

BENJAMIN KIRIMAOMATE'E BOSOKURU AND OTHERS -V- JERIEL MAEFA'ASIA AND OTHERS

HIGH COURT OF SOLOMON ISLANDS
(KABUL, J.)

Civil Case No. 310 of 2002

Date of Hearing: 4th February 2003

Date of Judgment: 7th February 2003

Mr D. Hou for the Applicants

Mr A. Radclyffe for the Respondents

JUDGMENT

Kabui, J. The Applicants filed an Originating Summons on 10th December 2002 seeking a number of declarations against the Respondents. The Respondents by their Counsel, Mr. Radclyffe, entered appearance on 10th February 2002. They then filed a Summons on 14th January 2003 seeking to strike out the Originating Summons filed by the Applicants. By Summons filed on 20th January 2003, the Applicants filed an application by Summons seeking leave of the Court to apply for an order of certiorari to remove into this Court to be quashed the decision of the Langa Langa House of Chiefs made on 20th June 1989. At the hearing, Counsel for the Applicants, Mr. Hou, withdrew the Originating Summons and then proceeded only with the application for leave under rule 2 of Order 61 of the High Court (Civil Procedure) Rules 1964 "the High Court Rules."

The Applicants' Case

Counsel for the Applicants did admit that in terms of rule 3 of Order 61 of the High Court Rules, the time limit of 6 months had lapsed in this case. However, he argued that the application was based upon fraud and so the time limit should have began to run from the date of the discovery of the fraud. He cited section 32 of the Limitation Act (Cap.18) (the Act) as being applicable in this case.

The Respondents' Case

Counsel for the Respondents opposed the application. He pointed out that the first step to take was to apply for extension of time but an application for extension of time had to be justified. He said an extension of time was not justified in this case. The second point he made was that section 32 of the Act did not apply to this case because rule 3 of Order 61 of the High Court Rules specifically stated that the time limit of 6 months was to be counted after the date of the proceeding and not upon the discovery of the cause of action. The third point he made was that the Applicants should have counter-claimed in Civil Case No. 212 of 2002, if not, he said they should come to Court by issuing a Writ of Summons and then prove fraud.

Decision of the Court.

By asking the Court to grant leave to apply for an order of certiorari under rule 2 of Order 61 of the High Court Rules paints the picture that there was no need to ask for an extension of time. But this is not the case here. The Applicants were well out of time by a stretch of some 14 years. There was and still is a need to extend time. The Applicants have not done this. Instead, they invoked section 32 of Act. The relevant parts of this section are as follow-

"...**(1) In this section, "fraud" means a false reresetation made knowingly, or without honest belief in its truth, or recklessly without care whether it be true or false, and includes such unconscionable or blameworthy act or omission as amounts to fraud in equity.**

(2) Subject to subsection 4-

(a)-----;

(b) where a claim in an action or arbitration is based on any fact relevant to the plaintiff's cause of action which has been deliberately concealed from him by the defendant; or

(c) where a claim in an action or arbitration is based on a relief from the consequences of a mistake,

the prescribed period for such action or arbitration, as the case may be, shall not begin to run until the plaintiff has discovered such fraud, or mistake, or could with reasonable diligence have discovered it.

(3)-----.

(4)-----.

(5)-----."

Paragraph 10 of Mr. Bosokuru's affidavit filed on 10th December 2002 puts the time the alleged fraud was discovered as sometime after the Writ of Summons in Civil Case No. 212 of 2002 was filed in the High Court in September 2002. Counsel for the Applicants cited the case of **Robert Ratu v. Dakolae Resources Development Company Limited and Others**, Civil Case No. 288 of 1997 as a case in point. That case was a case where the application was for extension of time on the ground of fraud. This is not the case here because the Applicants have not asked for extension of time but rather for normal leave to apply for an order of certiorari. The understanding on their part was that they were within time because their application was based on fraud in terms of section 32 of the Act. The Robert Ratu's case cited above can therefore be distinguished from this case. It does not apply to this case. That leaves me to consider further the application of section 32 of the Act. Does section 32 of the Act override rule 3 of Order 61 of the High Court Rules? Any overriding effect must necessarily be an amendment by implication for there is no expressed provision to that effect in terms of repealing rule 3 of Order 61 of the High Court Rules. The crucial word in section 32(2) of the Act is "action." In section 2 of the Act, "action" is defined to mean "an original proceeding that lies in a court under any law for the enforcement of a legal right, or for the redress of any legal wrong or legal injury or breach of a legal duty, or for any other legal relief and includes an action as defined in the Rules of Court and a suit as defined in the Magistrates' Courts Act" (Cap.20). But it does not include a criminal proceeding. Rule 1 of Order 1 of the High Court Rules defines "action" as meaning, " a civil proceeding commenced by a writ or in such other manner as may be prescribed by the rules of court but does not include criminal proceeding by the Crown." On first glance, the definition of the word "action" appears to be fairly wide so as to include an application for leave to apply for an order of certiorari. I think there is a fundamental difference. As said by Lord Brightman in **Chief Constable of North Wales Police v. Evans** [1982] A. E. R. 141 cited by me in **John Sina v. John Mark Matupiko**, Civil Case No. 082 of 2001, "**judicial review is concerned, not with the decision, but with the decision-making process**". The Court's jurisdiction to entertain prerogative orders is based upon section 84(1) of the Constitution giving it the power to supervise subordinate courts. As explained in **R.v. Northumberland Compensation Appeal Tribunal Ex. Parte Shaw** [1952] 1 A. E. R. 122 by Denning, L.J. whom I quoted in my judgment in John Sina's case delivered on 6th November 2002, the jurisdiction exists to correct an error of law that is revealed on the face of an order or decision or irregularity, or absence of, or excess of jurisdiction where shown. Denning, M. R. in **Reg. v. Herrod Ex.p. Leeds Council (D.C.)** [1976] 2 W. L. R. 18 whom I also quoted in John Sina's case above further said that an applicant for a prerogative order is not like a litigant who sought to assert some right he or she claimed he or she was entitled to claim. Rather, he said such person was a suppliant who sought to invoke prerogative orders as remedial measures on the ground that the Court would wish to correct some irregularity in the administration of justice in order to attain justice for that person. His Lordship further said prerogative orders were not to be claimed as of right. Invoking the supervisory jurisdiction of the High Court under section 84(1) of the Constitution is not an action to vindicate

some right to which one is entitled. It may well be an action in terms of taking a step to ask the High Court to correct the conduct of a subordinate court but certainly not an action in the form of a claim based on one's perceived right being litigated in a court of law. The other point of course is that fraud has never been a ground for the granting of prerogative orders. In saying this, I am mindful of Muria, C.J. deciding to grant extension of time on the ground of alleged fraud in Robert Ratu's case cited above. I have not contradicted that ruling because that was only an interlocutory ruling. Its correctness or otherwise was not conclusive at that stage of the proceeding. Fraud is the fundamental difference between section 32 of the Act and Order 61 of the High Court Rules for the purpose of Order 61 of the High Court Rules. I reject Mr. Hou's argument that time limit was governed by section 32 of the Act. I do not think section 32 of the Act has repealed Order 61 of the High Court Rules. This Order is alive and does exist on its own for good reason. The application must therefore fail on the ground that no leave can be granted until an order for extension of time has first been granted by the Court. There is no application for extension of time in this case and so I cannot consider one and decide to grant it or not. I agree with Mr. Radclyffe that a better approach was for the Applicants to file a counter-claim if they are so minded to do so. Failing that, an action by Writ of Summons is the other way to go. The Applicants' application is dismissed. Although the Respondents are successful in this application, I feel this is a case where the parties should pay their own costs. I order accordingly.

F. O. Kabui
Puisne Judge