Kaine, J. 702

IN THE SUPREME COURT OF PAPUA NEW GUINEA

CORAM : WILLIAMS, J.
Wednesday,
27th September 1972

APPEAL NO. 2 of 1965 (N.G.)

BETWEEN:

THE FIRST ASSISTANT SECRETARY, DEPARTMENT OF THE ADMINISTRATOR, POSITION NO. D.A.1, on behalf of: TOVATUMBU, TOGONTI, TIMAN, TARING, TOMBATA, TOLUBANG, TUANOM, TOLALAO, TALAI, TOPETEL, TOPIPILAK, and TIVARA on behalf of the matrilineages of No. 2 Napapar Village in the Rabaul Sub-District.

Appellant

AND:

THE ADMINISTRATION OF THE TERRITORY OF PAPUA AND NEW GUINEA

Respondent

re KERAVAT LAND

1972

Jun 26, 27, 28, 29.

RABAUL

Aug. 3
Sep. 27

PORT MORESBY

Williams, J.

This is an appeal against a Final Order made by the Land Titles Commission on 19th October 1964 concerning certain land at Keravat. By that order, made pursuant to the New Guinea Land Titles Restoration Ordinance 1951-1963 (to which I shall hereinafter refer to as "the Restoration Ordinance") it was declared that land of an area of about 4708 acres delineated on a plan annexed to the Final Order was owned absolutely by the Administration subject to an estate in fee simple of an area of about 500 acres to be held by the Director of District Services and Native Affairs as trustee as a reserve for natives. It was further declared that the Administration and the Director were entitled to be registered as owners of their respective interest and 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 the order or any part thereof.

The matters under investigation by the Land Titles Commission were a claim made by the Administration dated 8th May 1959 and a reference by the Director of Native Affairs dated 17th January 1962 under Sec.36 of

1972

In re Keravat Land

Williams, J.

the New Guinea Land Titles Restoration Ordinance 1951-1955. In the form of claim the Administration claimed to be entitled to a freehold interest in approximately 17000 acres said to have been acquired by "transfer from native owners". The land claimed was shown in a plan attached to the claim.

On 11th May 1959 a Provisional Order was made by the then Commissioner of Titles whereby it was provisionally declared that the area of approximately 17000 acres the subject of the claim was owned absolutely by the Administration and that no native or native community was, at the appointed date, entitled to any native customary rights in respect of the said land.

The reference by the Director of Native Affairs referred to the Provisional Order of 11th May 1959 and asserted that certain named persons, being the Alualua of the matrilineages of Napapar Village in the Rabaul Sub-District, claimed full rights of ownership by native custom on behalf of their matrilineages of an area of approximately 1000 acres in the north-west corner of the land covered by the Provisional Order. It would appear, having regard to other evidence, that the reference to the north-west corner should have been to the north-east corner. It was further asserted in the reference that the said land was never purchased from them or otherwise legally acquired from them or their ancestors and that neither they nor their ancestors ever abandoned their rights in the said land. They claimed full native customary rights of possession.

It will be seen from the foregoing that the Final Order was made with respect to an area of about 4708 acres whilst the Claim and the Provisional Order referred to an area of about 17000 acres of land. It would appear that by reference to several exhibits (particularly exhibits A & BA) that the total area with which the Commission concerned itself was an area of about 4708 acres of which about 2324 acres was claimed by the native people represented by the appellant in this appeal. How the area of 17000 acres referred to in the Claim and Provisional Order came to be reduced to 4708 acres is not clear. It would appear the 17000

acres embraced areas known as Keravat Nos. 1, 2, 3 & 4, and that Keravat Nos. 1 & 2 had not been the subject of objection or reference and had been dealt with by the Custodian of Expropriated Property. They were thus excluded from consideration by the Commission. It also seems that the area of 17000 acres referred to in the claim may have been overstated.

Counsel for the respondent raised a preliminary objection to the Notice of Appeal. He contended that the area claimed by the appellants (i.e. about 2324 acres) was the only area in dispute and that the appellants asserted no interest in the balance of the land the subject of the Final Order. Sec.38(1) of the Land Titles Commission Ordinance conferred a right of appeal to this Court from a decision of the Commission only upon "a person aggrieved" by that decision. Paragraph 2 of the amended Notice of Appeal stated that the appeal was against the whole of the order of the Commission. The appellants were not persons aggrieved with respect to the whole order but only so much of the order as dealt adversely to their claim with respect to part only of the land the subject of the Final Order. They accordingly had no status as appellants against the whole of the Final Order. The Notice of Appeal was therefore defective and the Court should not embark upon the hearing of the appeal unless it was limited to the area of land the subject of the reference by the appellants.

In support of this contention counsel for the respondent relied upon a decision of the High Court of Australia in Peter v. Shipway (1), and particularly upon the judgment of Higgins, J. at p.259. In that case proceedings had been brought in the Supreme Court of New South Wales raising questions of interpretation of a will. An appeal was brought to the High Court of Australia from a decision of the Supreme Court of New South Wales. The appellant, Mrs. Peter, appealed as a beneficiary under the will and as administratrix of the estate of her deceased husband. It appeared that Mrs. Peter and her deceased husband had assigned their interest under the will, by a deed of assignment, to creditors. The deed vested in the trustees under it all the interest of Mr. and Mrs. Peter in the will but subject to a trust in their favour in respect of any surplus that might remain after payment of debts. It further appeared that there could never be a surplus in the hands of the trustees after

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(1) (1908) 7 C.L.R. 232

payment of debts as the whole of the property would pay no more than a small proportion of the debts due. In these circumstances it was contended that the appellant had, in fact, no interest which could be affected by the interpretation of the will and, accordingly, had no status as an appellant. Griffith, C.J. considered the appeal on its merits and decided against the appellant on the merits adding that whether the appeal should be dismissed on this ground or on the ground that the appellant had no substantial interest in the case was a question "not worth deciding". O'Connor, J. also decided the matter on its merits. Isaacs, J. expressed the view that the appellant had no appealable interest in the matter but went on to say that "as my learned brothers who have preceded me think the appellant is technically entitled to demand the decision of the Court upon the construction of the will it is my duty to express an opinion". Higgins, J., in concurring that the appeal be dismissed, stated that, in his view, the appeal should be dismissed on the simple ground that the appellant had no interest or possible interest in the property in dispute and that "therefore she is not entitled to attack the judgment of the learned judge below, still less to have it set aside in favour of those interested who might have appealed but who have failed to appeal."

It will thus be seen that, in that case, the contention was that the appellant had no interest in, or possible interest in, the property in dispute and could not thus be said to have been adversely affected by the decision of the Court below. In the present case, however, the Final Order contained a declaration as follows:-

"Absolute ownership by the Administration of Papua New Guinea in the <u>whole</u> subject to an estate in fee simple held by the Director of District Services and Native Affairs as a trustee for natives over a <u>part</u> of the said piece of land containing about 500 acres ....." (the underlining is mine).

This declaration therefore, in its terms, conferred upon the Administration absolute ownership of an area of approximately 4708 acres subject to an estate in fee simple in favour of the Director with respect to approximately 500 acres being part of the 2324 acres. The declaration therefore disposed of the 1000 acres in a way adverse to the claims of the native people. This situation is, I think, plainly distinguishable from the position in <u>Peter v. Shipway</u> (2) (supra). In my view the

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(2) (1908) 7 C.L.R. 232

appellants were adversely affected by the Order in the terms in which it was pronounced and were "persons aggrieved" within the meaning of Sec.36(1).

As has been said there were before the Land Titles Commission a claim and a reference under the New Guinea Land Titles Restoration Ordinance. The claim was a claim by the Administration to have been entitled at the appointed date to an interest in freehold of approximately 17000 acres of land and to be registered or entered in a lost register as the owner of or the person entitled to that interest. The claim further asserted that the interest claimed (i.e. an estate in freehold) had been acquired by "transfer from native owners". The claim also contained the statement that the Certificate of Title or other documents evidencing title to the interest claimed had been "lost through enemy action". In answer to Q21 in the Claim Form concerning any other information which might be of assistance to the Commissioner the answer was given "Purchase documents lost. The attached map is taken from a pre-war map".

The statutory duty of the Commissioner imposed by Sec.42 of the Restoration Ordinance was to investigate the claim the nature of which I have set out in the preceding paragraph.

I turn now to the "Reasons for Finding" of the Commission. After making some observations on the history of the land the reasons then proceed, at p.5, to what appears clearly to me to be the ratio decidendi. It is stated:-

> "There is no doubt in my mind that much of the area was primary bush. There was occasional hunting, the use of the area for passing through by way of tracks and occasional gardening on a very small scale. Complete title by effective occupation over the whole of the area in dispute had never been established .....
> I am satisfied that much of the land in primitive times was ownerless and therefore, in any case, became the property of the Administration which may have been subject to the recognition of certain existing native rights. It is impossible now to determine exactly where any gardens were in the area or exactly what part of the area was used for hunting or even the exact location of native tracks. Nevertheless I feel I must take into consideration the existence of possible rights

> by native customary tenure at the time of the original alienation. I believe that full recognition will be given to any possible native interests if I assume that there had been no war, the Australian Administration would have set aside for the use of the people concerned, part of the area in question as a native reserve.
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> Accordingly I find that on the assumption that if there had been no war, and acting under the relevant provision of the New Guinea Land Titles Restoration Ordinance, part of the area containing about 500 acres was set aside for use as a native reserve and that this area was in the northern part of the area in dispute."

From the foregoing extract from the "Reasons for Finding" it is, I think, clear that the Final Order was made upon considerations irrelevant to the issues before the Commission and was, in any event, based upon several misconceptions. As to the latter it seems that the Commission was of the view that if land were ownerless it became by some automatic process the property of the Administration, entitling it to a Final Order under the Restoration Ordinance, and that it had authority to perform the executive act of creating a native reserve. Neither of these propositions, is, to my mind, tenable and the contrary was not asserted on behalf of the respondent.

It is plain, as I have said, that the Final Order was based upon irrelevant considerations. The Commission was called upon to hear and determine a claim which in substance was a claim to be entitled, as at the appointed date, to an estate in freehold acquired by transfer from native owners and to be registered or entered in a lost register as the owner of or person entitled to that interest. The findings upon which the Final Order was based did not advert to nor were they related to the matters in issue raised by the claim.

For the respondent it is contended that it is not open on this appeal for the appellant to rely on the aspect of this matter to which I have just adverted. It is said that the proceedings were not conducted before the Commission on the basis of a claim of purchase from the native people, that this was done without objection and that accordingly the appellant cannot now be heard to contend that the Commission did not advert to the literal terms of the claim.

There was power in the Commission, under Sec.29 of the Restoration Ordinance, to permit amendment of the claim. However, no order for amendment was made. The Commission is a statutory creation and its jurisdiction, powers and functions are circumscribed by the Ordinance creating it. In my view the manner of the conduct of the proceedings by the parties cannot enlarge the jurisdiction of the tribunal.

It thus seems to me that there was no determination of the claim by the Commission. In consequence the Final Order made was not an order made in determination of the claim and was made without jurisdiction. In any event the Final Order cannot be supported by reference to the reasons expressed by the Commission. In the reasons expressed the Commission took the view that the land was ownerless and thus apparently automatically belonged to the Administration, entitling it to a Final Order under the Restoration Ordinance, a proposition which, I think, is untenable. Additionally, the Commission had no jurisdiction to create a reserve in favour of the native people.

It is contended on behalf of the respondent that although the reasons expressed for the making of the Final Order may have been wrong, nevertheless the order was correct and is supportable upon other grounds. It was said that the Administration claim was in reality based upon Sec.67(3) of the Restoration Ordinance and that the case made for the respondent before the Commission was that the land had been acquired in German times as waste and vacant land followed by entry in the German Ground Book. That this was the substance of the case made before the Commission is shown, it was said, by the course of the evidence taken before the Commission. The argument proceeds that upon the evidence given before the Commission a case for the Administration was made out by reference to Sec.67(3) and that in these circumstances this Court should not disturb the Final Order except as to that part of it which had reference to the creation of a reserve in favour of the native people which part could, it was said, be severed from the remainder and replaced by some other appropriate order.

For the appellant it was said that the case for the respondent before the Commission was not based upon Sec.67(3) and that it was not open for the respondent to rely upon it on this appeal. The Commission in its reasons did not make any reference to it nor were any findings made with respect to it.

As I understand the "Reasons for Finding" there is nothing in them which indicates that the Commission adverted its mind to the provision of Sec.67(3) or to the matters which it would be necessary for the Administration to establish in order to gain the benefits of that provision.

There was, before the Commission, some evidence that an area of land in the Keravat area comprising approximately 4351 hectares of land was entered in the Land Register of the Colony of German New Guinea. The owner was shown as "The Fiscus of the Colony of German New Guinea" and the entry was made on 29th May 1912 "in pursuance of the taking of possession of 3rd May 1912". Whether or not the land described in the entry is identical with the land the subject of the proceedings before the Commission I do not know. This entry is the foundation of the argument now advanced under Sec.67(3) of the Restoration Ordinance.

References to what appear to be the final addresses of counsel who appeared before the Commission adverted to the entry in the Land Register. Counsel who appeared for the natives, the appellants in this appeal, referred to the entry and dismissed it in a few words saying that the entry was not indefeasable and that, in the year 1933, the Administration "appears to have acknowledged that the Ground Book entry was made disregarding native interests". Counsel who appeared before the Commission for the present respondent in dealing with this aspect of the matter contented himself with saying that "if in fact the land was not occupied or needed by the natives in 1912 and that position continued to the German capitulation, the Administration obtained an unencumbered title which could not be affected by any subsequent use of the land by native claimants."

The Commission in its "Reasons for Finding" in the course of a recitation of the history of the land said, "The documentary evidence shows that the Australian Administration became unhappy about the basis of Government titles to the area and decided to rectify the position by paying the natives concerned."

It does appear that before the Commission some reliance was placed by the present respondent upon the Ground Book entry and that, to some limited extent, it was canvassed at the hearing. But in the context of the Restoration Ordinance the Ground Book entry in itself did not entitle the Administration to a Final

Order. It was the starting point from which the provisions of Division 2 of Part III of the Lands Registration Ordinance 1924-1950 were required to be considered before any entitlement pursuant to Sec. 67(3) of the Restoration Ordinance could be determined. It does not appear that these provisions received any consideration and it does not seem to me to be a proper function of this Court, sitting on appeal from the Commission, to embark in an initial way upon this enquiry. In my view that is a matter which the legislature had, in the first instance, conferred upon the Commission.

It appears to me that there was confusion in the issues properly arising at the hearing before the Commission. As I have already stated, it is my view that the Final Order cannot stand, having regard to the reasons for its making. I think that the proper course in all the circumstances is for me to remit the whole case to the Commission for re-hearing. It will then be for the parties to make such applicationsto the Commission as they may be advised in order to clarify the issues which properly arise. I am not unmindful of the considerable lapse of time which has occurred since this matter was last before the Commission. But having regard to the apparent confusion before the Commission in the issues arising in the matter I think that this is the only course properly open to me.

At the conclusion of the hearing of this appeal upon the application of counsel for the appellant I reserved leave for the appellant to make application to add further parties. This application was made on 3rd August 1972.

Affidavits were filed in support of the application. Each affidavit is sworn by a deponent who asserts a claim to land the subject of this appeal and which is outside the land the subject of the reference. Each deponent asserts ownership on behalf of his own land owning group and on behalf of certain other named land owning groups. The basis of the claim of ownership is not disclosed.

I do not propose to make any order on the application in the light of the fact that I have remitted the matter for rehearing by the Commissioner. I leave it to the applicants to take such steps as they may be advised, to seek to have their claims investigated by the Commission upon the rehearing.

The order of the Court will be :-

(a) That the appeal be allowed and the Final Order quashed.

(b) That the case be remitted to the Commission for rehearing.

(c) That no order be made on the application to add parties.

(d) That the question of the costs of this appeal be reserved.

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

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