

FRANK OFAGIORO KABUI (Representing Afoa Lines) -v- SILIAGALO (Representing His Line)

High Court of Solomon Islands

(Palmer J.)

Civil Case No. **359 of 1992**
Hearing: **29 March 1994**
Judgement: **31 March 1994**

T. Kama for Plaintiff

P. Tegavota for the Defendant

PALMER J: By an Originating summons filed on the 3rd of december 1992, the Plaintiff, representing the Afoa Lines sought several declarations from the court namely;

1. That the Rumunafau Chiefs have no jurisdiction or power, under section 8D of the Local Courts Act (Cap.46) as amended to determine the dispute between the Plaintiff and the Defendant on 12th December, 1991 in that the western boundary of Afoa Land separating itself from Limaabu land was already determined by the Toambaita Local Court at Malu'u North Malaita in 1968 and confirmed on appeal by the High Court in 1969 and further confirmed in the Toambaita Local Court in 1980 in a dispute between Robinson Obiau and Leonard Maenuna and endorsed by the Malaita Customary Land Appeal Court in 1981 and the High Court in 1982.

2. That the principle of res judicata applies to the customary land dispute between the Plaintiff and the Defendant in Afoa Land in that the defendant belongs to the same genealogy upon which Robinson Obiau based his claim and lost in the Toambaita Local Court in 1980 on the same issue of moving the western boundary of Afoa Land eastwards to the Kwaibesi stream in Afoa Land and thus extending the eastern boundary of Limaabu Land over Afoa Land to the said Kwaibesi stream.

In support of the application, an affidavit of Frank Ofagioro Kabui was filed also on the same day. His affidavit sets out succinctly the basis of his claim as set out in the Originating summons. In essence his claim is based on the doctrine of res judicata; that the customary land dispute between the Plaintiff and the defendant in Afoa land had already been adjudicated upon by the Toambaita Local Court in 1980, on the same issue and between the same parties. The issue of the boundary seems not to have been disputed; that it was the same issue dealt with in the 1980 Local Court case. The main issue in dispute it seems, is the question of whether the same parties are now taking up the same issue.

The plaintiff has sought to show that the parties are essentially the same by way of comparing the genealogies of Robinson Obiau in the 1980 Toambaita Local Court and the Defendant in this case.

In the hearing before the court on the 18th of February 1993, learned Counsel for the Defendant then, Andrew Nori (now the Minister of Finance), sought directions from the court to refer a question to the Malaita Local Court to make findings in custom, which should assist the court in expediting the hearing of the Originating summons filed on the 3rd of December 1992. The question agreed to by consent by both parties was:

"Is Siliagalo a member of the same landowning group as Robinson Obiau who lost in the To'obaita Local Court in 1980 in a dispute with Leonard Maenuna about the Western boundary of Afoa Land?"

This question was then referred by this Court to the Malaita Local Court, which sat at Malu'u, on the 31st of March 1993 to consider the question. The findings of the Malaita Local Court read:

"This Local Court have heard the generation which Robinson Obiau given in Local Court case held between L. Maenuna in 1980. Which F. O Kabui produced in Court after read out to Mr Siliagalo and handed to Court as Exh. "5" and Siliagalo's generation given in chiefs settlement committee in December 12th 1991 exh. "C" even though the names on the genealogies are mixed up not in right order but the genealogies begin with IFUAKI beget BAKIA - DADAKUBALE (see generation attached). The defendant (Siliagalo) read out his generation in Court and recorded he also began with IFUAKI beget BAKIA - DADAKUBALE (see generation written down in Court proceeding.

This Court compared the above genealogies and found almost the same as one generation. See generation exh. "C" & "B" attached, see proceeding Nos 10 on both genealogies C & B "LAUAI (m) sons DAFENA & IOLO (m).

Court consider the above generations with knowledge of custom understanding that the defendant and R. Obiau are related or both descended of Ifuaki (m) beget Bakwa - Dadakubale that Court believed Siliagalo was the real member of the landowning group as Robinson Obiau who lost in the Tobaita Local Court in 1980 in a dispute with L. Maenuna. The defendant produced the same generation as Robinson Obiau (m). According to our culture two tribesman cannot descend of one man as Ifuaki the (devil) beget Bakwa-Dadakubale see generation Exhi "B" & "C". Therefore this court believed that R. Obiau and Siliagalo are descended of one generation through female linealities of Lima'abu land not Afoa land.

The Malaita Local Court answers question.

- 1. That Siliagalo (defendant) is a member of the same landowning group as Robinson Obiau who lost in the Tobaita Local Court in 1980 in a dispute with Leonard Maenuna about western boundary between Lima'abu land with Afoa land. See plaintiff's map exhibit "A" attached such land part of afoa land between Matakwalao to Kwaibasi stream."*

By summons dated 28th of September 1993 filed on the 30th of September 1993 the Defendant now seeks to have the findings of the Malaita Local Court of the 31st March 1993 quashed and for a re-hearing to be ordered concerning the question referred to the Local Court plus an additional question: ***"whether the defendant or Siliagalo has any right or ownership of Afoa or part of Afoa land as distinct from the right and ownership of the said Robinson Obiau."***

The grounds of the application read as follows:

- "1. The said local court had wrongly refused to accept the written submission of the defendant which sets out Robinson Obiau's true genealogy obtained from the Silolo House of Chieves. This written submission of the defendant was important and the court should have received it in order to rebut, the written submission given by the plaintiff which sets out genealogy of Luma'abu Gwabu Land and also genealogy of Robinson Obiau and that of the defendant. Had the court accepted the defendant's genealogy, it would have found that the genealogy presented by the plaintiff contradicts each other.*

2. The decision of the Malaita Local Court was biased and in favour of the plaintiff in that:-
 - (a) On Wednesday 30th of March 1993 at about 6 p.m. the plaintiff's father and the President of the Malaita Local Court were seen together at the plaintiff's father's house at Malu'u shopping and marketing centre.
 - (b) On Thursday 31st of March 1993 at about 7.45 p.m. the said President of Local Court and the plaintiff's father were again seen together at the same plaintiff's father's house at Malu'u and they were seen sitting together early that morning.
 - (c) On Thursday 31st of March 1993 at about 8.40 a.m. the plaintiff and the said President of Local Court were already seen at Malu'u Court House.
 - (d) On Thursday again 31st March 1993 at 3.30 p.m. the said President of Local Court and the plaintiff were seen together travelling in White Hillux Vehicle.
3. Because of the close association of the President of the Malaita Local Court before the court's hearing and on the date of hearing, the said Local Court could not be seen as impartial and there was a likelihood of bias against the defendant."

It would be proper for this court to restrict itself at this point of time to the matters raised in the summons filed on the 30th of September 1993.

GROUND 1.

The purported written submission from the Silolo House of Chieives was the claim that Robinson Obiau's mother was Dausiala and not Alumothe as stated by him under Oath before the Local Court in 1980.

A copy of the genealogy of Robinson Obiau produced before the Local Court in 1980 is annexed to the affidavit of Frank Obiau Kabui filed on 3/12/92 and marked exhibit "F".

In the hearing before this court, learned counsel for the Defendant applied to introduce the piece of evidence from the Silolo House of Chiefs which the Local Court had refused to hear. That information has been conveniently deposed to by Chief

Raymond Faneagalo in his affidavit filed on the 9th of November 1993. In the hearing before this court on the 29th of March 1994, Chief Raymond Faneagalo also gave oral evidence in which he stated that he had been to Robinson Obiau's house on many occasions some forty years or so ago and that he remembered being fed and attended to by a woman called Dausiala, whom he presumed to be the mother of Robinson Obiau. From this observation, the Defendant submits that the court should accept that Robinson's mother was Dausiala and not Alumothe.

Was it proper for the Local Court to exclude this piece of submission? The issue before the Local Court was to determine the question of whether Siliagalo was a member of the same landowning group as Robinson Obiau who lost in the 1980 Toambaita Local Court.

It is an undisputed fact that in the 1980 Toambaita Local Court hearing between *Leonard Maenuna - v - Robinson Obiau*, Robinson Obiau's claim was based on his genealogy which he had placed before that court and now produced before this court attached to the affidavit of Frank Ofogioro Kabui and marked as annexure 'F'. That genealogy originated from IFUAKI. The crucial point to note about the 1980 Local Court case is that it was that genealogy tree from, IFUAKI to OBIAU via ALUMOTHE that Robinson Obiau lost his case against Leonard Maenuna. He did not take up that case against Leonard Maenuna using his genealogy tree via Dausiala.

It may be that Robinson Obiau's line via Dausiala was completely different. However, one may ask why then did he use the line of Alumothe in tracing his line? Surely, there must be some explanation for this.

If the Defendant is now alleging that Robinson Obiau had used his line or genealogy in the case in 1980, then I think that is a separate matter for the Defendant to take against Robinson Obiau.

An appropriate action would seem to be one based on fraud against Robinson Obiau. Until that is done and proven, the Defendant is stuck with the decision of the Malaita Local Court between *Robinson Obiau -v- Leonard Maenuna*. It is one thing to allege fraud against Robinson Obiau, it is another thing to prove it in court. The evidence therefore of Chief Raymond Faneagalo makes little difference to the decision of the local court in 1980.

The rejection by the Local Court of the written submission from the Silolo House of Chieves therefore was not wrongful. Its finding on the other hand was very clear. It found that the genealogy as used by Robinson Obiau and now claimed by the Defendant in this case were the same. It is not for this court to question the decision as made in custom, recognising the fact that the Local Court Justices are more

knowledgeable in the customs and genealogies of the Local people within that region. This court's jurisdiction is primarily confined to matters of law and procedure.

This brings me to consider ground (2) of the summons which is based on an allegation of bias.

Part (a) of ground (2) states that on Wednesday the 30th of March 1993 at about 6.00 p.m, the plaintiff's father and the President of the Malaita Local Court were seen together at the plaintiff's father's house at Malu'u shopping and marketing centre.

The only affidavit evidence in support of this allegation was contained in the affidavit of Siliagalo filed on the 30th of September 1993, at paragraph 3(a). That affidavit did not state who saw the plaintiff's father and the president of the Malaita Local Court that evening.

In contrast, the affidavit evidence of Lemuel Liolea filed on the 25th of October 1993 stated very clearly at paragraph 3 that he was at Bitama on Tuesday the 30th of March 1993 and only travelled to Malu'u Station on the morning of the 31st March at about 5 a.m. He couldn't therefore have been at two places at the same time. Someone is clearly lying. I am not satisfied that it has been proven on the balance of probability that the President was with the plaintiff's father on the evening of the 30th of March 1993.

The second allegation relates to the President of the Local Court again been seen sitting together with the plaintiff's father at the plaintiff's father's house at I think 7.45 a.m and not 7.45 p.m as contained in the summons.

In support of this allegation, the affidavit of Caulton Tagini was filed on the 9th of November 1993. At paragraph 2 of that affidavit, he deposed:

"On the 31st March 1993 in the morning, I was following the main road and going to Malu'u court house. As I went passed, I saw Frank Kabui (Jnr) his father and Mr Liolea sitting down together in Kabui's father's house at the Malu'u shopping and marketing centre. They were setting (sic) on an extension to the said house made of bush materials and facing the hospital."

Also in the affidavit of Siliagalo, filed on the 30th of september 1993, at paragraph 3 (b), he deposes that he saw the President, Mr Liolea with the plaintiff's father at his same house, and that earlier on that morning, he had seen the plaintiff and the President walking past him at No'o stream.

In contrast, an affidavit of Michael Frank Kabui was filed on the 21st of January 1994, in which he denied ever talking with the President either before, on or after the 31st of March 1993.

The President, Lemuel Liolea, also filed an affidavit on the 25th of October 1993. He deposed at paragraph (3) of his affidavit, that he arrived at Malu'u Station at about 6.30 a.m. He said he stayed at a house given to them at the back of Malu'u Police Station. He was there with his two member justices and then proceeded to the court house together with the court clerk at about 8.00 a.m. He couldn't therefore have been with Michael Frank Kabui at his house that morning.

In the affidavit of Frank Ofagioro Kabui filed on the 21st of October 1993, he deposed that he arrived at his father's house at about 7.00 a.m on the morning of the 31st March 1993. Lemuel Liolea was not there, and that his father never spoke to him about Lemuel Liolea. At about 7.30 a.m, he left together with his father and other relatives to the Malu'u Court house by truck, arriving at about 7.45 a.m.

Clearly, someone is telling a deliberate lie. That is very bad and most disappointing, as it is clear that someone is trying to bend the rod of justice for their own selfish ends.

Am I satisfied on the balance of probability that I can accept the affidavits of Caulton Tagini and Siliagalo as more truthful in contrast to the affidavit evidence of Michael Frank Kabui, Frank Ofagioro Kabui and Lemuel Liolea?

There is also by the way, an additional affidavit filed by Frank Ofagioro Kabui on the 25th of March 1994, in which he stated at paragraph 3 that any person on the main road cannot see his father's house because it is blocked by trees and coconut trees.

With the greatest of respect to the affidavit evidence filed on behalf of the Defendant, I am still not satisfied that I can rely on their affidavit evidence, and accordingly reject their evidence. I find the affidavit evidence of Liolea, Michael Frank Kabui, and Frank Ofagioro Kabui, convincing, credible and reliable. The same goes for grounds 3(c) and (d).

Under ground 3(c), again when contrasted with the evidences of Liolea, Michael Frank Kabui and Frank Ofagioro Kabui, I am unable to accept that allegation as having been established.

Under ground 3(d), it was alleged that the President, Liolea was seen travelling with Frank Ofagioro Kabui on Thursday 31st March 1993 at 3.30 p.m, in a white hilux.

At paragraph 3 of Rex Noben's affidavit, he deposed that he saw Frank Ofagioro Kabui and Liolea sitting together in a white Hilux double cabin. He was standing on the road side at Gwa'ako village at that time.

In contrast, in his affidavit evidence filed on the 25th of March 1994, Frank Ofagioro Kabui stated at paragraph 7, that he travelled to Auki on Thursday morning 1st April 1993. Also in his affidavit filed on the 21st of October 1993, at paragraph 15, Frank Ofagioro Kabui deposed that he was picked up by Malu'u Police landrover at about 6.30 a.m. from the main road near his house, and taken to Auki. He boarded the *Campass Rose II* that same day and returned to Honiara arriving at about 3.30 p.m. Attached to his affidavit is a copy of the Coral seas ticket No. 429748, dated 1/4/93. The estimated time of departure on the ticket was put at 9 a.m. This corresponds to Frank Ofagioro Kabui's statement that he arrived at Honiara at about 3.30 p.m. It usually takes about six hours travel from Auki to Honiara by ship.

There is no way, Frank Ofagioro Kabui would be riding in a white hilux double cabin in the afternoon of Thursday, the day after the court hearing, at 3.30 p.m. Either Rex Noben was mistaken, or is telling a deliberate lie. Whatever it is, I reject his affidavit evidence on this point out right.

This in essence disposes of the allegations of bias.

There is however, one important point to note. Before the hearing proper was commenced, both parties were given opportunities to raise any objections to the court justices. If what the defendant alleges concerning bias was true, then why didn't he raise an objection. Some of the allegations of bias were purported to have occurred before the commencement of the court hearing. If the defendant was of the view that there was a real likelihood of bias, then why didn't he raise an objection. Was it because the allegations had no strands of truth in them?

It seems to me that where a person was given an opportunity to raise an objection but refused to take it, then it would be improper and unjust for this court to allow a person to take the chance of a decision in his favour, but then on losing the case, be allowed to raise an objection, which in effect he had waived unless it can be shown to the satisfaction of the court, that no opportunity was given or that the allegations of bias occurred during the hearing or after, or were only discovered afterwards by the Defendant. The case authority on this is *Tauri'i -v-Kerehote 1985/86 SILR 80, at pp 82-83.*

The summons is dismissed with costs.

It would now be appropriate to list the hearing for the Originating Summons filed on the 3rd of December 1992, and I suggest on a date to be fixed by the Office Manager. The findings of the Malaita Local Court would then be considered together with any other submissions that the parties may wish to make before final judgment.

(A.R. Palmer)

JUDGE