

GABRIEL HURA'A AND OTHERS (representing the Talapaina Tribe of Ulawa) -v- ATTORNEY-GENERAL (representing the Clerk to the Kira Kira Local Court)

HIGH COURT OF SOLOMON ISLANDS
(KABUI, J.).

Civil Case No. 092 of 2003

Date of Hearing: 20th October 2003

Date of Judgment: 22nd October 2003

Ms L. Kershaw for the Applicant

Mrs A. Kingmele for the Respondent

JUDGMENT

Kabui, J. This is an application for an order of mandamus demanding the Clerk to the Kira Kira Local Court to accept the appeal points and the fee of \$100.00 produced by the Applicant which he refused to accept on or about the 9th and 10th September, 2002. This application was in a form of statement of claim following a Writ of Summons filed on 28th April 2003. This form of application by writ seems to be at variance with Order 61 of the High Court (Civil Procedure), 1964, "the High Court Rules." There was however no objection from the other side and therefore nothing more is to be said about it. At the conclusion of the Applicant's case, Counsel for the Respondent, Mrs. Kingmele, applied for adjournment. I refused to grant the adjournment for reasons I will set out in this judgment.

The Facts.

By a written judgment dated 10th June 2002 of the Local Court, the Applicant on behalf of his tribe was adjudged not to be the customary owners of Oha land. The Chiefs had earlier ruled in his favour but the other side having taken the matter before the Local Court, the Applicant thought he had won again. His understanding from the oral judgment of the Local Court was that the Local Court upheld the Chiefs' decision. However, he later discovered that in the written judgment of the Local Court, he had lost his case. Oha land is situated on the Island of Ulawa in the Makira/Ulawa Province. Upon receipt of the written judgment and knowing the result of that judgment, the Applicant immediately went to Kira Kira on 9th September 2002 to lodge his appeal against the Local Court decision. He had with him the sum of \$100.00 being the appeal fee. At Kira Kira, the Local Court Clerk, Mr. Taro, told him that he must first of all prepare the appeal points and return with the appeal fee of \$100.00 with the said appeal points. Messrs Lamana and Wao were also present with him in the Clerk's office on that day. Next day, 10th September

2002, he with the other two said persons returned to the Clerk with the appeal points and \$100.00 appeal fee. The Clerk then told him in the presence of the said two persons that the total fee was \$500.00 and that the said sum must be paid in full before the appeal could be filed. The Applicant being unable to produce the remaining balance of \$400.00 did not pay that amount that day. The result was that the appeal period of 90 days had lapsed without an appeal being filed by the Applicant.

The decision of the Court.

At the hearing of this application, Counsel for the Respondent, Mrs. Kingmele, in response to my question, admitted that the correct fee for an appeal from any decision of the Local Court was the sum of \$100.00. (See LN No. 39/89). That is not disputed. This admission was an acknowledgement that the Local Court Clerk was wrong in refusing to accept the Applicant's appeal points on the payment of the sum of \$100.00. An adjournment to enable the Attorney-General to hear what else Mr. Taro had to say was beside the point. Counsel for the Respondent, Mrs. Kingmele, argued that she needed time to obtain an affidavit expected to be signed by Mr. Taro and returned to her. She said she had earlier received that same affidavit but was unsigned. She said her follow up letter was dispatched to Kira Kira only on 17th October 2003. She attributed the earlier delays to the post and phone calls being made on phone cards etc. I do appreciate that fact but the point still remains that Mr. Taro was wrong in refusing to accept the Applicant's appeal points on 10th September 2002 and the sum of \$100.00 as the appeal fee. It might have been that the other costs were security for cost and charge for typing the court record of the proceeding in the Local Court. (See *Marina v. Kinisita*¹ [1985/86] SILR 129) and *Liufaifao'oa v. Malaita Customary Land Appeal Court*² [1988/89] SILR 70) Counsel did not raise this issue as to whether or not security for costs and typing charge were to be part of the appeal fee so that the non-payment the total sum (a combination of the fee and other costs) is a bar to the appeal being processed or the appeal fee and the other costs can be separated so that the payment of the appeal fee is the only prerequisite to a valid appeal. Had Counsel raised this point, I would have considered an adjournment to await Mr. Taro's explanation. The unsigned affidavit sent by Mr. Taro would have, I thought, contained this information which Counsel would have seen before she sent it back for signing and then to be sent back to the Attorney-General. If the unsigned affidavit contained no such information, then obviously there can be no justification at all for Mr. Taro's refusal to accept the appeal points and \$100.00 as alleged by the Applicant. The hope that Mr. Taro may come up with a better explanation for a justification for what he did would be but a speculation. I am aware that there is the practice of asking the appellant to pay up-front security for costs plus the cost for typing the court record together with the

¹ [1985/86] SILR 129

² [1988/89] SILR 70

appeal fee. I do take judicial notice of this fact. Paying the security for costs and cost of typing the court record, added to the appeal fee will obviously increase the total cost of the appeal. In **Marina v. Kinisita**³ cited above, the appellant paid the appeal fee, security for costs and charge for typing in full within time. Similarly, in **Liufaifo'oa v. Malaita Customary Land Appeal Court**⁴ cited above, the appellant also paid the appeal fee, security for costs and charge in full within time. In this case, the appellant was ready and willing to pay the appeal fee but could not afford the balance of \$400.00 being probably the combination of cost and charge to be incurred up-front before the appeal could be processed for hearing. I can find no legal basis for any demand by any Clerk of any Local Court for the payment of security for costs and typing charge which if remains unpaid will prevent an appeal fee from being paid and the appeal being filed at all. As I have said, the prescribed appeal fee is the sum of \$100.00 no more and no less. The payment of the appeal fee within time is what the law requires. The date on which Mr. Taro refused to accept the appeal points and the appeal fee of \$100.00 was well within 90 days after the date of the Local Court judgment. The demand for security for costs and typing charge is only an administrative practice recently introduced which should not be a bar to an appeal if the prescribed fee of \$100.00 is paid by the appellant upon the filing of the appeal points. Whilst the requirement for the payment of security for costs and typing charge has been a practice, it has no legal basis other than practice in the case of the Customary Land Appeal Court. This view is supported by **Patatoa v. Talauai**⁵ [1983] SILR 112 where the payment of \$100.00 appeal fee would have secured the appeal had it not been its late payment. In that case, Daly, C. J. at page 116 said,-

“... an appeal will not be entered or processed until the fee is paid...”

In fact, item 6 in the Schedule to the Local Courts (Fees in civil cases), Rules 1969 appears to be in the wrong place, an anomaly, in that the prescribed fees therein are supposed to be fees for matters and actions to be heard by the Local Court itself and not for matters and actions to be heard by the Customary Land Appeal Court. There can be no doubt that the Applicant had been misled by Mr. Taro into believing that the correct appeal fee was the sum of \$500.00 and not being in possession of that amount on the relevant date, he accepted that information as the fact which obviously with the passing of time would bar any future appeal on his part within 90 days. In fact, it would appear that he had accepted the fact that any possibility of an appeal had clearly been ruled out by his inability to pay the demanded sum of \$500.00 until in April, 2003 when his Solicitor explained otherwise. Mr. Wao in his affidavit filed on 28th April 2003 said that they had attempted to negotiate for part payment of the demanded sum but this was refused by Mr. Taro. This fact clearly shows the failure on the part of Mr. Taro to explain the components of the sum of \$500.00 if indeed there were cost elements included

³ [1985/86] SILR 129

⁴ [1988/89] SILR 70

⁵ [1983] SILR 112

which if done would have prompted the Applicant to secure further funds to meet the demand. A blunt refusal, almost tantamount to saying "**Take or leave it**" was wrong. The appeal should have been filed or entered upon the payment of \$100.00 fee and filing of the appeal points and any requirement for security for cost and a charge for typing the court record could have been made a condition for the listing of the appeal for hearing, if the circumstances did necessitate imposing such cost conditions. Such did not happen in this case and so I must grant the order of mandamus as requested by the Applicant. The Respondent will pay the Applicant's costs. I order accordingly. That is-

1. An order for mandamus will issue against Mr. Taro or whoever is the present Local Court Clerk in Kira Kira to accept the appeal fee of \$100.00 to be paid with the appeal points to be filed by the Applicant within 28 days from today;
2. Costs to be paid by the Respondent.

F.O. Kabui
Judge