at the conclusion of the enquiry as to the ownership of any native land the Commission was to announce its decision to the parties concerned.

Under the provisions of Part III there was to be set up a Register of Native Land. The duty to do this devolved upon the Registrar of Titles. He was directed to enter in the Register a description of the boundaries and situation of land the subject of an enquiry before the Commission and the names of the natives or native communities found by the Commission to be a native owner thereof. Entry in the Register constituted a presumptive title only although after five years' existence on the Register without amendment the entry should become conclusive evidence of the title of the native owners referred to therein. I understand that this Register was in fact never set up. Part VI of the Ordinance allowed an appeal against a decision of the Commission to a Native Land Appeal Court which was to be constituted by a Judge of the Supreme Court.

It will be apparent that what the Commission or a Commissioner was both directed and empowered to do was to enquire for the purpose of setting up a Register of Native Land and to incidentally determine any disputes as between natives or native communities as to the ownership of native land.

On the material before me it appears that in 1960 and for some years before there were disputes between the Endugwa and Kamanegu Groups over alleged encroachments by members of each group on lands belonging to members of the other. The groups themselves are not landholding entities in the Chimbu District where these lands are situated. Land is held for some general purposes by the clans but the basic landholding groups are either sub-clans or extended families.

In some way which was not made clear to me Mr. Orken, who was then a Native Land Commissioner, became seized of this dispute and on the 9th day of October 1962 after an exhausting enquiry published what he described as a "Decision" followed by a "Finding" in which he carefully defined the boundary between the lands of the two groups. From his analysis of the evidence and material before him it is obvious that this boundary was intended to define a line which as nearly as may be would conform to the boundary between the group lands in 1938, when so he

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decided government control was first established - a line beyond which neither group should transgress. It is equally obvious that he did not purport to record any "native claimants" as "native owners" of land within boundaries as set out in any claim nor to determine the question of ownership of any land marked out and defined in accordance with the Ordinance.

With the enormous changes which have taken place in the last decade both in policy and in popular attitudes it would be both difficult and improper to criticize what took place on the part of the Native Land Commission in 1961-1962. However, on any view it is clear that there was no legislative warrant for the sort of "Finding" that was made and in legal terms the Commissioner had no jurisdiction to make the order or "Finding" that he did. And that finding in my opinion could not be a finding referred to in Sec.44 of the Land Titles Commission Ordinance 1962-1970.

Those same changes to which I have referred have extended into the administrative, legal and quasi-legal structure. No longer is there a Native Land Commission. It disappeared on 23rd May 1963 - to be succeeded by an entirely new body, the Land Titles Commission rising Phoenix-like on that very same day. This body was to deal with all proceedings pending before the Native Land Commission (see Ordinance No.12 of 1963 - "An ordinance to repeal the Native Land Registration Ordinances 1952 and for other purposes") but was then to go on to perform a much wider function or, perhaps more accurately, group of functions.

Where natives were deemed to possess native customary rights in relation to native land the Native Land Commission Rules of 1952 required that a claim should be delivered to the Commission. I assume that this must have been done as a pre-requisite to the hearing by Mr. Commissioner Orken but I have not had the advantage of seeing it. However, from his very thoroughly prepared "Decision" it is obvious that there were long-standing disputes between the groups to which I have referred as to their territorial boundary. As to the conditions existing in 1962 the Land Commission appears to have achieved a practical working, albeit temporary, solution to the long-standing problems and to have palliated the friction. However, that palliative has been exhausted and the friction continues and may well have become exacerbated. The basic problem is certainly not solved and solution seems a long way off. Yet it is essential to keep seeking.

The present application in my view is an attempt to cut away some dead wood which is thought to be hampering a proper approach to the problem; but unfortunately I think it is misconceived. The Court is to be asked to issue a Writ of Certiorari directed to Mr. M.B. Orken, a Senior Commissioner of the Land Titles Commission. This is not the same Mr. M.B. Orken who until 23rd May 1963 was a Native Land Commissioner. That Mr. Orken no longer exists. Although Sec.13 of the Native Land Registration Ordinance

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directs and Sec.14 permits a Commissioner to record his decision I cannot see that the Native Land Commission can in any way be regarded as a Court of Record. Even if it were its existence has been terminated by legislation and the reasoning of Sly J. in Ex Parte South Australian Brewing Co.Ltd.(1) cannot apply.

I was troubled by Sec.5 of the Native Land Registration Ordinance (Repeal) Ordinance but I cannot see that the section enables this Court to order some custodian of records to bring up the record (assuming there be one) of a non-existent or defunct body to be dealt with. I am fortified in this view when I consider the usual progress of Certiorari proceedings. If a Writ is granted it is either allied with a Writ of Mandamus to compel the body which has erred or gone outside its jurisdiction to hear and properly determine, or if the latter Writ is not sought there is a clear appreciation that the body to whom Certiorari has gone, on its proceedings being quashed, will do what it should have done. There is no person or body here to whom Mandamus could go. It could certainly not go to Mr. Orken and equally certainly not to the Land Titles Commission. There is no proceeding to be properly heard and determined.

In the result I have come to the conclusion that I should not grant an Order Nisi. It is consequently unnecessary for me to consider whether I could direct such issue in this case - although I am certainly of the view that I could. It is clear to me,both from the history of the land disputes in this land-hungry area and from the very large number of what I take to be responsible citizens present at what after all is a technical and quite inconclusive proceeding, that it is essential to try to find some lasting solution to the problems besetting us in this area - problems which if not solved can only lead to further mayhem and violent death. Although it forms no part of my decision I think it proper to express my view that all parties concerned ought as soon as possible to formulate claims for hearing before the Land Titles Commission. Further, in view of what in my judgment is a potentially and immediately dangerous and explosive situation I would hope there would be a Land Titles Commissioner available to as expeditiously as possible deal with these claims, and begin what must of necessity be protracted and arduous hearings.

Application dismissed.

Solicitor for the Prosecutor : P.J. Clay, Crown Solicitor.
Solicitor for the Respondent : W.A.Lalor, Public Solicitor.

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(1) (1908) 8 S.R.(NSW) 361 at 395.