IN THE SUPREME COURT)
OF PAPUA NEW GUINEA)

CORAM : WILLIAMS, J.
Wednesday,
19th July, 1972

APPEAL NO. 2 of 1969 (N.G.)

BETWEEN: THE DIRECTOR OF DISTRICT ADMINISTRATION & OTHERS
Appellants.

AND: THE ADMINISTRATION OF THE TERRITORY OF PAPUA AND NEW GUINEA
Respondent.

In re Morobe Goldfields

1972
May 24, 25.
WAU
Jul.19.
PORT MORESBY
Williams, J.

This is an appeal against a final order made by the Land Titles Commission on 7th October, 1968, concerning land in the vicinity of Wau. By that order it was declared, pursuant to the provisions of the New Guinea Land Titles Restoration Ordinance 1951-1966, that the abovenamed respondent was the absolute owner of an area of about 6000 hectares of land in the Morobe Goldfields District of Morobe and was entitled to be registered in the Register Book in respect thereof. It was further declared that no native customary rights were retained, on the appointed date, by a native or native community in respect of the said land or any part thereof.

In short the case made by the respondent before the Land Titles Commission was that, in the year 1941, it had purchased the land in question from various native owners who are appellants in this appeal. The Commission upheld this claim. The decision of the Commission is challenged on a number of grounds. The main grounds may, I think, be shortly stated as follows:-

(1) That the evidence before the Commission was insufficient to establish a valid purchase of the land by the respondent from the appellants.

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(2) That, upon the evidence, it could not properly have been found that the respondent would have been entitled to a certificate of title with respect to the land.

Williams, J.

This matter arose for consideration by the Commission under the provisions of the New Guinea Land Titles Restoration Ordinance. It was common ground between counsel for the respective parties that the matter fell for consideration under Sect.67(3).

As has already been stated, the claim in this case is founded upon an alleged purchase of the land from the native people. At the time of the transaction with the native people there were statutory provisions governing the purchase by the Administration of land from the natives. These provisions were to be found in Sects. 6, 8 and 9 of the Land Ordinance 1922-1941. I set them out hereunder:-

"6. Save as hereinafter provided a native shall have no power to sell lease or dispose of any land, and any contract or agreement made by him so to do shall be void.

8. - (1.) If the native owners are willing to dispose of any land the Administrator may out of funds provided for the purpose purchase or lease it upon such terms as may be agreed upon between him and the owners.

(2.) No purchase or lease of any land shall be made by the Administrator until he is satisfied after reasonable inquiry that the land is not required or likely to be required by the owners.

9. Leases and purchases of land by the Administration from natives shall be authenticated by such instruments and in such manner as may be prescribed, and until so prescribed the practice prescribed by the First Schedule to this Ordinance shall be followed."

In effect therefore the Administration was authorised to purchase land from willing native owners after the Administrator, following reasonable inquiry, was satisfied that the land was not required, or likely to be required, by the owners. It was then necessary that any purchase of land by the Administration from the native owners be authenticated by such instruments and such manner as was prescribed and, until so prescribed, the practice prescribed by the First Schedule to the Ordinance was to be followed.

It appears that, at relevant times, Reg.28 of the Lands Regulations (to be found in Vol.III of the Laws of the Territory of New Guinea 1921-1945 at p.2687) was in force. That regulation provided that the certificate of transfer from a native to the Administration shall be in accordance with Form "S". By Reg.30 it was provided that strict compliance with the forms under the regulations was not required and that substantial compliance was sufficient.

It was thus necessary, in order to comply with Sect.9 of the Land Ordinance, that the purchase of land said in this case to have been made from the native owners be authenticated by an instrument in Form "S" or substantially in accordance with that form. The form and manner of the authentication having been prescribed by the regulations, the practice prescribed by the First Schedule to the Ordinance was no longer applicable.

I turn now to Sect.42(2) of the Lands Registration Ordinance which, with other sections of that Ordinance, was repealed by Sect. 67(1) of the New Guinea Land Titles Restoration Ordinance 1951. It would have been necessary, in order to obtain a Certificate of Title in the name of the Administration with respect to the land said to have been purchased from the native owners in this case, for the requirements of Sect.42(2) to have been met.

That section provided, inter alia, that, where land was acquired by the Administration under the provisions of any Ordinance or law, the Registrar of Titles, upon production of such evidence of title as he deemed sufficient or as may be prescribed by any Ordinance, accompanied by a proper plan and description of the land should bring the land under the Ordinance by registering, in the manner provided by the Ordinance, a Certificate of Title in the name of the Administration.

In my view an instrument of transfer in accordance with Form "S" or substantially in accordance with that form was evidence of title as "may be prescribed by any Ordinance" within the meaning of Sect.42(2) of the Lands Registration Ordinance. Sect.9 of the Lands Ordinance was mandatory in its terms and prescribed the form and manner of authentication of a purchase by the Administration from native owners. In my opinion the Registrar of Titles, could not, in the proper exercise of his function under Sect.42(2) have accepted, as evidence of title in the Administration, anything less than an instrument of transfer in accordance with form "S" or substantially in accordance with that form.

I pass now to a consideration of the evidence which was before the Commission. It appears that most of the relevant papers had been lost or destroyed so that those who gave evidence before the Commission did so very largely from their recollections of events which occurred some 27 years before. In these circumstances it is not surprising that the evidence was often vague and contradictory. The case for the claimant was that, in the year 1941, the land in question had been purchased from native owners. Questions arise as to the boundaries of the land and the consideration said to have been paid for it. Without canvassing the evidence in detail I think it is sufficient, for present purposes to say that it emerged from the evidence that some transaction had been entered into involving the purchase of at least some part of the land with which this appeal is concerned and that a consideration of at least £100 was involved and that some, if not all, of the consideration consisted of War Savings Certificates issued to the native owners. It was claimed by counsel for the appellant that, upon the evidence, there was much uncertainty in the minds of the native people and that it could not be said that there was any real consensus between the parties. However, in the light of the views I shall later express, I do not find it necessary to pursue this aspect of the matter.

I propose now to consider the evidence before the Commission relating to the exectuion of any document which may have evidenced the transaction relating to the land.

On the evidence of Mr. Niall some documents were executed at the time of the transactions. These documents were not in evidence before the Land Titles Commission. Mr. Niall, when

asked what happened to the documents after they had been signed, stated that he could not remember whether he sent them back to the District Officer at Salamau or direct to the Lands Department. There is no evidence as to what happened to them after they left Mr. Niall's hands.

As to the form of the documents Mr. Niall was asked if he had seen the documents in connection with the transaction. The following questions and answers appear at p.95 of the transcript:-

"Q. Did you see all the documents?
A. All the documents were here - I think Mr. Fox got them and brought them to me or handed them to the Clerk.
Q. Was there a certificate of alienability (sic alienated ability)?
A. We never got them in those days.
Q. Were the documents from the Lands Branch?
A. I think they came from the Lands Branch.

.....

Q. This form "S" purchase document can you remember whether it was amended as far as the - was it in the ordinary form attached to the Ordinance?
A. This big double sheet - such as the one in use now - Transfer of Land by the Natives to the Administration.
Q. I presume this is the double sheet attached to the Ordinance. Do you remember whether the statement that the boundaries had been walked had been crossed out and initialled?
A. It would have been - I can't remember but you didn't sign them unless you had walked around them.
Q. Do you know who signed this document?
A. I would have signed it.
Q. But who would have signed on behalf of the vendors?
A. The Luluai would have, for one. The normal thing was you attahced a sheet of paper with their names and they put a cross.
Q. Would these people who got the certificates, would all of them have signed it?
A. Yes."

Later at p.84 of the transcript the following appears:-

"Q. This transfer document did you receive the marks of everyone of these people?

A. I think I did. It would be a cross because they were afraid of putting their thumb print because they put their thumb print on a contract of labour but they held the pen in front of the kiap - they thought that was different."

Ninga Yamong also gave evidence concerning the execution of documents. At p.73 of the transcript the following appears:-

"Q. Did you hear yesterday Mr. Niall say that he had a big sheet of paper and everybody put their marks on it with a pen?

A. If I saw the paper I would be able to discuss it with you but with no paper or no marks I can't tell you.

Commissioner: The reason we are holding this Court is because all the papers were destroyed.

A. I don't know. There were small slips of papers given to us and put in the bank. I didn't mark any papers."

The evidence I have set out above is, I think, the principal evidence relating to the documents evidencing the transaction. The prescribed form of transfer (Form "S") is in three parts. The first part takes the form of an acknowledgment of sale by the vendor of the land therein described together with declarations that the vendor has the full right to sell the land to the exclusion of others, that the vendor in company with Administration officers has walked around the boundaries of the land, that the consideration is the price asked for the land and is a fair price and that the consideration has been paid. The second part consists of a certificate from the interpreter that he truly interpreted the contents of the first part of the form, that in company with the vendor and Administration representative he walked around the boundaries of the land, that the boundaries were identical with those described in the first part of the form, that the consideration was paid in his presence and he was certain that the vendor knew what he was selling and was satisfied with the price. The third part of the form consists of a certificate by the Administration representative to the same effect.

One matter common to all parts of the form is the certificate that the parties walked around the boundaries of the land. This, clearly, upon the evidence, was not done. On the evidence the most that was done was that the boundaries were indicated in a general way from the back of the District Office. Asked whether the statement in the form that the boundaries had been walked was struck out Mr. Niall stated that "It would have been - I don't remember but you didn't sign them unless you had walked around them". If this part of the form had been struck out then it seems to me to be a material departure from the prescribed form. The certificate concerning walking the boundaries appears in each part of the form and the reason for its presence is obviously to avoid any uncertainty in the minds of the parties, particularly the native vendors, as to the dimensions of the land the subject of the transaction. In this case there was evidence before the Commission of uncertainty in the minds of the native people as to the boundaries of the land. Further, on this aspect of the matter the following evidence of Mr. Niall is, I think, relevant:-

"Q. When you were explaining the boundaries to the people presumably in the back yard or on the verandah you explained them in very general terms is that correct?

A. Yes.

Q. Did you show the people the map?

A. No, I don't think so.

Q. It wouldn't have made any sense to them?

A. No.

Q. Would you say then that the people only had a very general idea of the boundaries?

A. Fairly general. I would point out those boundaries would have taken you 2 weeks to walk around."

As I have already said the third part of the form comprises a certificate from the Administration representative (in this case Mr. Niall). He was, amongst other things, required to certify that "he was certain that the vendor when he signed the transfer knew what land he was selling." This was not the case of a purchase of a small area of land the boundaries of which could be seen on casual inspection but an area of land comprising approx. 6000 hectares in the hills surrounding the township of Wau. No questions were directed to Mr. Niall

concerning this part of the certificate but I do not think that it could be accepted that a responsible Administration officer would, in the circumstances mentioned, have certified that "he was certain" that the vendors knew what land they were selling.

The second part of the form contains a certificate from the interpreter regarding a number of matters. It is common ground that in this case the interpreter at the time of the transaction between Mr. Niall and the native people was Ninga Yamong, who gave evidence before the Commission. When asked questions concerning the signing of documents Ninga is reported as saying "I don't know. There were small slips of paper given to us and then put in the bank. I didn't mark any papers". If that part of his answer which I have underlined is accepted (and so far as I can see it was not contradicted by any other evidence) then it appears that Ninga did not give the certification required by the second part of Form "S".

I pass now to the Commissioner's "Reasons for Decision" in which the following paragraph appears:-

> "The documentation of the purchase could have been and probably was entered in the Index of Unregistered Administration Land kept under Section 43A of the Lands Registration Ordinance and the Administration would have been entitled to the benefit of a Certificate of Title under Section 42(2) of that Ordinance."

The finding that "the documentation of purchase probably was entered in the Index of Unregistered Administration Land" is, I think, open to some doubt in circumstances where, upon the evidence, the last heard of the documents was that they had been despatched from Wau in 1941 by Mr. Niall either to the District Officer at Salamau or to the Lands Department. However, it seems, from the rest of the paragraph of the "Reasons for Decision" quoted, that the Commission took the view that, once the transaction was recorded in the Index of Unregistered Administration Land kept under Sect.43A, it was thereafter an automatic process to obtain a Certificate of Title under Sect.42(2). If, as appears to be the case, that was the Commission's view, then I think that it was plainly erroneous in that it failed to have regard to the strict requirements of proof

of entitlement to a Certificate of Title laid down by Sect.42(2). Entry in the Index under Sect.43A did not confer on the Administration an indefeasible title whilst, of course, the issue of a Certificate of Title under Sect.42(2) did.

The Commission did find that there was a purchase of the land by the Administration from the native owners. I think it was open for the Commission to find that there was a purchase of land although it is open to doubt whether the native owners had any real understanding of the boundaries of the land included in the transaction. The witnesses for the appellants, in effect, agreed that there had been a sale of at least part of the land the subject of this appeal. Their chief complaint seemed to be that they had never received the proceeds of the War Savings Certificates. But it was necessary for the Commission to go further than finding that there had been a transaction between the parties. It was also necessary for it to find that the transaction was, upon the evidence before it, evidenced in such a way as to satisfy the requirements of Sect.42(2) relating to the issue of an indefeasible Certificate of Title.

As I have said earlier it was common ground between counsel that this matter fell for consideration by the Commission under Sect.67(3) of the New Guinea Land Titles Restoration Ordinance. That section has received consideration in this Court in previous cases, (Tolain & Others v. The Administration (Vulcan Island) (1); Custodian of Expropriated Property v. Director of District Administration (re Tonwalik) (2); Director of District Administration v. Administration (3)). Applying the principles laid down in those cases it seems that the task confronting the Commission was to form a statutory opinion whether the applicant would have been entitled to registration if, under the repealed provision of the Land Registration Ordinance and with all relevant documents available, proceedings, completed before the appointed date, would have established entitlement to registration.

As I have said it appears that the Commission concluded that the transaction would have been entered in the Index kept under Sect.43A of the Lands Registration Ordinance and then inferred that this would have resulted automatically

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(1) (1965-66) P.N.G.L.R. 232.
(2) (1969-70) P.N.G.L.R. 110
(3) a decision of Kelly, J. (unreported) given on 25 Nov 1971

in the issue of a Certificate of Title under Sect.42(2). If this was the Commission's approach then it was, in my view, incorrect.

If however the Commission directed its mind to the requirements of Sect.42(2) of the Lands Registration Ordinance then the evidence before it showed that some documents evidencing the transaction were executed. These documents were not in evidence before the Commission and were presumably lost or destroyed. In the view I take of the matter the transaction was required to be evidenced by a transfer in Form "S" or substantially in that form in order to satisfy the requirements of Sect.42(2). Upon the evidence before the Commission the document could not have been in Form "S" as there would have been no certification concerning walking the boundaries and no certificate by the interpreter. It is also improbable that Mr. Niall would, in the surrounding circumstances, have certified that he was certain that the native vendors knew what land they were selling. These matters involved, to my mind, substantial departure from the prescribed form. A document which so departed from the prescribed form was not one which, in my opinion, the Registrar of Titles, in the proper discharge of his functions under Sect. 42(2), could have accepted. To the extent that the Commission formed any other view then it was either wrong in law, in that it misconstrued Sect.42(2), or it made a finding of fact which was not open to it upon the evidence, namely that the transaction between the parties would have been authenticated in the manner necessary to satisfy Sect.42(2). In either case, in the view I take of the matter, the Commission's decision cannot stand.

A number of other matters were canvassed in argument before me. However, in the light of the views I have just expressed, I do not think that it is necessary for me to deal with them.

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