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

CORAM: KELLY, J.

Thursday,

25th November, 1971.

BETWEEN THE DIRECTOR OF DISTRICT ADMINISTRATION on behalf of SINILA TELAWUT of the MOHOMARABA Clan, RUTIN LASBUT of the MOKOMODEI Clan, LAPASEI KAMBAS of the MOHOKALA Clan, BOPEI TAMANGAN of the MOHOMAF Clan, KOLOSEI PAKIN of the MOHOMUNA Clan, SONGAT MATMAGOR of the MOHOTIRIN Clan and SARAKAIS MATAREI of the MOHONUAS Clan

Appellant

AND THE ADMINISTRATION OF THE TERRITORY OF PAPUA AND NEW GUINEA

Respondent

In re Madina and Madina Foreshore Reserve

1971
Oct 14
KAVIENG
Nov 25
PORT MORESBY
Kelly, J.

This is an appeal from a final order of the Land Titles Commission relating to land in the district of New Ireland known as Madina and Madina Foreshore Reserve being respectively Portions 200 and 200A. The Commission was dealing with a claim made by the Administration on 6th June, 1957 under the New Guinea Land Titles Restoration Ordinance whereby it claimed to be entitled to a freehold interest in land said to have been acquired by transfer from native owners. Provisional orders in favour of the Administration, which between them covered the whole of the subject land, were made on 29th April, 1966 and 21st November, 1969. By its final order dated 31st March, 1971 the Commission declared that it was established that on the appointed date there was absolute ownership of the land by the Administration, that the Administration was entitled to be registered as owner and that no native customary rights were retained on the appointed date by a native or native community in respect of the land or any part thereof.

The appellant, the Director of District Administration, brings the appeal on behalf of seven named natives representing their respective clans. At the hearing before the Commission oral evidence was given by native witnesses the general

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effect of which was indicative of there having been no sale from native owners to the Administration. The Administration is unable to prove registration as the owner of a freehold estate prior to the destruction of the register and is compelled to rely on Sec. 67(3) of the Restoration Ordinance. It is unable to produce any direct documentary evidence of the transfer on which it relies but points to notices in the New Guinea Gazette in September, 1934 and January, 1935 referring to a transfer from natives of the subject land which was then said to be the subject of a draft certificate of title in which the Administration was named as owner as being evidence of the fact that there was such a transfer of the freehold from the native owners to the Administration. The Commission found that the evidence establishes prima facie that the Commissioner for Lands produced to the Registrar a transfer from natives of Portions 200 and 200A duly authenticating a purchase by the Administration under the provisions of the Land Ordinance 1922-1941 and that a proper plan of that land accompanied the transfer thereby entitling the Administration to be registered as the owner in a Certificate of Title registered pursuant to the provisions of Section 42(2) of the Lands Registration Ordinance. It is this finding which the appellant primarily attacks. Counsel for the appellant concedes that he is compelled to accept the fact that there was a transfer as recited in the Gazette notices but submits that in the absence of evidence as to the terms of such a transfer it cannot be presumed that it was a transfer of a freehold interest.

The Commissioner of Titles had on 21st August, 1957 made a final order under the Restoration Ordinance as it then stood on a claim made by New Ireland Plantation Limited on 4th September, 1952 to be entitled to a leasehold interest in Portion 200 which comprises the major part of the land the subject of the present appeal. In support of its claim the Company had produced an Agricultural Lease dated 20th July, 1934 granted to it by the Administrator of the Territory of New Guinea for a term of 99 years from 25th March, 1927 and registered in the Register of Administration Leases on

17th September, 1934. By this final order the Commissioner declared that it was established that on the appointed date the interest owned by the Company was a lease on the terms and conditions set out in the lease document and he further declared that no native customary rights were retained on the appointed date by a native or native community "in respect of the land the subject of this order or any part thereof". After the making of the provisional order in relation to this claim to a leasehold interest on 13th October, 1952, the Director of Native Affairs had given a certificate under Sec. 36 of the Restoration Ordinance dated 27th September, 1956. No corresponding certificates were given by the Director of District Administration in relation to the claim to the freehold and in the case of each of the provisional orders there made he referred the question of native customary rights to the Commission. The Commission appears to have given some weight to the Sec. 36 Certificate issued in 1956 and this is the subject of one of the grounds of appeal.

Counsel for the appellant concedes that the Administration must have had sufficient interest to support the registered lease but submits that the evidence does not establish that the Administration had any greater interest than this. On the basis that it is not shown that the Administration had any reversion after the granting of this lease his primary submission is that on the appointed date the Administration had no interest in the land and therefore was not entitled to be registered as owner of an interest and that full native customary rights were retained on the appointed date. Alternatively he submits that on the appointed date the Administration was owner of a leasehold interest for 99 years from 25th March, 1927 and is entitled to be registered as owner of that interest and that it should be ordered that on the expiration of that leasehold interest the land shall revert absolutely to the owners by native customary right.

Other grounds of appeal were the rejection by the Commission of the evidence of the native witnesses and the failure of the Commission to comply with the provisions of Sec. 20 of the Evidence (Land Titles) Ordinance 1969.

Evidence was given by three native witnesses who claim to have been alive at the relevant time, one

then being a young man, one an adolescent and one a child. There is nothing in the Commission's judgment to indicate that it did not accept that these witnesses were alive at the time of the events which they purported to describe even though it gave little weight to their evidence as against the documentary material on which its decision was based. The effect of the evidence of these witnesses was that at a time which would appear to have been either during or shortly after the First World War a European named Ben Mocatta came to Madina village and built a trade store. He married a girl from the village and was then given permission by the lululai to use an area of land on which there were gardens, presumably the present Portion 200, which was then cleared for him and coconuts planted there. Mocatta was later joined by his brother Hugh and, although he was not given permission by the villagers to sell the land, after leaving the village he did so, the purchaser presumably being New Ireland Plantations Limited. Some time after Mocatta left a kiap came to the village and asked the villagers if they would sell the land but they told him they would not do so; they told the kiap that they had not been paid for the plantation. At an earlier stage during Ben Mocatta's time at Madina, he also tried to obtain what would appear to be the present foreshore reserve (Portion 200A); a kiap came and paid the villagers for the coconuts which they had on the land but the witnesses claim that they were paid for the coconuts only and not for the land.

The Commission described this evidence as being sketchy, in parts contradictory and its credibility affected by the self interest of each witness in the manner (sic) of the claim. I must say with all respect to the Commission and having due regard to its undoubted advantage of having actually seen and heard these witnesses that this seems rather harsh criticism. In addition there was one circumstance relating to the question of survey on which the Commission relied heavily to discredit one witness Rutrua Leblust whom they considered was endeavouring to mislead the Commission and further his own interests. I can only say that I would have hesitated to draw such an inference on the basis of the answers given.

The documentary material upon which the Commission relied has to be considered in the framework of

the legislative provisions then in force. It is not asserted that the land here in question was land which had been registered in the German Land Register or Ground Book or land in respect of which a person was entitled to be registered at the relevant date (9th May, 1921) under the laws then in force. Consequently if the Administration had acquired an interest in the land by transfer from its native owners and then sought to have that interest registered under the Lands Registration Ordinance 1924 as amended from time to time, it would have to take the appropriate steps under Sec. 42(2) of that Ordinance which provided that where any land or any estate or interest in land (other than land in categories which are not applicable here) is or has been acquired by the Crown or the Administration or has become Crown land or Administration land under the provisions of any Ordinance or law, the Registrar, upon production of such evidence of title as he deems sufficient or as may be prescribed by any Ordinance, accompanied by a proper plan and description of the land, shall bring the land under the Ordinance by registering, in manner provided in the Ordinance, a Certificate of Title in the name of the Administration of the Territory. The requisite evidence of title was not prescribed by any Ordinance so that it was in the discretion of the Registrar what evidence of title he deemed sufficient.

The Registrar of Titles was at that time appointed by the Governor-General, was required to take an oath of office prescribed by the Ordinance and amongst the powers given to him by Sec. 11 were those enabling him to require production of instruments affecting land about to be brought under the Ordinance and to summon any person to appear and give evidence respecting the land or the instruments affecting the title thereto. As in the case of the holders of corresponding offices under the Torrens Title legislation of the Australian States, the Registrar was required to exercise a judicial discretion in carrying out his duties. As is pointed out by the Judicial Committee in Manning v. Commissioner of Titles (1), referring to the corresponding official under the Western Australian legislation, he is not a mere machine and where notice has been given of an application (in that case pursuant to a statutory obligation to do so) his investigations

(1) (1890) 15 App. Cas. 195 at p. 201

prior to registration cannot be complete until it is seen what the notices produce. In Municipal District of Concord v. Coles (2) Griffith, C.J. referred to the duty of the Registrar-General (as he was there called) if he has reason to believe that giving effect to the application in compliance with its terms would do an injustice to the public or to an individual to stay his hand until the matter is properly investigated. In Templeton v. Leviathan Proprietary Ltd. (3) Higgins, J. while stating, at p. 60, "Prima facie, it is the duty of the Registrar to register any instrument presented in proper form and signed by a person competent in law, and according to the title as appearing on the register, to effect the dealing presented by the instrument." went on to point out, at p. 64, "The Registrar has to discharge not merely ministerial but also judicial duties; and it is his duty to 'prevent instruments from being registered which in law, as well as fact, ought not to be placed on the register'". Starke, J. concurred with the opinion of Higgins, J. on this subject.

It appears that in the exercise of the discretion thus reposed in him the Registrar chose to adopt the procedure prescribed in Division 2 of Part III in the case of land registered in the Ground Book or in respect of which a person was entitled to be registered at the relevant date. In those cases the prescribed procedure was obligatory before land could be registered under the Ordinance but this was not the case where registration under Sec. 42(2) was sought, even though that section is contained in Division 2. No doubt it was a convenient procedure, but as Minogue, J. (as he then was) pointed out in Tolain & Ors. v. Administration (the Vulcan Case) (4) the procedure provided by the specific provisions of Division 2 directed to the bringing under the Ordinance of land which was alienated or in the process of alienation when the Lands Registration Ordinance was made is not the procedure "prescribed" by Sec. 42(2).

The notice given by the Registrar and published in the New Guinea Gazette on 29th September, 1934 is described as a "General Notice of bringing land under the Ordinance" and is that provided for by Sec.

(2) (1906) 3 C.L.R. 96 at p. 106
(3) (1921) 30 C.L.R. 34
(4) (1965-66) P. & N.G.L.R. 232 at pp. 276-7

21(1). It gives notice that it is proposed to register under the Ordinance the lands named and described in the Schedule, names the place where the draft certificate of title may be inspected and also names a date for the lodging of caveats by any person objecting to registration. The second notice in evidence, that published in the New Guinea Gazette on 15th January, 1935, is that provided for by Sec. 22. It is a notice given by the Director of District Services and Native Affairs to the effect that he has been served with a draft certificate of title and notice of proposed registration and it appoints a date for the lodging of claims by natives or native communities to rights over the land.

In the case of the subject land the notices indicate that the basis on which it is sought to make title is "Transfer from Natives" and there is a reference to the Index of Unregistered Administration Lands. This is a book which the Registrar was required to keep pursuant to Sec. 43A of the Lands Registration Ordinance, the description being self-explanatory; Subsec. (5) of that section provides that no entry in the Index shall give the Administration any further or other title than that given by the instrument on which the entry was based.

The position which emerges from the documents then is that an instrument or instruments transferring some interest in the subject land was lodged with the Registrar who made the appropriate entries in the Index of Unregistered Administration Lands, prepared a draft certificate of title, gave notice of the proposed registration in the Gazette and also served the draft certificate on the Director of District Services and Native Affairs who in turn gave notice and called for claims by natives or native communities. I think it may also be inferred that a proper plan and description of the land were produced to the Registrar in order to enable the draft certificate of title to be prepared (see Sec. 53 and Fifth Schedule). That, however, is as far as the evidence goes and it does not establish whether any claims by natives were lodged and if so what then ensued or whether in due course registration was effected. There was material before the Commission in the form of statistics to the effect that from the time when the Lands Registration Ordinance came into operation until 30th June, 1940, 1286 draft certificates of

title were published and of these 1170 had matured into registration. No argument was addressed to me as to the inference sought to be drawn from this but if it is sought to infer that there was a 91 per cent chance of a draft certificate of title having ultimately been registered (cf. Vulcan Case (5) (supra)) I would merely observe that such an inference could not really assist in determining the matters on which under Sec. 67(3) the Commission was required to form an opinion.

It will be convenient at this stage to set out the provisions of Sec. 67(3) of the Restoration Ordinance:

> "67(3) For the purposes of this Ordinance, a person shall be deemed to have been entitled, at the appointed date, to an interest in land, and to be entered or registered in a lost register as the owner of, or person entitled to, that interest if, in the opinion of the Commission, he would have been so entitled if -
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> (a) the provisions repealed by this section had remained in force;
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> (b) no relevant document or register had been lost or destroyed; and
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> (c) the procedure prescribed by those provisions had, before the appointed date, been completely applied in relation to that land."

The application of Sec. 67(3) was considered at length by Clarkson, J. in In re Tonwalik Island (6). His Honour there concluded that what the section required was that the Commission should accept that the provisions of the Lands Registration Ordinance (which are now repealed) setting out the procedure required prior to registration had not been complied with, and then having made certain other assumptions, namely that the repealed provisions had remained in force and that no relevant document or register had been lost or destroyed, it must then form an opinion as to what would have been the result if the repealed provisions had been complied with before the appointed date.

It appears to me that this is not the way in which the Commission approached the matter. What it did was to apply the maxim omnia praesumuntur rite esse acta

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(5) (1965-66) P. & N.G.L.R. 232 at p. 258
(6) Unreported judgment No. 526 of 2nd June, 1969.

resulting in a finding that prima facie a transfer of the land authenticating a purchase by the Administration had been produced together with a proper plan and then to go on to hold that by reason of such production the Administration was entitled to be registered pursuant to Sec. 42(2).

I would not quarrel with the finding that on the evidence prima facie a transfer of the nature referred to by the Commission was produced to the Registrar. The preparation of the draft certificate of title would certainly point to the transaction having been one of purchase and not lease, as having regard to the definition of the certificate of title in Sec. 4 of the Lands Registration Ordinance such a document would not appropriately be prepared in the case of a lease. However, the Commission made an error of law when it held, as it impliedly did, that the mere production of a transfer and plan entitled the Administration to registration. There is no question of entitlement to registration merely by producing documents which prima facie should bring this about. I have already dealt with the discretion imposed in the Registrar; he was under a duty to satisfy himself as to sufficiency of the evidence of title and no doubt equally under a duty on being so satisfied to effect registration, but he was not a mere machine.

The way in which Sec. 67(3) should have been applied in this case is that the Commission would have found as it did that a transfer indicative of a purchase from natives had been produced. It would, I think, have been entitled to proceed on the basis that such a transfer was one of an interest in fee simple. It would have known that the Registrar had issued a draft certificate of title and that notices had been given which even though not required in this instance as a matter of law had been part of the procedure adopted by the Registrar, presumably in the process of satisfying himself as to the sufficiency of evidence of title. From there on, however, the Commission is obliged to enter the sphere of speculation in order to decide whether it could form the opinion that the Registrar would have deemed the evidence of title sufficient. In order for the procedure prescribed by Sec. 42(2) to be completely applied, and for the Commission to form the opinion that had it been so applied the Administration would then have been

entitled to be registered as owner of a freehold interest, it is necessary to go further than the mere production of an instrument of transfer and to go as far as concluding that the instrument in fact produced was one which the Registrar would have deemed sufficient as evidence of title.

It is clear that the Commission did not apply its mind to this aspect. Had it done so, it would have properly taken into account the likelihood of the procedure in fact adopted by the Registrar bringing forth native claims and, if this were so, whether it is likely that it would have caused the Registrar not to be satisfied as to the sufficiency of evidence of title which had been produced, for instance, by reason of the fact (assuming that the Registrar's inquiries indicated this to be so) that the natives who had purported to transfer the land to the Administration were not entitled to do so, or that for some other reason the transfer did not operate to give a good title to the Administration.

On this approach to the problem it is not likely that the Commission would derive much assistance from the existence of the 99 year lease as the most that could be said is that the Administration had a sufficient interest in the land to support this lease in respect of Portion 200. The Administrator is empowered by Sec. 8 of the Land Ordinance 1922-1933 to either purchase or lease land from native owners on such terms as may be agreed upon between him and the owners. The lease would certainly indicate that the Administration was asserting at a time which was some two months prior to the giving of the notices by the Registrar as a step towards bringing the land under the Lands Registration Ordinance that it had a greater interest than that which it was granting although that of course is not probative of the fact that it had such an interest. The lease does not recite that the Administration is owner of the freehold and the reservations do not themselves necessarily indicate that its interest was a freehold one.

The Commission would be entitled to have regard to the fact that a Sec. 36 Certificate was given in 1956 in relation to the claim for restoration of the leasehold interest, as one of the matters which it is required to declare in its final order is the nature and

extent of the native customary rights (if any) which at the appointed date were retained by a native or native community in respect of the land. However, even reading that certificate in its broadest sense, that is, as relating to customary rights in respect of the freehold and not merely the leasehold to which the earlier claim relates, it does no more than state that to the best of the knowledge and belief of the Director of Native Affairs there was no assertion of native customary rights on the appointed date and there is no evidence of the inquiries made by the Director before the certificate was given. The certificate is not conclusive evidence of the facts stated in it.

Counsel for the respondent submitted that the Sec. 36 Certificate previously given by the Director raised an estoppel against him so that in this appeal he would not be allowed to say that it is untrue that no native or native community was or asserts that he or it was at the appointed date entitled to any customary rights in respect of the subject land. I do not consider that any estoppel arises in this instance. In giving the certificate the Director acted under a statutory duty imposed on him by Sec. 36 of the Restoration Ordinance, whereas in the present appeal he is merely on the record as representing the native claimants pursuant to the obligation imposed on him by Sec. 37 of that Ordinance to present the case for those claimants. I consider it would be wrong in principle that the persons whom he thus represents should now be in any way affected by what he has previously done at a time when he was not representing them.

I may say here that whilst one of the grounds of the appeal is that the Commission rejected the evidence of the native witnesses, it would appear that this overstates the position. The Commission was certainly critical of that evidence and as I have already indicated perhaps unduly critical and it was clearly prepared to give little weight to it. However, on the view which it took it did not find it necessary to reach a positive conclusion as to whether or not it should accept this evidence.

Counsel for the respondent also seeks to rely on the conclusiveness of the final order in respect of the leasehold, in particular the declaration that as at the appointed date no native customary rights were re-

tained in the land or any part thereof and does so on the basis of Sec. 2 of the Land Titles Commission (Declaratory) Ordinance 1968. However, whatever may be the meaning of "land" where used in the declaration, that is, whether it means only the leasehold interest in the land or is intended to embrace the fee simple, in my view for the reasons which I gave in The Administration v. Blasius Tirupia and Others (7) this section has no application to an order made by the Commissioner of Titles. Consequently the order made on 21st August, 1957 is not conclusive of this question.

The application of Sec. 20 of the Evidence (Land Titles) Ordinance 1969 now requires consideration. That section provides:

"20(1) In any case in which the question of whether any land is or is not Administration land is before the Commission and the Commission finds that the land is Administration land, the Commission shall certify in its decision -

(a) whether the decision that the land is Administration land rested, on the evidence before the Commission, on a presumption as to title to the land set up under Part III of this Ordinance and was not otherwise established; and

(b) if so, who would have been found to be the owner of the land, if that presumption had not been available and the land had been found to be native land.

(2) Where the Commission certifies in terms of paragraph (b) of Subsection (1) of this section, then subject to any right of appeal the person specified in the certificate is entitled to a payment of an amount calculated in accordance with this Part."

One of the grounds of appeal is that the Commission failed to comply with the provisions of that section. Counsel for the respondent submitted that this ground is not open to the appellants as it was argued on their behalf before the Commission that the Ordinance had no application in these proceedings. As the way in which this arose at the hearing before the Commission was that reference was made to the Ordinance

(7) Unreported judgment No. 651 of 2nd November, 1971.

by counsel for the present respondent in the course of his argument and counsel for the present appellant then submitted that it had no application, I think the situation may be distinguished from that in the cases cited to me and in my view it is necessary to consider whether or not the Ordinance is applicable and if so what consequences ensue.

In Sec. 3 of the Ordinance "Administration land" is defined as meaning land other than native land and "land" as including an interest in land. In order for the provisions of Sec. 20 to apply in the present instance, the question of whether any land is or is not Administration land must be before the Commission and the Commission must find that the land is Administration land. The question which the Commission had to determine under the Restoration Ordinance is whether or not the Administration was entitled to an interest in the land as at the appointed date and to be registered as owner of that interest so that this does raise the question as to whether the land is or is not Administration land. If the Commission finds that the Administration was entitled to such an interest it would seem that this necessarily involves a finding that that interest in the land is Administration land even though this might not be expressed in precisely those words. There is nothing in the Evidence (Land Titles) Ordinance itself which would prevent its application to Restoration proceedings and Part II of the Ordinance dealing with its application and specifically by Sec. 4 excluding its operation in certain proceedings makes no reference to Restoration proceedings. The matter therefore falls to be determined on the wording of Sec. 20 itself as to whether Restoration proceedings in any particular circumstances come within that section.

The next question which then arises is whether the decision that the land is Administration land rested on the evidence before the Commission on a presumption as to title set up under Part III of the Ordinance and was not otherwise established. This is a matter as to which the Commission must certify; the provision is mandatory. The same applies to the second matter for certification in paragraph (b) of Sec. 20(1) although the necessity for this only arises if the Commission certifies affirmatively under paragraph (a) and in Restoration proceedings the situation may well be that

on the evidence before it the Commission is quite unable to certify who would have been found to be the owner of the land had it been found to be native land.

In the light of these matters I am concerned as to what order I should make. Neither party suggests that I should send the matter back for further hearing and in view of the time that has already elapsed and the number of hearings of one kind and another that have already taken place I am reluctant to do so. However, it seems that as the Commission, because it erred in law as I have indicated, has not really put its mind to the matters on which under Sec. 67(3) of the Restoration Ordinance its opinion is required, the proper course is that it should now give its opinion and also consider the question of certification under Sec. 20 of the Evidence (Land Titles) Ordinance.

The order of the Court will therefore be that the appeal be allowed and the final order quashed and that the case be remitted for further hearing before the Commission.

Solicitor for the Appellant : W.A. Lalor, Public Solicitor

Solicitor for the Respondent: P.J. Clay, Crown Solicitor