IN THE HIGH COURT
OF SOLOMON ISLANDS) Customary Land Appeal Case No. 7 of 1984

O'OA LAND

Javen PUIA Appellant

-v-

Ngepetuha TONGAKA Respondent

JUDGMENT

BEFORE: John FREEMAN, Commissioner of the High Court

The appellant and the respondent in person.

JUDGMENT

Javen PUIA appeals against a decision of the Central Islands Customary Land Appeal Court which awarded O'OA land to Ngepetuha TONGAKA. The CLAC sat on 25 November 1983 at NGOTOHENUA, Bellona, adjourned part-heard for the weekend, sat again on 28 and 29 November and apparently gave judgment (though this is not clear from the record) on 30 November. The clerk was David FIRISUA Esq.; the president Fr. Samuel BALEA.

The notice of appeal gave ten grounds. Nos. 1 to 4 raise admissible questions of law or procedure, and I shall deal with each separately. Nos. 5 to 9 raise questions of custom or fact not within the jurisdiction of this court, and I declined to hear argument on them.

No. 10 is a complaint against the CLAC's order for costs, and I shall deal with it at the end of this judgment.

The admissible grounds of appeal are as follows:-

1. During the weekend adjournment the clerk Mr FIRISUA and the president Fr. BALEA bought a chicken from the appellant's store and talked to his brother (who was also his interpreter) while they stayed to have it cooked by his "nephew (sic) Miss Florence". The appellant made a rather ingenious suggestion; since the clerk and the president had allowed themselves to be seen fraternizing with the appellant's side, they then felt obliged to decide the case in favour of the respondent in case their actions were misunderstood. If that is right, it does not seem to have done them much good.

It is perfectly true that if there is over-close contact between the court and a party, then the court may be tempted to redress the balance by giving an unfair decision against that party. It is a much more insidious risk than any temptation to give an unfair decision in the party's favour. It might have been wiser for the clerk and president not to stay any length of time at the appellant's house after buying the chicken. It may have caused a few tongues to wag when they did so. But if CLACs are to continue to sit on small remote islands such as Bellona (rather than put litigants there to the trouble and expense of coming to Honiara), then the members must be allowed a reasonable amount of discretion in what they do out of court. The clerk and president are both experienced and respected members of the CLAC and they have taken the trouble to swear affidavits. After reading those I am satisfied that there was no need for the clerk and the president to protect themselves from criticism for any improper conduct. So there was no question of them doing so by coming to a decision against the merits of the case.

As for whether justice was seen to be done to the appellant, I am quite sure no sensible local man would have had any doubt about that. If he had seen anything wrong in the clerk and president talking to the appellant's side, he could only have thought it would have helped the appellant.

Ingenious speculations such as the one put forward in this appeal would not have occurred to him. So I altogether reject ground 1.

2. When the court began to question the appellant, the president started by trying to put to him a long point about the system of land tenure in the Floridas (his own islands). This was not understood, and the attempt had to be abandoned. It is suggested that this made the president lose face, and so led him to favour the respondent.

The president says in his affidavit that he put the Florida custom to the appellant to get him to explain what the Bellona custom was on this point. Most of us who have sat on CLACs have tried to find the answer to questions of custom in this way. If a direct question draws a blank, or is misunderstood, then sometimes the only way to get an answer is to put one's own custom to the witness, in the hope that he explain how his differs from it. Sometimes this does not work, but I am sure none of us have any hard feelings about that. Ground 2 is also rejected.

3. In the CLAC the parties and witnesses gave evidence in th language of Bellona. This was translated into English for the benefit of the court; the only member who could understand the Bellona language was E. TAKI from Rennell. The appellant suggested that because TAKI was having difficulty following the English translation, (as he says he told him outside court) then that must also have been true of the other members, apart from the clerk. So he concluded that the three other members could not have played their proper part in the decision.

This alleged admission by TAKI was not specifically referred to in the notice of appeal (as it should have been) so it has not been possible to get his comments on it. But even if TAKI did say he was having trouble with the English language, that statement was made out of court and not assented to in any way by the other members, so is no evidence at all that they had similar trouble. If the appellant had any suspicion that they did, the right thing for him to do was to take it up with the clerk in court. He failed to do this, and it is now too late to make any such complaint, even if it were justified. I should add that I have never yet come across a CLAC member who cannot understand English (though many may prefer pidgin). Ground 3 is rejected.

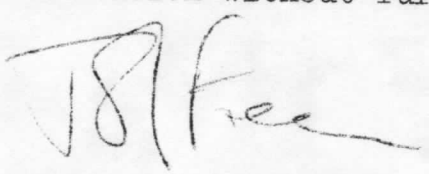
4. When TAKI's first wife died, the respondent buried her in the land in dispute. The appellant suggests this might have obliged TAKI to return a favour to the respondent when taking part in this case.

This may or may not be so; but the appellant very frankly admits that he did not raise this point when the president invited objections to the members; he had simply forgotten all about it. This disarming admission makes me quite sure that the point cannot have been of any great importance, or it would certainly have been remembered. In any case, the

question of whether such a favour would in the custom of Bellona require a return in the form of an unfair decision of a case is not one which this court can normally consider. The CLAC can, since its members are learned in custom; such a question should always be raised before them. Only if they fail to apply the right principles of law (or follow an unfair procedure) in considering it can this court interfere.

I reject ground 4 and so the whole appeal is dismissed. On ground 10, the appellant argued that since there is no express statutory power for the CLAC to award costs, they had no jurisdiction to do so. S. 231 A and S. 231B(1) and (2) of the Land and Titles Act (Cap. 93) contain all the statutory powers of the CLAC to hear appeals from a Local Court. It is quite true that those sections say nothing about costs; neither do they lay down procedural rules of any kind, even on questions so basic as whether the CLAC can hear evidence. There is provision in S. 235 of the Land and Titles Act for practice regulations to be made. This has not so far been done; unless it ever is, CLACs have just the same inherent jurisdiction as any other court to control their own procedure by making such orders as seem fair. I am inclined to think they have succeeded reasonably well in doing so: certainly I should give them every encouragement to award costs in suitable cases. I should regard the $50 ordered here as a very moderate award against an unsuccessful appellant from the Local Court. If an appeal has actually cost a successful respondent more, then more should be awarded. Where an appeal from the Local Court succeeds, the CLA may take a different view, since the appeal and its result may be no fault of the respondent's. They may well consider it fair to award a maximum of $50 (half the appeal fee) and half the typing costs against the respondent, unless they can see he has done something wrong.

So the CLAC's award of $50 costs against the appellant is confirmed. (The money has already been paid in to the Local Court Clerk and there will be an order for payment out). The respondent asked for costs in this court: his air-fare to and from Bellona ($140) and subsistence while in Honiara. I am not prepared at present to grant subsistence costs in these cases; litigants usually stay with relations in the capital, and are unlikely to have to spend more money than at home. I shall order $140 costs against the appellant. There is $100 in court, which will be paid out to the respondent (I should say that the amount of security taken is entirely a matter for clerks to CLACs, but it seems to me that $100 is no longer enough, and $250 would be more like the sum very often needed to cover transport and possible legal representation). The appellant must pay the remaining $40 to the respondent through the court within one month of today. If he does not, payment may be enforced by writ of execution without further order.



(John FREEMAN)
Commissioner of the High Court

10 July 1984