

IN THE SOLOMON ISLANDS

COURT OF APPEAL

CIVIL JURISDICTION

Civil Appeal No. 2 of 1987

Connolly P.

Kapi J.A.

Savage J.A.

BETWEEN:

AKUILA TALASASA, JACOB ZINGIHITE and
NATHAN MAISASA LOSA

Appellants

AND:

REX BIKU, JOHN KEVISI and
CUSTOMARY LAND APPEAL COURT (WESTERN)

Respondents

JUDGMENT OF THE COURT

Delivered the *Twenty Second* day of *November* 1988.
In open Court Gordon Ward C.J.

These proceedings arise out of an application made under s. 5B of the Forests and Timbers Act 1977 by Kazukuru Left Hand Land Investment Ltd. for the consent of the Conservator to carry on negotiations with a view to entering into an agreement for the acquisition of timber rights on customary land. By s. 5B(2) the Conservator is required to forward such an application to the appropriate area council which in turn fixes a place for the determination of the matters specified in s. 5C(4), gives notice to the public within the area of its authority and who appear to have an interest in the land, trees or timbers and thereafter meets and considers the application. Section 5C(4)(a) provides as follows:

"(4) Upon the conclusion of its considerations under subsection (3), an area committee (now council) shall issue a certificate in the prescribed form setting out its determination as to whether -

- (a) the persons proposing to grant the timber rights in question are the persons, and all the persons, lawfully able and entitled to grant such rights and, if not, who such persons are;"

On 25th July, 1984 Roviana Area Council certified that Jacob Zingihite, John Wesley Talasasa and Nathan Maisasa Losa were the persons lawfully able and entitled to grant the timber rights in question.

On 6th August, 1984 an appeal to the Western Customary Land Appeal Court was instituted by Rex Biku, John Kevisi, Edwin Biku, Peter Siga and Hughie Soaki pursuant to s. 5D(1) of the Act which reads:

"5D(1) Any person who is aggrieved by any act or determination of an area committee under section 5C. may, within one month from the date of the determination, appeal to the customary land appeal court having jurisdiction for the area in which the customary land concerned is situated and such court shall hear and determine the appeal."

The Western Customary Land Appeal Court, after extensive hearings, determined that the persons entitled to grant the timber rights sought by the original application on behalf of the Kazukuru Tribe were Jacob Zingihite (as Land Guardian) in consultation with the three Chiefs of the Kazukuru Tribe namely Rex Biku (for his father Edwin Biku, Chief of Munda), Simion Mamupio, Chief of Dunde and Peter Siga, Chief of Kindu, together with John Talasasa (representing a new branch of the Kazukuru which had no formal chief, being the patrilineal descendants of Kirirande, this branch apparently having adopted patrilineal descent as the means of determining their representative in such matters). In coming to this conclusion the Customary Land Appeal Court regarded as established beyond doubt that the Kazukuru land belongs to the tribe and that it is not the personal fief of the Chiefs or the

Land Guardian or of John Talasasa. The Court concluded that according to the custom of the Kazukuru people the relationship between the Chiefs (Bangara) and the Land Guardian is one of co-operation and unity so that a Land Guardian would not allocate plots of land or take decisions affecting the land without first consulting and reaching agreement with the Chiefs. The Court therefore concluded that the persons entitled to grant timber rights in Kazukuru were the Land Guardian and the Chiefs on behalf of the people of the Kazukuru Tribe.

After identifying the persons entitled to grant timber rights the Court, consistently with what has already been said, prescribed that these rights were to be exercised jointly by unanimous consent, a prescription which accorded with the custom as they found it to exist and one which is necessary to an accurate statement of the matter specified in s. 5C(4)(a). John Talasasa was neither the Land Guardian nor was he a Chief. His position may therefore be thought to be something of a qualification of the original custom but, as the Customary Land Appeal Court pointed out, the descendants of Kirirande, having formed a new branch of the Tribe were likely to suffer in a matter such as this unless they had a voice and the decision of the Court was to appoint a representative for them whose position could be assimilated as far as possible to the position in custom of a Chief. This aspect of the decision certainly appears eminently fair and, as it was the Court's application of custom to the circumstances which had arisen, it is not a matter for the High Court or for this Court on appeal and indeed was not challenged before us.

It will be seen that the Area Council had determined in favour of the representatives of the descendants of Kirirande alone,

whereas the Customary Land Appeal Court had identified, as was required, all the persons lawfully able and entitled to grant the timber rights in question. Thereupon certiorari was sought from the High Court by Akuila Talasasa (representing John Talasasa), Gordon Kiko Zingihite and Nathan Maisasa Losa to quash the determination by the Western Customary Land Appeal Court on a number of grounds. All failed and certiorari was refused by the learned Chief Justice. Appeal was then brought from the decision of the Chief Justice to this Court, the appellants being the prosecutors before the High Court and the respondents being the Customary Land Appeal Court (Western), which properly took no part in the argument before this Court, Rex Biku and John Kevisi, the latter being of the same line as Peter Siga and identified in interest with him. For practical purposes the appellants are the Kirirande descendants (who happen to include the Land Guardian Jacob Zingihite) and the respondents represent the Chiefs and people of the Kindu and Munda groups of the Kazukuru Tribe. Simion Mamupio, Chief of the Dunde group took no part in the proceedings before the Area Council or the Customary Land Appeal Court.

The grounds of appeal before this Court were more limited than those taken when certiorari was sought from the High Court. They are two in number and it will be convenient to deal with them in order. The first is that the learned Chief Justice erred in law in holding that in proceedings inter partes a third party, namely Simion Mamupio, could be given, or identified as having, rights in respect of the land in question. This proposition, when examined against the legislative background to which I have referred, is plainly unsustainable. Section 5C(4)(a) placed on the Area Council a statutory obligation to determine and certify whether the

persons proposing to grant the timber rights in question were the persons and all the persons lawfully able and entitled to grant such rights and, if not, who such persons were. The function of the Customary Land Appeal Court once an appeal was instituted is, as set out in s. 5D(1), to hear and determine the appeal. In this statutory context this must mean that it is the duty of the appellate Court to examine the determination certified by the Area Council and determine whether it correctly identified all the persons lawfully able and entitled to grant the rights in question. Moreover it is clear that the jurisdiction of the appellate Court was not simply to determine whether the decision below was correct or not for s. 5D(3) imposes on the duty of clerk to the Customary Land Appeal Court to notify the Conservator, when the appeal is finally determined, "of such determination and the terms thereof". It follows that it is the function of the Customary Land Appeal Court to examine the question afresh and to make its own determination. This has occurred here. To deny to the Land Appeal Court the power to identify a person as one of the persons lawfully able and entitled to grant such rights is to deny it the right to perform the very duty which is cast upon it by the legislation. Once the Land Appeal Court's examination of the facts and consideration of the custom led to the conclusion that the Chief of Dundee was one of those able and entitled to grant the rights in question, it was their positive duty so to determine and certify. Certiorari could not possibly go on the ground that the answer to the question required by the legislation to be answered involved identifying a person as having a function to perform under custom, although he had taken no part in the previous proceedings. It was suggested that the inclusion of Simion Mamupio in the decree of the

Land Appeal Court went to that Court's jurisdiction, the argument being that the proceedings being inter partes, the decree of the Court could not lawfully grant rights to or impose obligations on persons other than parties. This is to misunderstand the nature of the jurisdiction being exercised here. Neither the Area Council nor the Land Appeal Court is empowered to make appointments. The statutory duty is to identify the persons who are lawfully able and entitled to grant the rights in question on the application of the rules of custom to the facts. To do so cannot on any view be regarded as an excess of jurisdiction.

The second ground was that the learned Chief Justice had failed to consider adequately whether a decision upon a customary issue of a competent Customary Land Appeal Court was binding in respect to the same parties and land and reliance was placed on the decision of the Western Customary Land Appeal Court in Case No. 2 of 1980. If it be the fact that the Customary Land Appeal Court in this case failed properly to apply a former decision of its own or, indeed, failed to apply the principles by which a decision determining the rights of parties to litigation binds the parties and their successors in title in later litigation, this may well amount to an error of law. It is however far from certain that certiorari would go merely for error of law having regard to the provisions of s. 5D(2). We shall return to this point.

However, as nothing we say should be understood as casting any doubt on the correctness of the decision of the Western Land Appeal Court in this case, it should be made clear that appeal No. 2 of 1980 concerned a boundary dispute between the Kirirande descendants and the Kindu. The critical point in the case was an acknowledgement of the boundary as found by the Court by one Iabula

on behalf of the Kindu, following a custom meeting at the conclusion of a war, when it was agreed to define the boundaries in writing. Iabula had done so for the Kindu and the question of importance decided in the case was whether the writing produced was the genuine writing of Iabula in the circumstances which I have mentioned. Such a decision cannot conceivably be regarded as governing the question who are the persons entitled to grant timber rights to strangers to the Kazukuru people on behalf of the whole of the people. However in the course of the judgment in 1980 the Court made a finding that the Kazukuru are matrilineal in descent. It emerges from the judgment of the Land Appeal Court in this case that while this is correct for certain purposes it is not a complete statement. It was this consideration that led the Land Appeal Court to say that they regarded themselves as bound by the 1980 decision so far as it went. What emerged in this case was that the office of Land Guardian descends matrilineally, whereas the Chiefship is patrilineal in descent. Indeed the claim of John Talasasa to represent the descendants of Kirirande would appear to be wholly patrilineal in character. The finding to which I have referred in the 1980 case therefore could only be regarded as completely determining the current problem if the position of the Chiefs and of John Talasasa is completely disregarded. The notion of the sole decision affecting Kazukuru land being left to the Land Guardian was thought by the Customary Land Appeal Court to be contrary to custom and it follows therefore that they could not have regarded the 1980 case as providing the whole of the answer to their problem. In our opinion therefore no error of law is disclosed.

Having said so much we do not wish to encourage attempts to bring appeals from the Customary Land Appeal Court to the High Court in the guise of applications for certiorari. Section 5D(2) reads as follows:

"Any provision in any other law to the contrary notwithstanding, the order or decision of a customary land appeal court on any appeal entertained by it under subsection (1) shall be final and conclusive and shall not be questioned in any proceedings whatsoever."

It will be noted that s. 5D(2) does not in terms exclude certiorari. Clearly enough the provision making the decision of the Customary Land Appeal Court final and conclusive would not avail to do so: Reg. v. Medical Appeal Tribunal; ex parte Gilmore [1957] 1 Q.B. 574 affirmed by the Privy Council in South East Asia Fire Bricks Sdn. Bhd. v. Non-Metallic Mineral Products Manufacturing Employees Union [1981] A.C. 363 at pp. 369-70. However this leaves the provision that such a decision "shall not be questioned in any proceedings whatsoever". Despite old decisions of the Court of King's Bench that certiorari can only be taken away by express negative words, the trend of authority now establishes that it is the effect of the ouster provision which must be regarded: Hockey v. Yelland (1984) 157 C.L.R. 124. It was there said by Gibbs C.J.: "It is a well recognised principle that the subject's right of recourse to the Courts is not to be taken away except by clear words."

Thus in Colonial Bank of Australia v. Willan (1874) L.R. 5 P.C. 417 a provision forbidding removal into the Supreme Court was treated by their Lordships as a no-certiorari provision. In South East Asia Fire Bricks (supra) it was provided that an award of an industrial court should be final and conclusive and that it should not be "challenged appealed against, reviewed, quashed or called

in question in any court of law". Having held that the finality provision was not sufficient to exclude certiorari their Lordships expressed the view that the final words "quashed or called in question in any court of law" seemed to be clearly directed to certiorari. This view has been accepted by the High Court of Australia as appears from the judgment of Gibbs C.J. in Hockey v. Yelland already cited, a judgment which expresses the view of a majority of the Court. It is true that s. 5D(2) does not use the word "quashed" but it is significant that in South East Asia Fire Bricks at p. 370 it is said -

"if 'quashed' were for some reason not enough, the expression 'called in question in any court of law' is in their Lordships' opinion amply wide enough to include certiorari procedure."

We are of the opinion therefore that s. 5D(2) is to be regarded as a no-certiorari provision. It follows that it is effective to oust certiorari for errors of law not going to jurisdiction: South East Asia Fire Bricks; Hockey v. Yelland. It has of course long been established that a no-certiorari provision will not oust the jurisdiction of the superior courts to confine inferior courts to their jurisdiction, on the footing that the Parliament could not have intended a tribunal of limited jurisdiction to be permitted to exceed its authority. The exact limits of the residual jurisdiction of the High Court notwithstanding s. 5D(2) need not be examined for the purposes of this appeal. de Smith, Judicial Review of Administrative Action (4th ed.) at p. 367 examines the question. What is clear however is that an error of law by a Customary Land Appeal Court in arriving at a decision or determination on a matter within its jurisdiction cannot be challenged before the High Court by

certiorari even though that error appears on the face of its record. This conclusion will have the beneficial effect that decisions of a Customary Land Appeal Court on questions of custom will not be open to challenge in the High Court by bringing appeals under the legislation under the colour of applications for certiorari.

In our opinion the decision of the learned Chief Justice was correct. This appeal must be dismissed with costs.

BY THE COURT,



(P.D. CONNOLLY P.)