

FANIDUA KIRITE'E
v.
ROCKY SUGUMANU

PLAINTIFF
DEFENDANT

High Court of Solomon Islands

(Palmer J.)

Civil case No. 245 of 1990

Hearing: 7/3/95

Judgment: 10/3/95

T. Kama for Applicant

J. Wasiraro for Respondent

PALMER J: On the 21st of December, 1990, the Plaintiff (Respondent in this application) filed a statement of claim in which he claimed inter alia that he was the lawful owner of Fassifau Land by virtue of a purchase of the said land from Ramoitolo in 1971.

On the 3rd of March, 1994, summary judgment was entered against the Defendant (Applicant in this application), together with damages totalling some \$62,966.00.

On the 9th of May, 1994, the Defendant filed a summons to set aside that summary judgment. In his affidavit in support filed on the same day, he gave a number of reasons why he was not present during that hearing and stated that he had a viable defence to the Plaintiff's claim. In a further affidavit filed on the 15th of February, 1995, he stated that the land sold by Ramoitolo to the Plaintiff in 1971, belonged to his tribe and that Ramoitolo had no right in custom to sell that land. The question of customary ownership over Fassifau land therefore, was being challenged and raised as the defence to the Plaintiff's claim.

In the affidavit in reply of Fanidua Kiritee filed on the 8th of February, 1995, he contended inter alia that the Applicant (Defendant) had no defence to his claim in that the land in dispute had already been adjudicated upon by the Local Court, in a case between Nowae and Ramoitolo in 1968; land case no. 29/68. The Local Court had awarded ownership of the area of land in dispute in that case to Ramoitolo. He also stated and this is not disputed, that the Applicant is of the same tribe as Nowae and that their ownership claims are identical. Accordingly, he says that the Applicant is bound by that decision and estopped from asserting any fresh rights of ownership over that land.

The law governing setting aside of judgments obtained in default has been conveniently set out in the case of *Kayuken Pacific Ltd. v. Harper* [1987] S.I.L.R. 54. The first important matter for the Courts to consider is whether there is a triable issue in the affidavit of merit filed. If there is, then the Court must then go on to consider whether it should exercise its discretion in favour of the application.

In assessing whether there is a triable issue, the decision of the Local Court in the land case no. 29/68 must first be considered. The relevant parts of the decision of that Local Court read:

"... it seem that Nowae the Plaintiff must own the other side of the land, and Ramoitolo the other side. It looks as Nowae must own Kwakwali north side and Ramoitolo own the South side Marade & Uka. ... So the Court divide the land between them. There is a valley between Kwakwali and Tolo's village follow the valley from Lalinali river up the stream up to where the group of nali nuts trees are and follow the main bush road, bottom is toward the Su'u river. The land paid at Gwaufala must be mark for Leanafaka's people. The properties of Olosua coconut and Alata for fishing remain unchange. Only the land belong Tolo as said in previous cases. What made the saltwater people lose Adakoa is they have carried their devil away to the Island and nothing left at Adakoa"

The parties are in agreement as to the boundary description commencing from the "valley" between Kwakwali and Tolo's village, right up to the main bush road. They disagree however, on two matters. First, is the reference in the description of the boundary, "bottom is toward the Suu river". Secondly, they disagree as to the boundary from the "Valley" downwards (or in an easterly direction).

The Applicant says that the reference in the description of the boundary "bottom is toward the Suu river" can only be logically construed as referring to the Adakoa water at the bottom of the land in dispute, for the reason that the original area of land which caused the dispute and which resulted in that Local Court case, was a piece of land sold to Maniliu and located near Adakoa. The Applicant therefore says that the above construction of that description will make sense of the whole proceedings.

The Respondent on the other hand submits that the reference to the description "bottom is toward the Suu river" must be read in its context, as following or continuing on from the main bush road. It therefore couldn't be a reference to the Adakoa water, which is way down to the east of that boundary. He submits that it could only be a reference to the river which connects to the main bush road (the Rade River); that is the bottom of the main bush road is toward that river.

With respect to the submissions of both parties, I must admit that the description of those two parts of the boundary is ambiguous. To add to the uncertainty, there is no identifiable river called "Suu river".

The boundary description therefore is clear and identifiable only as far as it commences from the "Valley" between Kwakwali and Tolo's village, right through to where the main bush road is. Beyond the "Valley" and the main bush road, the boundary description is ambiguous.

The Respondent has submitted that the boundary beyond the "Valley" is the Lalignali River itself.

Lalignali River until it meets the "Valley" between Kwakwali and Tolo's village and continue up the stream etc". or it could easily have said that the boundary on the eastern side of the land is the Lalignali River. Neither of the above descriptions were adopted. Instead the description of the boundary was commenced in my view, from the "Valley" between Kwakwali and Tolo's village. The reference to the Lalignali River indicates the boundary line along that Valley, going up the stream. There is no indication of the continuation of the boundary from the "Valley" and going downwards along the Lalignali River to its delta or mouth. I note it is unusual to have the boundaries of the land in dispute described in such an incomplete and uncertain manner, but that is the best that we have. It is not for this Court to re-write the judgment of the Local Court.

Further down its findings, there is a reference to the properties of Olosua, namely, coconut and alata for fishing, of which the Local Court ruled that these remain in his possession, but that the land belonged to Ramoitolo. The location of Olosua's properties on the map used for submissions by the parties unfortunately, had not been marked. From the evidence recorded in the Local Court proceedings however, I am satisfied that that area is located near Adakoa, and not located on Fassifau land.

There is also a reference in the findings of the Local Court to the ownership over Adakoa as having been lost by the saltwater people. There is no indication however as to who those saltwater people are. Maybe, the parties themselves know.

Apart from the above specific references to the boundaries descriptions of land and other land areas, there is hardly any reference or mention as to which of the two parties own Fassifau land in custom. The boundary descriptions, as pointed out earlier, do not make clear on which side of the customary land boundary, Fassifau land is located. What this simply means is that, the question of customary land ownership over Fassifau land, as between Ramoitolo and Nowae, has not yet been litigated upon and finally settled. The matter is therefore still open for either party to take the matter to the Chiefs for hearing under the Local Court Amendment Act 1985, and before the courts, where the chief's finding is not accepted. The question of customary ownership over Fassifau land at this point,

remains a live issue. If ownership is eventually determined in favour of Ramoitolo, then the Respondent/Plaintiff can continue to pursue his claim in this action. If it is determined in favour of the Applicant/Defendant, then that would seem to be the end of this action.

I am satisfied accordingly that there is a triable issue as submitted in the affidavit of merit of the Applicant.

The next matters for the Court to consider, as set out in *Kayuken Pacific Ltd v. Harper* (1987) SILR 54, related to the question of the exercise of the Court's discretion. The first point to consider is, what was the reason for the failure of the absent party to appear?

In this case the reasons given were:

- (i) that the Applicant could not find any solicitor in time to assist him.
- (ii) that he would be attending a Central Region Area Council meeting on that day, and
- (iii) that he was unable to collect his file documents from his former solicitor in time to attend the Court hearing.

In his affidavit filed on the 9th of May, 1994, at paragraph 2, Rocky Tisa Sugumanu deposed that he became aware in January 1994, that his former solicitor would not be able to represent him that day in Court. The Applicant however, had all the time in February of 1994 to find a replacement solicitor, and yet was not able to do so. I find this a weak excuse. Parties to cases must take responsibility over their cases and act diligently and intelligently, as to the conduct of their cases and not sit back, and then expect things to go always as they wish.

The second reason given, I find to be irrelevant to the question of exercise of the Courts discretion.

The third reason, I find to be of some substance. I accept that there may be difficulties in getting in touch with his solicitor, Mr. Tagaraniana, for the collection of his file documents. However, that is

not a reason for not appearing in person before this Court. I do note though, that even if the Applicant had appeared in person, that most likely he would not have been able to proceed with his case, and instead would have asked for an adjournment. At least, he did have the courtesy of informing the Registrar that he would not be appearing on that day.

The other matter for this Court to consider in the exercise of its discretion, is the question of undue delay.

The summons to set aside judgment was filed on the 9th of May 1994, some two months after. No reason however, was given for the two months delay.

Finally, the Court must consider whether the other party will be prejudiced by an order for a new trial. This is the determining issue in this case. Although unattractive reasons have been given for the non-attendance of the Applicant at the trial, and no reasons given for the delay of two months in instituting an action to set aside the summary judgment, I am not satisfied that there will be further prejudice caused to the Respondent/Plaintiff if a new trial is ordered. This case has been outstanding since December of 1990 and further delay will not prejudice the Respondent/Plaintiff's case.

Taking all factors into account, I am satisfied that the judgment of this Court entered on the 3rd of March 1994 against the Applicant be set aside. A proper statement of defence should be filed within 14 days from today.

The parties should now apply their minds to the question of whether these proceedings should be stayed pending determination of the question of customary ownership over Fassifau land as between Nowae and Ramoitolo, or their representatives.

On the question of costs, the Applicant must bear the costs of this application and the hearing on the 3rd of March, 1994.

ALBERT R. PALMER

A.R. PALMER

JUDGE