

**JOHN BARE MAETIA -v-**  
**HUGH BENNETT AND**  
**DANIEL KIKILE**

**HIGH COURT OF SOLOMON ISLANDS**  
**(Palmer J)**

**Civil Case No. 314 of 1995**

**Hearing: 28th February, 1996**

**Judgment: 29th February, 1996**

*G. Suri for Applicant*

*A. Radclyffe for First Respondent*

*P. Lavery for Second Respondent*

**PALMER J:** This is a directions hearing by the Plaintiff, but a number of preliminary points have been raised by Messrs Radclyffe and Lavery, of Counsels for the First and Second Respondents.

First, it is argued that the Applicant's claim is dependent on the validity of the sale and purchase transaction of the subject land between Teisi Toma and Daniel Kikile (the 2nd Respondent). Until that had been conclusively proven, the Applicant had no claim against the First and Second Respondent. With respect to the Second Respondent however, I think that defect can be cured by joining Teisi Toma as a party to this case. The case against the First Respondent would stand or fall then on the outcome of the Applicant's case against the Second Respondent.

The second argument raised, questions the form in which this action had been commenced. It was suggested that commencing this action by originating summons was not the correct form. It should have been for breach of contract and specific performance. On this point, Mr Suri, of Counsel for the Applicant argues that his application commenced by Originating Summons is within the four corners of Order 58 Rule 1 of the High Court (Civil Procedure) Rules, 1964, in particular the words "*other instrument*", which would include the receipts relied on by the plaintiff.

Mr. Lavery however pointed out and correctly, that the crucial words in Order 58 Rule 1 are the words "*determination of any question of construction arising under the instrument*". The interests of a person under a deed, will or other written instrument is qualified by the words "*determination of any question of construction arising under the instrument*". As pointed out by Mr Lavery, there is no issue of construction on these documents of sale and purchase by Teisi Toma and the Second Respondent. Accordingly, there is no jurisdiction under Order 58 Rule 1 for this Court to deal with the

issues raised in the Originating Summons filed on 16 October 1995. What is in issue is the validity of those transactions. The Applicant's claim rather is that he had a valid title to that piece of land by virtue of the transfer of title by sale, by the Second Respondent to Teisi Toma and then to himself. His claim therefore would appear to be more of one for trespass and eviction against the First Respondent, and an injunction or declaration against the Second Respondent from asserting any rights over the said land. The correct form would be by Writ and a Statement of Claim. As the wrong form of action had been commenced it is defective and *void ab initio*. The defect cannot be cured by any amendment. The whole action in my respectful view would have to be recommenced by adopting the appropriate form and as provided under the Rules, and setting out the appropriate cause of action of the Applicant.

### **Orders of the Court**

1. The Notice of Appointment to hear originating summons filed on 27 November, 1995 is dismissed.
2. The originating summons filed on 16 October, 1995 is struck out.
3. Costs against the Applicant.

**ALBERT R. PALMER**

**A. R. PALMER**  
**JUDGE**