

IN THE SOLOMON ISLANDS COURT OF APPEAL

NATURE OF JURISDICTION: Appeal from a judgment of the High Court of Solomon Islands.

COURT FILE NUMBER: Civil Appeal No. 4 of 2006

DATE OF HEARING: Tuesday 27th March 2007

DATE OF JUDGMENT: Thursday 10th May 2007

THE COURT: Lord Slynn of Hadley P,
Adams JA
Salmon JA.

PARTIES: Francis Pitabelama & Others
(Appellants)
-v-
Moses Biliki & Others
(Respondents)

ADVOCATES:

Appellants: Mr M Pitakaka
1st & 2nd Respondents: Mr A Radclyffe
3rd Respondent: Mr G Suri

KEY WORDS:

RESERVED/DISMISSED: Dismissed

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JUDGMENT

This appeal is against the decision of the Chief Justice given on the 30th December 2005 refusing an application for interlocutory orders to prevent the respondents from entering, felling trees and removing logs from Zarakana customary land. The appellants representing the Kataka and Riqi/Sopere tribes claim ownership rights over the land. The second respondents represent the Kona tribe.

Brief facts

There is a long history of disputes over the subject land. In 1978 in proceedings to which the appellants were not parties, the Western Customary Land Appeal Court held that the Kona tribe had primary rights to the Kapoka land within the Zarakana land. In 2002 timber rights proceedings came before the Western Province Executive Committee. The 2nd Respondents were described as the putative landowners in those proceedings. The appellants were objectors. It is apparent from the detailed minutes of that hearing, that the Executive Committee heard extensive evidence from the parties as to ownership of the land. The hearing extended over several days. In its determination the Committee noted that the ownership of the land had been tested through the court on three occasions, first in 1933 when the Kona tribe was successful, secondly in 1978 when a Local Court held that the Kona tribe and another tribe had rights and thirdly in 1979 when the CLAC upheld the 1978 decision but gave primary rights to the Kona tribe. The determination of the Executive was that the representatives of the Kona

tribe were the persons having the right to the disposal of timber rights on the Zarakana/Kapoka land.

The appellants appealed that decision to the Western Customary Land Appeal Court. Again there was a full hearing at which the appellants presented their case in detail. The Appeal Court dismissed the appeal and upheld the decision of the executive. The Appeal Court's decision was given on 26th August 2003.

Finally on the 20th October 2003, the 2nd appellant commenced proceedings against the Kona tribe in the Ririo house of Chiefs to determine the customary ownership of the Zarakana land. The Kona tribe denied that the Ririo Chiefs had jurisdiction to deal with the matter. The Kona tribe did not appear at the hearing before the House of Chiefs which gave a decision in favour of the Riki/Sopere and Kataka tribes.

The decision of the Chief Justice

The Chief Justice held that the decision of the WCLAC binds the plaintiffs and that the doctrine of estoppel by judgment applies. He held that the Ririo House of Chiefs had no jurisdiction to rehear the same issues as had been agitated before the Provincial Executive and confirmed on appeal before the WCLAC. He said-

“Their claim of right over the trees on Zarakana land, which stems from their claims of ownership over the said land, had been finally disposed of. If one looks at the objections of the plaintiffs

against the claims of the Kona tribe before the Provincial Executive in the timber rights hearing held on 24th September 2002, it is clear that those same issues of ownership over Zarakana land were to form the same claims before the Ririo House of Councils (*sic*). In conducting the timber rights hearing, the Provincial Executive heard objections from the Kataka and Riki/Sopere tribes in full."

And later the Chief Justice said-

"It is important to appreciate that in hearing an appeal on timber rights, a Customary Land Appeal Court has jurisdiction to deal with issues of customary rights so as to enable it to reach a decision that is final and conclusive. Where it has exercised its jurisdiction as conferred upon it under that legislation, its decision is final and conclusive and this court's jurisdiction to interfere is ousted."

For those reasons the judge refused to grant the injunction sought by the appellants. The judge also held that even if triable issues had existed he would have declined to grant the orders sought on the application of the doctrine of *laches*. He held that the plaintiffs were aware of the intention of the defendants to commence logging operations, were aware that logging operations commenced in April 2005 but did not commence proceedings until the end of October 2005 by which time a shipment of logs had already left.

The appellants' submissions

The appellants identified four issues for consideration by this court:-

1. Whether CLAC has jurisdiction under section 10(1) of the Forestry Resources and Timber Utilisation Act (FRTU) to determine a land dispute on appeal by any persons aggrieved by the determination of a Provincial Executive made under section (8)(3)(b) or (c) of the FRTU.
2. If the CLAC does have jurisdiction to determine the land dispute, from where does it source that power.
3. If the CLAC does not have jurisdiction to determine the land dispute, on an appeal from the determination of the Provincial Executive does section 10(2) of the FRTU estopp an aggrieved person from initiating land dispute proceedings in the appropriate forum vested with jurisdiction to deal with such disputes.
4. Whether the doctrine of laches applies in the circumstances of this case.

The appellants' argument in brief, is that as a result of the provisions of the Land and Titles Act and the Local Courts Act land

ownership disputes can only be resolved through the procedures outlined in those Acts. In particular it was argued that a customary land dispute must first go to the Council of Chiefs. Counsel for the appellants argued that because the jurisdiction of the CLAC is appellate, its jurisdiction is no broader than that of the court or tribunal appealed from. It could therefore have no jurisdiction to determine a land dispute unless the matter had first gone to the Council of Chiefs as required by section 12(1) of the Local Courts Act.

Consideration

The interrelationship between the Land and Titles Act, the Local Courts Act and the Forestry Resources and Timber Utilisation Act is crucial to the resolution of this appeal. The relevant provisions are set out below. Section 254(1) of the Land and Titles Act [CAP.133] provides:

254. - (1) A local court shall, subject to the provisions of this section, sections 12, 13 and 14 of the Local Courts Act, have exclusive jurisdiction in all matters and proceedings of a civil nature affecting or arising in connection with customary land other than -

(a) any such matter or proceeding for the determination of which some other provision is expressly made by this Act; and

(b) any matter or proceeding involving a determination whether any land is or is not customary land.

Subsection 4 of section 255 is also relevant. It provides:

(4) A customary land appeal court shall have and may exercise all the powers of a local court.

A limitation on the jurisdiction of the local court in relation to customary land disputes is set out in section 12 of the Local Courts Act [CAP.19]:

12. (1) Notwithstanding anything contained in this Act or in any other law, no local court shall have jurisdiction to hear and determine any customary land dispute unless it is satisfied that –

(a) the parties to the dispute had referred the dispute to the chiefs;

(b) all traditional means of solving the dispute have been exhausted; and

(c) no decision wholly acceptable to both parties has been made by the chiefs in connection with the dispute

“Customary land dispute” is defined in the Local Courts Act as meaning, “A dispute in connection with the ownership of, or, of any interest in, customary land or the nature or extent of such ownership.”

The Forest Resources and Timber Utilisation Act [CAP.40] sets out the procedure that applies to those wishing to acquire timber rights on customary land for the purpose of logging trees. Application is made to the Commissioner of Forest Resources. His consent must be obtained to negotiate with the appropriate Regional Government, the Provincial Executive and the owners of the customary land (Section 7(1)). Once the consent of the Commissioner has been received the Provincial Executive fixes a time and place for a meeting to be held with the appropriate regional government, the customary land owners and the applicants, to determine the matters specified in subsection (3) of Section 8, which provides:

(3) At the time and place referred to in subsection (1), the Provincial Executive shall in consultation with the appropriate Government discuss and determine with the customary landowners and the applicant matters relating to -

(a) whether or not the landowners are willing to negotiate for the disposal of their timber rights to the applicant;

(b) whether the persons proposing to grant the timber rights in question are the persons, and represent all the persons, lawfully entitled to grant such rights, and if not who such persons are;

(c) the nature and extent of the timber rights, if any, to be granted to the applicant;

(d) the sharing of the profits in the venture with the landowners; and

(e) the participation of the appropriate Government in the venture of the applicant.

Section 10 provides a right of appeal to the Customary Land Appeal Court having jurisdiction in the area in which the land is situated to any person aggrieved by the determination of the Council made under paras (b) or (c) of Section 8(3).

The essence of the appellants' argument is that if, during a Section 8(3) meeting a dispute arises as to the ownership of the customary land, that dispute must be resolved in the manner set out in Section 12 of the Local Courts Act, that is to say, it must first be referred to the Chiefs who are defined in that Act as the "Chiefs or other traditional leaders residing within the locality of the land in dispute and who are recognised as such by both parties to the dispute."

There are two decisions of this Court that are of particular relevance to this Appeal. The first is *Simbe v. East Choiseul Area Council and Others* CAC-F18 of 1997, judgment given on 9 February 1999. The Court first noted in paragraph 7 that in many, if not most instances, the task of identifying the customary owners is likely to be an essential step in the process of determination under s.5(3) (now s.8(3)). In paragraph 8 this

Court said (note that the section numbers in the FRTU Act have now changed) :

It remains true to say that, in making a determination for the limited purposes of s.5C(3), it is no part of the function of an area council to decide questions of ownership of customary land in a way that is either binding or final in effect. It is one of the features of the statutory procedure under Part 11A that an area council is a tribunal, and not a court of record, or indeed a court of any kind whether of customary or common law. It has long been recognised that its determination gives rise to no guarantee that the contracting customary owners are the true owners. See Hyundai v. A-G (1993) CC 79/93, at pp.8-10 [72-74], citing with approval the remarks in the High Court of Commissioner Crome in Fugui v. Solmac Construction Co.Ltd. [1982] SILR 100, 107. If a binding determination is desired it must be obtained from a local court under s.8 of the Local Courts Act as amended by the Local Courts (Amendment) Act 1985 inserting ss.8C, 8D and 8F; or on an appeal, instituted under s.5E(1) of the Forest Resources Timber and Utilisation Act by a person who is aggrieved by a determination of the area council under s.5C(3)(b) of that Act, to a customary land appeal court having jurisdiction for the area in which the customary land is situated. In contrast to an area council determination, the order or decision of a customary land appeal court on an appeal pursuant to s.5E(1) is "final and conclusive" :see s.5E(2) . Such an order or decision has been said to create an estoppel by judgment as between the parties: Beti v. Allardyce Lumber Co.Ltd. (1992) CAC 5/92, at p.9; and, since by s.5E(2) it is "not [to] be questioned in any proceedings whatsoever", an order or decision of that kind has been held to be immune from review by certiorari in the High Court: Talasasa v. Biku (1988) CAC 2/1987, at pp.8-10.

Last year in *Veno v. Jino* 2006 FBCA 22; Civil Appeal 02 of 2004 (12 April 2006) this Court described the provisions of s.8(3) of the Forest Resources and Timber Utilisation Act as creating "another exception to the exclusive jurisdiction of the local court in disputes over customary ownership". Although it was not necessary in *Veno* to discuss the issue that arises in this case the observation must be correct. As was said in *Simbe* the identification of the customary owners is likely to be an essential step in the process of determination under s.8(3). The Provincial Executive must determine whether the persons proposing to grant timber rights are lawfully entitled to do so and if not who such

persons are. There is nothing in that Act to require that a dispute as to the persons lawfully entitled should be referred to a Council of Chiefs. There are two further points worth noting: first the FRTU Act is concerned with the identification of the persons lawfully entitled to grant timber rights. It is true that that will almost invariably be the customary owners of the land on which the timber stands but it is nevertheless the case that the purpose of the decision of the Provincial Executive and on appeal the Customary Land Appeal Court is different to that which is described in s.12 of the Local Courts Act. Secondly, a genuine dispute as to land ownership does not necessarily arise just because it is claimed. This case is a good example of that. The evidence before the Provincial Executive and on appeal before the Customary Land Appeal Court seems to have been overwhelmingly in favour of the respondents.

Finally, reference must be made to ss.(2) of s.10 of the FRTU Act. It provides

(2) Notwithstanding any provision to the contrary in any other laws 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.

As this Court said in *Veno* such privative or exclusionary clauses do not entirely exclude the examination by courts of general jurisdiction. The limited jurisdiction left to the courts may, for example, be exercised where the decision under review was made without jurisdiction. A starting point is *Anisminic Limited v. Foreign Compensation Commission* [1969] 2AC147. There can be no suggestion that the Customary Land Appeal Court acted in excess of its jurisdiction in this case. It was

required of the Provincial Executive to determine the identity of the person's lawfully entitled to grant the timber rights. It did so on the basis of extensive and it seems compelling evidence. That decision was upheld by the C.L.A.C. In those circumstances there is no reason why s.10(2) should not be given full effect. The appeal is dismissed. The respondent is entitled to costs.

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Lord Slynn of Hadley
President of the Court of Appeal

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Adams JA
Member of the Court of Appeal

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Salmon JA
Member of the Court of Appeal