Raine, J.

779

IN THE SUPREME COURT)
OF PAPUA NEW GUINEA)

CORAM: WILLIAMS, J.
Thursday,
14th February, 1974.

Appeal No. 42 of 1973 (NG)

BETWEEN: THE GOVERNMENT OF PAPUA NEW GUINEA
Appellant

AND: THE KATUMUNI GROUP (DANDOU and BAIYEN CLANS)
1st Respondent

AND: THE DANGORAI CLAN
2nd Respondent

AND: THE GWANGAIE CLAN
3rd Respondent

Baiyune Land Portion 62

1973
Dec. 14, 17, 18
1974
Feb. 14
PORT MORESBY
WILLIAMS, J.

This is an appeal from a final order made by the Land Titles Commission on 19th December, 1972 under the provision of the Land Titles Restoration Ordinance 1951-1968 (hereinafter referred to as "the Restoration Ordinance") wherein it was declared that it was not established that at the appointed date the Administration of Papua New Guinea (now called the Government of Papua New Guinea) was entitled to an interest in the land the subject of this appeal or entitled to be registered as the owner of or person entitled to an interest therein.

A formal claim under the Restoration Ordinance was lodged by the Administration on 10th May, 1961. In it the Administration claimed a freehold interest on the land described as Baiyune Pastoral Lease, Portion 62, District of Morobe containing 3122 hectares. Questions in the claim form as to how and from whom the interest claimed

was acquired were not answered but in a sheet of paper attached to the claim form it was stated that Portion 62 is a surveyed portion, the survey having been effected in 1935, and that the land was formerly held as Pastoral Lease No. 3, Morobe by A.L. Simpson but forfeited by notice of 10th December, 1941 published in the New Guinea Gazette on 15th December, 1941 for non-fulfilment of conditions.

By a document dated 4th November, 1961 there was a reference under Section 36 of the Restoration Ordinance of the question of native customary rights in the land claimed by the respondents.

At the hearing of this appeal before this Court the appellant's case was based squarely upon the provisions of the Evidence (land Titles) Ordinance 1969. Section 7 of that Ordinance makes provision for a number of "prescribed acts" in relation to land. By Section 11(1) of the Ordinance proof of a "prescribed act" in relation to land is sufficient to set up (subject to rebuttal) "a strong presumption that the land was, at the relevant date, Administration land." In essence the appellant's claim is that the evidence establishes that there was, as provided by Section 7(a) of the Ordinance, a purchase of the land by or the transfer of the land to the Administration or alternatively that there was, as provided by Section 7(g) the giving by the Administration of a granted application for an Administration lease.

It is acknowledged by Counsel for the appellant that the appellant's claim must be established pursuant to Section 67(3) of the Restoration Ordinance and it is submitted by him that the statutory presumption arising from the Evidence (Land Titles) Ordinance is sufficient to satisfy the requirements of Section 67(3) of the Restoration Ordinance.

Section 67(3) of the Restoration Ordinance has received consideration in this Court on several occasions. It was said by Clarkson J. in In re Tonwalik Land (1) that Section 67(3) empowers the Commission to grant applications for registration of title where the applicant would have been

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(1) (1969-70) P.N.G.L.R. 110

entitled to registration, if under the repealed provisions of the Lands Registration Ordinance and with all relevant documents available proceedings completed before the appointed date, to bring the land under the Lands Registration Ordinance would have established entitlement to registration.

The repealed provisions of the Lands Registration Ordinance comprise Sections 16-43 (inclusive) which in general terms made provision for the bringing under Ordinance of freehold land already alienated or in process of alienation. The relevant section for the purposes of this case is Section 42(2). It is acknowledged by Counsel for the appellant that for the appellant to succeed in the claim it is necessary that the requirements of Section 42(2) be satisfied. The crux of the case made for the appellant as I comprehend it, is that evidence given before the Commission that there has been a purchase of the land by the Administration or that alternatively that there has been the giving by the Administration of a granted application supplemented by the presumptions arising from the Evidence (land Titles) Ordinance to which I have already referred is such as should satisfy the Commission notionally performing the functions of the Registrar of Titles under the repealed Section 42(2) of the Lands Registration Ordinance that the Administration is entitled to a Certificate of Title.

Basic to the appellant's claim is that it owned the land as a result of a purchase from the native people. Evidence both oral and documentary was given before the Commission. It appears from the evidence that some negotiations for the purchase of land took place as early as the year 1933. Mr. Senior Commissioner Smith in his reasons for his decision (with which Mr. Chief Commissioner O'Shea concurred) found that the evidence supported a purchase of an undefined part of the land the subject of these proceedings but that the evidence did not establish the existence of any document authenticating the purchase. These, I think, were findings reasonably open to the Commission upon the evidence and, upon the well established principles relating the function of appellate tribunals, should not, in my view, be disturbed.

Section 42(2) of the Lands Registration Ordinance was (before its repeal) in the following terms:

> "(2). Where any land or any estate or interest in land (other than land referred to in sub-section (1) hereof) 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 this Ordinance by registering, in manner provided in this Ordinance, a Certificate of Title in the name of the Administration of the Territory."

At the time of the transaction, purchase of land by the Administration from native owners was governed by Sections 9 and 10 of the Land Ordinance 1922 as amended. I expressed the opinion in the case of in Re Morobe Goldfields (2) that Section 9 of the Land Ordinance required the authentication of the transaction in the manner prescribed, that is by an instrument in Form S or an instrument substantially in

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(2) (Unreported judgment No. 687 of 19/9/1972)

accordance with that form. I further expressed the view that an instrument in Form S or substantially in that form was evidence prescribed by an Ordinance within the meaning of Section 42(2), and that the Registrar of Titles could not, consistently with the proper performance of his function under Section 42(2) of the Lands Registration Ordinance have accepted anything less as evidence of the Administration's right to registration.

It thus seems to me that there being no evidence of any document authenticating the transaction and, putting aside the question of any assistance the appellant may gain from the provisions of the Evidence (Land Titles) Ordinance, the appellant's claim to be entitled to a Certificate of Title under Section 42(2) must fail.

This leads to a consideration of the provisions of the Evidence (Land Titles) Ordinance and so far as the purported purchase of the land is concerned particularly to Section 16 of that Ordinance. Section 16 provides:-

> "16.(1) Subject to Subsection (2) of this section, for the purposes of setting up a presumption under this Division in relation to any land it is irrelevant that -
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> (a) any prescribed act was invalidly or ineffectually performed;
>
> (b) any act, matter or thing was made, done or entered into by a person (including the Administration) who had no power to do so,
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> if it purported to be performed, made, done or entered into with respect to the land.
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> (2) Nothing in Subsection (1) of this section prevents the rebuttal of a presumption under Part IV of this Ordinance by proof of a matter referred to in paragraph (a) or (b) of that subsection, or derogates any right to a payment under Part V of this Ordinance."

It will be seen that Sub-section (1) provides that

for the purposes of setting up a presumption under Division 2 of the Ordinance it is irrelevant that any prescribed act, in this instance the purchase of the land by or the transfer of the land to the Administration (vide Section 7(a) of the Ordinance) was invalidly or ineffectually performed. However, notwithstanding the fact that invalid or ineffectual performance of a prescribed act is stated to be irrelevant Sub-section (2) allows rebuttal of an irrelevant matter. I find the section difficult indeed to understand. But it seems to me that this Section cannot be invoked by the Administration to prove the occurrence of the prescribed act viz. the purchase of the land by, or transfer of the land to, the Administration. Rather it appears to me that the Section is directed to situations where a purchase or transfer has been proved by evidence but where the authority of the person or persons conducting the transaction is in question in which event the onus of proof shifts to the person asserting that the prescribed act proved was done without proper authority. In this case the Commission found (rightly in my view) that the prescribed act under Section 7(a) had not been proved in that the purchase transaction went only to some undefined part of the land the subject of the claim. It thus seems to me that no assistance can be gained by the Administration from Section 16. Further I do not think that, in the absence of evidence of the existence of a purchase document, any assistance can be derived by the appellant from the provisions of Section 12 of the Ordinance.

In addition to the evidence of purchase there was also evidence of dealings in the land by the Administration. It appears that in about the year 1934 one A.L. Simpson applied for a Pastoral Lease of Portion 62 and that his application was subsequently granted. The lease, however, was forfeited by notice of 10th December, 1941 published in the New Guinea Gazette of 15th December, 1941 for non-fulfilment of conditions. One J.M. Bourke then applied for a Pastoral Lease over the area and it appears that on 18th May, 1948 the then Acting Administrator approved a recommendation that the application be granted. It does not appear that a lease in fact was issued but Bourke was in the position of having rights of occupancy under a "granted application." Subsequently Bourke's interest was assigned to one M.J. Leahy who, it appears, is the present holder of the granted application although it also

appears that the term was extended.

It is contended on behalf of the appellant that on 1st May, 1948 (the date of Bourke's grant) at the latest, there was a granted application within the meaning of Section 7(f) of the Evidence (land Titles) Ordinance and that by force of Section 11(1) of that Ordinance there is set up a strong presumption that the land was at the relevant date Administration land. "The relevant date" in relation to a granted application for an Administration lease is defined in Section 3 of the Ordinance to mean the date on which, under Section 10 of the Ordinance, the granted application is deemed to have taken effect. Reference to Sections 10 and 14 of the Ordinance indicates that "the relevant date" in relation to Bourke's granted application was 18th May, 1948.

Thus it is said that there is in terms of Section 11(1), a strong presumption that on 18th May, 1948 the land was Administration land. "Administration land" is defined in Section 3(1) of the Ordinance to mean land other than native land. "Native land" is also defined and does not include native land while it is or was leased by the owners to the Administration.

It is here necessary, I think, to advert to the nature of the proceedings which were before the Commission. As has been said they were proceedings under Section 67(3) of the Restoration Ordinance. It was observed by Clarkson, J. in re Tonwalik (3) (supra) as follows:-

> "A claimant under the Restoration Ordinance is not endeavouring to re-establish ownership. His claim is that having held ownership at all material times and, having been registered or entitled to be registered as owner in the lost register, he seeks recognition of the fact that he was so registered or entitled."

The entitlement referred to must, of course, be established by reference to the appointed date viz. 10th January, 1952.

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(3) ((1969-70) P.N.G.L.R. 110)

The Evidence (Land Titles) Ordinance 1969 has the effect that there arose an evidentiary presumption that on 18th May, 1948 (if one takes the date of approval of the granted application in favour of Hourke as being the relevant date within the meaning of Section 11(1) of the Ordinance) the land was Administration land which by definition means merely that it was not native land. I fail to see how his presumption assists the appellant in the circumstances of this case. The appellant in its claim asserted ownership in freehold in the land and that it was entitled to registration in the lost register in respect of that interest. Putting the appellant's case, as it seems to me, at its highest, the issue may be reduced to this - whether the Commission when under Section 67(3) of the Restoration Ordinance was notionally performing the function of the Registrar of Titles under the repealed Section 42(2) of the Lands Registration Ordinance could properly have concluded that an evidentiary "strong presumption" that the land was Administration land, that is, not native land, was sufficient to entitle the Administration to a Certificate of Title for a freehold estate in the land.

The test to be applied by the Commission was laid down by the Full Court in Re Madina (4). There it was said that it must be clear that such a title has been shown "as would be forced on an unwilling purchaser."

In my view the Commission could not properly have concluded that the Administration was entitled to a Certificate of Title for an estate in freehold in the land. This is the conclusion which the Commission reached and is, I think, clearly correct.

It might be contended that the Administration should be considered to have sufficient interest in the land to support the grants it has made. But this is not the issue raised in the present proceedings where the claim asserted is an entitlement to a Certificate of Title for an estate in freehold and a right to the registration of that interest in the lost register.

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(4) (Unreported Judgment FC No. 42 of 6/12/1972)

It should also be kept in mind that at the prescribed date the purchase of land from native owners and the manner of its authentication was governed by the provsions of Sections 8 and 9 of the Land Ordinance 1922-1941. The Evidence (Land Titles) Ordinance is not an Ordinance relating to the acquisition of land. It is, as its title suggests, an Ordinance setting up evidentiary presumptions. To hold that an evidentiary presumption that land is not native land entitles the Administration to a freehold estate in the land would involve ignoring the provisions of the Land Ordinance in force at the relevant time which governed the acquisition of land by the Administration from native owners.

Counsel for the appellant cited the case of Re Madina (5) and the decision of the Full Court on appeal from that decision (No. FC 42 supra) as authorities for the proposition that the Administration could invoke the aid of the Evidence (Land Titles) Ordinance in this case. The facts in Re Madina(supra) (6) were very different from those in the present case and it seems that the issue presently raised did not arise for consideration. It may well be that, in some circumstances, assistance could be derived by the Administration from the Evidence (Land Titles) Ordinance in proceedings under the Restoration Ordinance. In the circumstances of this case however I think that neither the decision of Kelly, J. nor that of the Full Court in the case of Re Madina (7) provide assistance in the matter.

I would affirm the decision of the Land Titles Commission.

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

Solicitor for the Respondents: G.R. Keenan, Acting Public Solicitor

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(5) (Unreported decision of Kelly, J., No. 654)
(6) (Unreported decision of Kelly, J., No. 654)
(7) (Unreported Judgment FC No. 42 of 6/12/1972)