CHARLES IROBINA, REX MAE, PETER KINITA, PETER TARI -v- ALVIN IDUKELEMA AND PATRICK TAFEA NE'E

High Court of Solomon Islands
(Palmer J.)
Land Appeal Case No. 1 of 1993
Hearing: 11 October 1993
Judgment: 18 January 1994

R. Teutao for Appellant
J. Wasiraro for Respondent

PALMER J: This is an appeal against the decision of the Magistrates Court, Malaita, which dismissed an appeal of the Appellants on the 27th of March 1992 against the Respondents from a decision of the Land Acquisition Officer, Mr David Totorea, who had been appointed to acquire land for the National Government for purposes of re-locating the Auki Prison. This appeal has been lodged pursuant to section 65 (2) of the Land and Titles Act (Cap. 93).

The facts briefly are as follows:

On or about the 24th of April 1991, Mr. David Totorea, was appointed by the Provincial Secretary, Malaita, as an acquisition Officer, to act as his agent, pursuant to section 60(1A), for the purpose of acquiring customary land at AIMELA known as HAUSAHOE, for the purposes of establishing the new Prison Camp/Compound for Malaita Province.

A copy of this has been submitted to the court as an exhibit.

On or about the 6th of May 1991, a written agreement, pursuant to section 61 (b) of the Land and Titles Act, was made between the acquisition Officer and Alvin Indukelema and Peter Tafea Ne'e, as the purported owners or duly authorised representatives of the owners of customary land. An objection was subsequently lodged by the Appellants on or about the 9th of May 1991.

On the 12th of June 1991, at Auki, a public hearing was conducted by the Land Acquisition Officer pursuant to section 63 of the Land and Titles Act.

At that public hearing, the Appellants raised an objection inter alia, that the Acquisition Officer was a man from the same area as the Respondents and was in fact related to one of them, Peter Tafea Ne'e, and therefore likely to be biased against them.

The objection was dismissed by the Land Acquisition Officer, after which he made a determination in favour of the Respondents. The Appellants lodged an appeal to the Magistrates Court. This was heard on or about the 20th of February 1992 and judgement delivered against the Appellant on the 27th of March 1992.

The grounds of appeal are contained in the Notice of Appeal filed on or about the 26th of June 1992.

Grounds (1) and (2) are related to each other and so I will consider them together. They read:

"(1) *That the learned Magistrate erred when he failed to consider evidence adduced on behalf of the Appellants which showed that the Land Acquisition Officer had an interest in the said acquisition.*

(ii) That the learned Magistrate erred in law when he held that in order to rely on bias as an appeal ground the Appellants had to show that bias actually existed."

The Law

The law on bias has already been dealt with time and again by the courts. The cases of *Kevesi -v- Talasasa (1983) SILR 87, Rade and Soso -v- Sautuana (1985-86) SILR 55 George Tetea -v- Elizabeth Harani, LAC No. 8 of 1990,* unreported, judgement delivered on the 16th October 1990, all recognised that the test is an objective one, that is "whether there would be an appearance of partiality to a reasonable and fair-minded observer."

In the case of *Paul Maenu -v- Gabriel Lamani, LAC 2 of 1992,* unreported, judgement delivered on the 22nd of December 1992, the two recognised tests of bias in the English courts were propounded and applied. These were (i) whether there was 'a real likelihood of bias', and (ii) whether there is 'a reasonable suspicion that there may have been bias'. Both questions were to be determined objectively, in the former, what right-minded or reasonable people would think in the circumstances; and in the latter, the standard is measured by right thinking people on the circumstances.

The test applied by the courts in this jurisdiction, it would appear, stem from these two recognised tests, more the former one.

Mr Teutao referred to ***Maenu -v- Lamani's*** case, in support of his submission that the learned Magistrate had erred in law, when he held that it had to be shown that bias actually existed. The relevant part in the judgement of the learned Magistrate read:

"When bias is alleged it is not enough to merely say that bias exists because, of in this case, family relationships. The appellants must show that the relationship caused the Land Acquisition Officer to act in a manner demonstrably biased. This they have failed to do."

With respect, I must agree with Mr Teutao, that the learned Magistrate was mistaken as to the correct or recognised tests of bias to be applied. Re-quoting ***Denning L.J in the case of Metropolitan Properties Co. (F.G.C.) Ltd -v- Lannon & Others [1968] 3 All E.R. 304 at page 310,*** he said:

> *"...in considering whether there was a real likelihood of bias, the court does not look at the mind of the justice himself or at the mind of the Chairman of the tribunal, or whoever it may be who sits in a judicial capacity. It does not look to see if there was a real likelihood that he would, or did, in fact favour one side at the expense of the other. The court looks at the impression which would be given to other people. Even if he was as impartial as could be nevertheless, if right-minded persons would think that, in the circumstances, there was a real likelihood of bias on his part, then he should not sit. And if he does sit, his decision cannot stand. Nevertheless, there must appear to be a real likelihood of bias. Surmise or conjecture is not enough. There must be circumstances from which a reasonable man would think it likely or probable that the justice or chairman, as the case may be, would, or did favour one side unfairly at the expense of the other. The court will not enquire whether he did, in fact, favour one side unfairly. Suffice it that reasonable people might think he did. The reason is plain enough. Justice must be rooted in confidence; and confidence is destroyed when right-minded people go away thinking: "The judge was biased."*

The next point raised by Mr Teutao is that there was a real likelihood of bias when the Land Acquisition Officer dealt with the public hearing at Auki on the 12th of June 1991.

Three points have been raised by Mr Teutao in support of this.

First, he referred to an article written by the Land Acquisition Officer way back in 1977, when the Land Acquisition Officer was working in the Ministry of Agriculture and Lands. The article is contained in a book called 'Land in Solomon Islands' and the article is contained in chapter 29, pages 218-225. The book was published by the University of South Pacific in 1977. Although the name of the land is not specified, it

has not been disputed that that article referred to a registered land which was adjacent to the customary land in question in the acquisition proceedings. The relevant portion reads:

> *"Despite the fact that there are no disputes over boundaries of individually owned registered parcels, there is a major dispute appealing against the settlement officer's decision in 1967 by some people living outside this land settlement scheme. This affects the area known as Section 11 covering registered parcels Nos. 2, 19, 21 and 22. However this appears not to have any effect on the individual owners of registered parcels in Section 11 as they have vested their trust in the government that whatever the outcome may be certain provisions would be made to safeguard their interest.*
>
> *The argument is about whether or not the settlement officers decision could over-ride what was said to be an earlier Native court case against the present registered owner. The registered owner has now died, and the claimants say he confessed before he died that he had stolen the land through the settlement officer's decision."*

The submission of Mr Teutao is that what the Land Acquisition Officer had written in that article, especially the last part pertaining to the confession of the registered owner (which was non-other than the late Irobina, father of the Appellants) revealed what was the opinion of the writer. The Land Acquisition Officer must have believed in what he was told by Nelson Kifo, and therefore had seen it fit, to include that bit in his article. This showed very clearly that the Land Acquisition Officer had already expressed an opinion about land which was adjacent to the land being acquired, and between the same parties as in previous court hearings and disputes. There is therefore a real likelihood of bias, and it would not be proper to allow the Land Acquisition Officer to deal with the claims of the parties in the public hearing.

I am satisfied this concern is justified. I am satisfied the Land Acquisition Officer had an interest in the proceedings that had been held in the 1960 - 61 court case between the fathers of both parties in court, and in the determination of the Land Settlement Officer dated the 31st October 1967. This is clear from the relevant parts of his article. But also when he was asked under cross-examination by Mr Teutao if he believed in what he had written about the land been stolen, he replied, "I believed it."

With respect, this is clear evidence that there was a real likelihood of bias occurring.

I am satisfied right-minded people would say that he will most likely favour the Respondents anyway, or that he would be biased. If he believed what he was told, that the registered owner, the late Irobina, confessed that he had stolen the land through the

settlement Officer's decision, then it is most probable that he held an opinion that the land rightly belonged to the Respondent and not the Appellants. Thus, in this case, it is likely that he will be biased.

The second point raised by Mr Teutao referred to the relationship between the Land Acquisition Officer and the Respondents. Under examination in chief by Mr Wasiraro, about his relationship with Peter Tafea Ne'e, he disclosed that Peter Tafea Nee's mother is like an aunty to him. He stated that when his mother was small, she was looked after by Peter Tafea Nee's mother.

With respect, this is evidence in my view of a very close tie in custom between the Respondent, Peter Tafea Nee, and Mr Totorea. In custom, Mr Totorea would feel obliged, to do a good turn to Peter Tafea Nee, to repay his mother's love, care and kindness. Such acts in custom are similar to an adoption in a westernised society. Mr D. Totorea's mother would look on Peter Tafea Nee's mother as her mother. This explains why D. Totorea would call Peter Tafea Nee's mother as his aunty. Peter Tafea Nee would be looked upon by D. Totorea as an uncle, in custom. I do not think such a relationship could ever be described as insignificant or negligible. In his evidence before this court, Mr. Totorea sought to minimise that relationship by saying, that they were related, but did not know if they were closely related or not.

I do not think that changes the fact, that close customary ties do exist through what Peter Tafea Nee's mother had done for D. Totorea's mother, when she was small. Such actions can be likened to a customary adoption. It has not been pleaded that this was a customary adoption. However, I am satisfied that normally, customary obligations would flow from such actions and carried on from one generation to another. Mr. D. Totorea therefore, would consider himself obliged to give assistance to Peter Tafea Nee. Right-thinking people would view that, as a real possibility, and therefore giving rise to a real likelihood of bias occurring.

Accordingly, I am satisfied that it was not proper for Mr. D. Totorea, with all due respect to him, to preside over the public hearing between the parties in this case. It is not whether he was impartial or not, when he dealt with the matter. He may have been impartial, as he had alleged forcefully in his determination and before this court. The court however ***"looks at the impression which would be given to other people. Even if he was as impartial as could be nevertheless, if right-minded persons would think that, in the circumstances, there was a real likelihood of bias on his part, then he should not sit.' (per Denning L.J. (IBID)***

There is another relationship, also highlighted during the hearing, which in my view does indicate to some extent some form of interest in this case. Nelson Kifo, the key witness for Idukelema in the 1960 to 1961 case, is an in-law of Mr D Totorea. Nelson

Kifo's wife, is D. Totorea's aunty (i.e. his mother's sister). D. Totorea therefore, is linked in custom to some extent through the bond of marriage to Nelson Kifo. He would in custom to some extent feel obliged to render benevolence to his in-law. A right minded or reasonable person would think that there is a real likelihood of bias.

The third point raised by Mr Teutao is that the Land Acquisition Officer failed to enquire into the question of bias raised by the Appellants when it was put before him. The clear case authority on this is, George Waneai -v- George Linganafelo L.A.C. No. 6 of 1990, unreported, judgement of Ward C.J. delivered on the 25th February 1991. At page 1, the court stated:

> " *Where an objection is raised, the court must hear the objection and investigate it as far as they consider necessary and then, on the matters before them make a decision. If that procedure is followed this court will be reluctant to interfere unless the decision is plainly wrong.*"

The above statement was reiterated in the latter case of ***George Tetea -v- Elizabeth Horani LAC. NO.8 of 1990***, unreported, judgement delivered on the 16th of October 1991 per Muria J., as he then was. In that case, the learned judge stated:

"*It will be observed that the court is duty bound to hear the objection and investigate it. This entails the procedure that should be followed. The court must look into the allegation of bias and as far as necessary consider evidence both from the objector and the Respondent and any other person including the person against whom the objection is raised who may assist the court in ascertaining the validity of the objection.*"

The question before this court therefore, is whether the LAO did investigate the objection as raised, and then make a decision on the matters before it.

The records of the LAO contained the following statement:

"*The Acquisition Officer replied that the point raise has no proofs by evidences of influence yet. Once the Public Hearing proceedings has taken place and should there be clear evidence on the Acquisition Officer favouring his 'wantok' then this can be proofed (sic) by evidence. Therefore this point is also disqualified as not valid argument.*"

What the LAO was doing was in fact to apply the same test of bias mentioned by the learned Magistrate, that of establishing actual bias. The objection however, was never investigated. The allegations raised, of a likelihood of bias, through the relationship of the Land Acquisition Officer to the Respondents, was never investigated and no decision taken. Accordingly, the matter should be remitted back to a different Land Acquisition Officer to deal with.

It would not be necessary to consider the other grounds of appeal, however, I will only deal with grounds 3 and 4, as they touch on the legality of the appointment of the Land Acquisition Officer, by the Provincial Secretary (Malaita Province).

Ground 3 alleged that the appointment of the Land Acquisition Officer was defective as it was made by the Provincial Secretary (Malaita Province), rather than the Commissioner of Lands as required by section 60 (1) of the Land and Titles Act.

The submission of Mr Teutao on this is that matters pertaining to Prisons is not a devolved function. Accordingly, the acquisition should have been done by the Commissioner of Lands, on behalf of the National Government and not the Provincial Assembly.

It has not been disputed that Prisons is not a devolved function. Accordingly, anything relating to it is the responsibility of the National Government. When it comes to land matters, the Commissioner of Lands is the responsible officer and not the Provincial Assembly.

Now, Section 60 (1) of the Land and Titles act provides that:

"Whenever the Commissioner wishes to purchase or to take a lease of any customary land under section 59, he shall in writing appoint an Acquisition officer to act as his agent for the purposes of the acquisition."

There is no evidence whatsoever that Mr D. Totorea was appointed by the Commissioner of Lands. There is no evidence in writing of any such appointment. The only evidence we have is an appointment of Mr D. Totorea by the Provincial Secretary, Mr J. Watealaha.

Mr Wasiraro has sought to submit that the Provincial Assembly is the agent of the Commissioner of Lands. With respect, section 60(1) cannot be stretched to cover that. That section specifically requires that the Commissioner of Lands "shall in writing appoint an Acquisition Officer." There is no power to appoint someone else who in turn can appoint an acquisition officer.

The Provincial Assembly's powers are provided for in section 60 (1A) of the Land and Title Act. Mr Teutao has correctly submitted that matters on Prisons do not belong to the Provincial Assembly. Accordingly, they do not have power to acquire land for purposes of re-locating the Auki Prison.

The defect is fairly clear and straight forward, but also easily remedied. All that needs to be done, is for the Commissioner of Lands to appoint an acquisition Officer, in writing, for this job.

For the reasons already stated, the appeal is allowed with costs, the judgement of the Magistrate's court is set aside, the Land Acquisition Officer is accordingly disqualified, and I direct that the matter be remitted back to be dealt with by a different Land Acquisition Officer, correctly appointed in writing, by the Commissioner of Lands.

(A.R. Palmer)
JUDGE