

MICHAEL DAKA

APPLICANT

v.

JOHN MORITANA
JEREMIAH
AUGUSTINE OKAI
MAGI
MALACHI TATE
BOBBY ALAIFERA

- 1. RESPONDENT
- 2. RESPONDENT
- 3. RESPONDENT
- 4. RESPONDENT
- 5. RESPONDENT
- 6. RESPONDENT

High Court of Solomon Islands

(Palmer J.

Civil Case No. 1 of 1993

Hearing: 9/2/95

Judgment: 10/2/95

J. Masiraro for the Applicant

T. Kama for the First, Second & Sixth Respondents.

C. Tagaraniana for the Third, Fourth and Fifth Respondents.

PALMER J: By notice of motion filed on the 10th of March, 1993, an application was made for the issue of a writ of attachment against the Respondents for **Contempt of Court**, the grounds of which have been set out in the statement **Accompanying Application** for leave to commence this action.

There are three main grounds set out in that Statement. The first one refers to a Local Court decision in 1974 in which it is alleged that John Moritana, Jeremiah Kalibiu and Bobby Alaifera were parties or members of the parties in that Local Court case, and which had been won by the Applicant.

The second one relates to a Local Court case in 1981 and subsequent appeals to the Malaita Customary Land Appeal Court and High Court in 1983 in which Malachi Tate was a party and lost. The Applicant was also the winner in those cases.

In both those cases, the Courts ruled that those customary lands in dispute were part of Oroba Land, the ownership of which vested in the Applicant.

The third ground is the ground which actually gave rise to this contempt action, that the Respondents have continued to make gardens and plant coconuts in Oroba Land without the permission or consent of the Applicant.

An action for **Contempt of Court** is a serious claim and the recognised standard of proof is no less lower. It is the criminal standard as has been aptly endorsed by the learned Chief Justice Muria in the case of *Hitukera -v- Hyundai Timber Company Ltd. and Maepeza* C102/92, unreported, judgment delivered on the 23rd of July, 1992, quoting *Lord Denning in Re Bramblevale Ltd [1969] 3 All E.R. 1062 at 1063*.

The Court therefore must be satisfied beyond reasonable doubt that the allegations raised have been duly proven.

The first ground raised is more of a preliminary matter in custom between these parties, that is, whether John Moritana, J. Kalibiu and B. Alaifera were parties or members of the same parties in the 1974 Local Court case. This point must necessarily be proven before the last ground can be considered; i.e. whether gardens had indeed been made in Oroba Land. If it is not proven then that is the end of that matter. The reason being that that decision would not be binding on the Respondents.

A copy of that Local Court case is annexed to the affidavit of Michael Daka filed on the 29th of December, 1992, marked 'Annexure A'.

The Plaintiff in that 1974 case was Francisco Wanega, and the defendant, Michael Daka; the Applicant here.

The allegation which must be proven to my satisfaction is that John Moritana, Jeremiah Kalibiu and Bobby Alaifera were members of the same tribe-or line as Francisco Wanega, such that if they shall seek to raise any claim, they would be estopped on the basis that the same matters raised in that Local Court case would be re-litigated i.e., it is res-judicata.

The evidence relied on by the Applicant to prove his allegation came from his own statements under oath before this Court.

At best the evidence produced was scanty and general. There was a bold assertion that because those three Respondents were called as witnesses for the Plaintiff, that they must be related. No evidence however, of the genealogy of those three Respondents was produced to this Court to support that assertion.

Under cross-examination by Mr. Kama, no satisfactory explanation was provided as to how they may have been related.

In the Local Court records of proceedings of the 1974 case, at page 1, the genealogy of Francisco Wanega was meticulously described. In the evidence of J. Kalibiu however, at page 3 of the record of proceedings, he expressly stated that he did not know Francisco Wanega's generation. This was referred to by Mr. Kama when cross-examining the Respondent.

The same reference was made to Bobby Alaifera's evidence and John Moritana's evidence in the Local Court proceedings by Mr. Kama. The response by the Applicant was similar, that the evidence does not show or acknowledge that they may have been related. There is no evidence or little evidence to show that those three Respondents are members of the same

time or line as Francisco Wanega. There is no evidence or little evidence to show that Francisco Wanega was acting for and on behalf of those three Respondents.

There is a belief and an assertion on the part of the Applicant, but that is not sufficient.

There must be evidential backing proven to the required standard.

There is no evidence of any other proceedings before the Chiefs, but especially the Local Court to have this crucial issue determined. The normal practise in such matters is to have such issues determined before the Local Courts. This should have been done first by the Applicant.

It remains this first ground.

The second ground relates to Malachi Tate. It is not in dispute that there was a court case between Malachi Tate and George Kakai and the Applicant. It is not in dispute that in the Local Court, the Applicant won the case. On appeal to the CLAC and the High Court, these were also won by the Applicant.

The crucial evidence against Malachi Tate is whether he did make gardens in Oroba Land as per the 1981 and 1983 Court decisions.

There is unchallenged evidence from the Applicant that Malachi Tate did make gardens in Oroba Land but that since 1993 he has left the vicinity of that place.

It is also being alleged in the evidence of the Applicant though not raised in the Statement of the accompanying Application for Leave, that the other Respondents were also represented by Malachi Tate in the 1981 case. Unfortunately, the evidence adduced is again scanty and

It is not in dispute that Augustine Okai and Magi were witnesses for Malachi Tate in the 1981 Local Court case, and on appeal to the CLAC, John Moritana and Jeremiah Kalibiu appeared as witnesses for him.

In the Local Court record of proceedings, in the evidence of Augustine Okai, at page 4, he pointed out that he was from Faka Island and has his own separate line but that he also knew about Malachi's line.

The evidence adduced against Okai by the Applicant is insufficient. No genealogy of Augustine Okai has been filed and proven before this Court to satisfy me that they are from the same tribe or line, and that their claims are identical. No determination of any Local Court on this central issue has also been produced to satisfy me that they are one and the same people. Being a witness is not sufficient.

The same can also be said for Magi.

In the CLAC - record of proceedings at page 3, para. (5), there is a reference made by Malachi Tate to the female lines which still live in the land and looked after it for him. These were K. Oko, Kalibiu and J. Moritana.

In his evidence before the CLAC, J. Moritana sets out how he came to dwell at Tali (see page 3). Under cross-examination by the Court he however pointed out that:

Appellant is true owner of sarifafa because it is his tribe's - he claims by male line.

I am related to appellant on the female side - I don't know through whom".

The statement by J. Moritana would give the appearance that there are two distinct lines, that of Malachi Tate and that of his. It is not clear however, what is meant by the reference to the female line, where that is traced from and how.

The burden of proof however does not shift. It remains with the Applicant to satisfy this Court that J. Montana and Malachi Tate are one and the same person and that their claims are identical, or that Malachi Tate was representing them in Court. The evidence adduced by the Applicant on this subject is unsatisfactory.

The same goes for Jeremiah Kalibiu. In his evidence before the CLAC at page 4 of the record of proceedings, he pointed out that he came from Faufera. There is however, no evidence or sufficient evidence to support the Applicant's allegation that J. Kalibiu too is from the same tribe or line as Malachi Tate. In his own evidence before this Court, the Applicant stated that Malachi Tate was from another place. That must surely mean that they are not of the same tribe.

It is important to point out here that where questions of genealogy are involved, and questions pertaining to whether certain persons are members of the same tribe or the same person as in a previous case, then the appropriate forum for the determination of those issues is before the Local Court, not here, unless there is sufficient material before this Court to enable it to make a satisfactory ruling on those issues. The reason is that these issues more frequently involve customary evidence of which the Local Court Justices would be in a better position to deal with, with their local knowledge in genealogy and custom.

This case has been brought on a claim for **Contempt** and yet there are preliminary issues pertaining to the genealogy and membership of a tribe or line, which have not yet been determined. On this basis, customary evidence have had to be introduced before this Court. It has already been pointed out that the appropriate forum should have been with the Local Court. Once those preliminary issues had been finally sorted out, then may be the claim for Contempt could have been considered. I say no more.

The question then of whether the Respondents have made any gardens in Oroba Land or not is not in issue at this point.

The application for issue of a writ of attachment for contempt against all the Respondents, except Match, is dismissed with costs.

As to Match, there is clear evidence that he no longer resides in or near Oroba Land, and that he has not made any garden there.

There is no evidence to suggest that there is any possibility of him returning to that place. Accordingly, it is my view that an appropriate order would be for a conditional discharge for a period of 6 months, with effect from today.

If he should in the period enter Oroba Land and make gardens or do anything contrary to the rights of the Applicant, then he will be required to appear before this Court for punishment by fine or imprisonment.

ALBERT R. PALMER

A. R. PALMER,

JUDGE