

IN THE FIJI COURT OF APPEAL

Civil Jurisdiction

Civil Appeal No. 4 of 1979

Between:

NEI TAONAMAINA SMITH

Appellant

and

TAUTEI NAUNTA

Respondent

Mr. K.C. Ramrakha & Mr. A. Singh for the Appellant  
Mr. J.R. Reddy for the Respondent

Date of Hearing: 2nd June, 1980

Date of Judgment: 27/6/80

ORDER OF THE COURT

Spring J.A.

This is an appeal from the High Court of the Gilbert Islands sitting in its appellate jurisdiction. The facts may be shortly stated. The Abemama Lands Court in case No.106/71 approved the sale by T. Bauro Tokatake of various lands including Tabonibuka and Teriki to the respondent. It was alleged by the appellant that lands so transferred were registered as Royal lands or Te Uea lands and that T. Bauro Tokatake, the son of the High Chief Tekinaiti, had no right to sell lands registered under Te Uea.

The Lands Court approved the sale. The appellant appealed to the Lands Courts Appeals Panel established by virtue of section 11(1) of the Native Lands Ordinance (Cap.22) upon the grounds that Bauro as the son of the High Chief was precluded by the customary law of Abemama to transfer by sale title to lands registered under

Te Uea. The President of the Lands Courts Appeal Panel on the 14th February, 1976 held that Bauro Tokatake as the son of High Chief of Abemama had no legal capacity to sell lands registered under Te Uea and that sale of such lands to the respondent was unlawful and invalid. The Lands Court Appeals Panel further ordered that these lands together with other lands registered under Te Uea sold over the years from 1951 to 1971 to other persons, be transferred back to Te Uea as the sale of Royal lands or Te Uea lands was unlawful. The respondent appealed to the Senior Magistrate's Court by virtue of Section 26(1) of the Native Lands Ordinance and an interim injunction was made by the Senior Magistrate on the 29th March, 1976. A Commissioner of the High Court of the Gilbert Islands on his own motion transferred the appeal from the Senior Magistrate's Court to the High Court in exercise of the power which he claimed existed by virtue of Section 53 of the Magistrates' Courts Ordinance (Cap.2) on the grounds, that there was a difficult point of law involved and that the Senior Magistrate had some interest in the subject matter of the appeal. The Commissioner of the High Court on 16th November, 1976 allowed the appeal of the respondent along with 30 other appeals dealing with the sale of Te Uea lands to other persons over the years from 1951 to 1971; the Senior Magistrate's interim injunction was discharged. On the 4th October, 1977, the Chief Justice of the High Court of the Gilbert Islands granted leave to the appellant to appeal to this Court against the decision of the Commissioner of the High Court.

The appeal came before this Court on the 10th July, 1979, and for the reasons given in an Order of this Court dated 25th July, 1979 the appeal was adjourned and the matter remitted to the High Court of Gilbert Islands for (inter alia) further evidence to be taken as to local customary law affecting land in Abemama and for a list of the persons to be settled whose lands may be affected by the proceedings. On the 4th January, 1980 a Magistrate was appointed pursuant to a warrant given by this Court dated the 15th day of October, 1979 and evidence was taken from various persons, including the appellant and the respondent relating to the sale of the lands to the respondent and registered as Te Uea lands or chiefly lands.

The appellant and the respondent were represented by counsel before this Court; counsel for the appellant submitted that the records or minutes of the hearing before the Lands Courts relating to the sale of the lands to the respondent were not included in the record and accordingly were not available to this Court; that under section 13(1) of the Native Lands Ordinance the Lands Court was required to "hear and adjudicate in accordance with the provisions of the Land Code or where the Code is not applicable the local customary law all cases concerning transfers of titles to native land registered in the Registers of Native Land....."; further the only record before this Court dealing with the sale of the lands to the respondent was contained in the evidence of the respondent given at the inquiry held on the 4th January, 1980 to the effect that Bauro Tokatake had given a letter in which he requested that the lands Teanganibai and Teranganikarewe be transferred to the respondent. The notes of evidence taken at the inquiry relating to this matter contain a statement by the respondent as follows:

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"Members of the Lands Court could not come to a decision since there were no such names as Bauro wrote in his letter, however, in the end the Lands Court for the 20 acres, gave me Teriki (1A) and Bauro was not present."

The appellant was in occupation of Teriki at the time the Lands Court made its decision but she was so far as we know not a party to the proceedings before the Lands Court now do we know whether she was present at the hearing or even aware that she may be dispossessed of her occupation of the land called Teriki. Mr. Ramrakha for the appellant urged upon this Court that an Order should be made remitting the case to the High Court of the Gilbert Islands for a thorough investigation.

Mr. Reddy who appeared for the respondent submitted that the decision of the Commissioner of the High Court be affirmed upon the grounds that the Lands Court was the best judge of local customary law and had approved the sale of the lands to the respondent; further that there was insufficient evidence of customary law restricting the sale of Royal lands by the High Chief or his representative; also the evidence taken before the presiding Magistrate on the 4th January, 1980 indicated that prior to 1948 there might well have been no Royal or chiefly lands.

Turning now to a consideration of the Native Lands Ordinance, it is noted that section 6 provides for the establishment of a Lands Court. Section 6 reads :

"6.(1) There is hereby established within the area of authority of each Council, a Lands Court consisting of not less than six members, including the President, appointed by the Council subject to the approval of the Lands Officer.

- (2) There shall be a Registrar of the Court also appointed by the Council."

Section 13 of the Ordinance states :

"13.(1) Subject to sections (31(1) and 33 the Court shall hear and adjudicate in accordance with the provisions of the Land Code applicable or, where the Code is not applicable, the local customary law, all cases concerning land, land boundaries and transfers of titles to native land registered in the Registers of Native Lands and any disputes concerning the possession and utilisation of native land.

(2) Every attempt to transfer, transmit or otherwise deal with native land except in accordance with the provisions of this section shall be null and void and of no effect."

Section 21 of the Ordinance provides :

"21.(1) The evidence given in all cases brought before the Court, the observations of the members and summing up of the President and the judgment of the Court shall be recorded by the Registrar in the Court's minutes book which shall be kept in the manner prescribed by the Lands Officer; and the minutes of each case shall be signed by the Registrar and President of the Court.

(2) The minutes of evidence, affidavits, certificates of representation and certified copies of any testamentary instruments which may have been tendered in evidence shall be preserved in the records of the Council within whose area of authority the Court is established or as the Lands Officer may otherwise direct."

Section 24 of the Ordinance provides that the Court shall have the powers and observe the procedure set out in the Second Schedule of the Ordinance. Section 4 of the Second Schedule provides :

"4. The following procedure shall be observed by the Court .....

(e) During the course of the proceedings the President may discuss with the members of the Court the native custom applicable to the matter in issue. After hearing all the evidence and discussing as necessary the native custom, the President shall summarise the facts and the custom for the benefit of the other members of the Court. The Court shall then consider its judgment, which shall be by a majority vote to all members eligible to take part in the matter in issue. In the event of an equal division of opinion amongst the members the President shall have a casting vote in addition to his original vote. The judgment so arrived at shall be pronounced in open Court by the President and shall be entered by the Registrar in the minutes of the Court."

The records and notes of evidence of the Lands Court relating to the sale of the lands to the respondent by Bauro Tokatake do not form part of the record before us although the appeals to the Lands Courts Appeal Panel and the Senior Magistrate's Court (removed into the High Court) are appeals from the decision of the Lands Court confirming the sale of the above mentioned lands to the respondent; we agree with the submissions of counsel for appellant that the minutes of the

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proceedings before the Lands Court which are required to be recorded in accordance with Section 21 of the Ordinance should form part of the record as the decision of the Lands Court is the very nub of the matter. If, as we have assumed, the appellant was not a party to the proceeding before the Lands Court, she must have brought the appeal to the Panel as a "person feeling herself aggrieved" under Section 25(1) of the Native Lands Ordinance, and thus started the series of appeals culminating in the present appeal to this Court. We do not feel that it would be right for us to adjudicate upon the latter without having taken steps to have brought before us the record of the tribunal from which the appeal emanates.

Perhaps less important, as we have a detailed judgment from the Appeals Panel, but in the interests of completeness, this Court should see a copy of any minutes or notes of evidence taken on the appeal to the Panel under Appeal Abemama No.1/76.

We turn now to consider the validity of the transfer of proceedings from the Senior Magistrate's Court to the High Court questioned by counsel for appellant.

The Commissioner of the High Court stated in his judgment :

"..... I have transferred this appeal from the Senior Magistrate's Court to the High Court in exercise of the High Court's powers under section 53 of the Magistrates' Courts Ordinance (Cap.2) to apply the practice of the County Courts in England. Section 44 of the County Courts Act 1939 appears to confer the necessary powers. There is a difficult point of law involved. There is also a practical difficulty

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for the Senior Magistrate to hear this case since he has some interest, albeit small, in the case."

Section 53 of the Magistrates' Courts Ordinance applied upon by the Commissioner states :-

"53. Subject to the provisions of any other law for the time being in force, the jurisdiction vested in Magistrates' Courts shall be exercised (so far as regards practice and procedure) in the manner provided by this Ordinance or by any other Ordinance for the time being in force relating to criminal or civil procedure, or by Rules of Court, and in default thereof, in substantial conformity with the law and practice for the time being observed in England in county courts and courts of summary jurisdiction."

It is noted that the Senior Magistrate had an interest, albeit small" in the appeal and no doubt were raised in the appeal the Commissioner decided to transfer the appeal into the High Court. With respect we agree that in the circumstances this was a proper course to take and while we entertain doubts as to whether Section 53 of the Magistrates' Courts Ordinance was the empowering section, we believe that Sections 34(1) and (2) of the Magistrates' Courts Ordinance provide sufficient authority for the Commissioner's actions. Sections 34(1) and (2) of the Magistrates' Courts Ordinance provide :-

"34.(1) A Magistrate's Court may, of its own motion or on the application of any person concerned, report to the Senior Magistrate the pendency of any cause or matter which in the opinion of the Magistrate exercising jurisdiction in such Magistrate's Court



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ought to be transferred from it to any other Magistrate's Court or to the Senior Magistrate's Court; and the Senior Magistrate shall by order direct in what mode and where the cause or matter shall be heard and determined.

(2) The provisions of subsection (1) shall apply to the Senior Magistrate's Court as if reference to a Magistrate's Court were a reference to the Senior Magistrate's Court and reference to a Senior Magistrate's Court were a reference to the High Court."

The terms "cause" and "matter" are defined in Section 2(1) of the Ordinance as follows :

" 'cause' shall include any action, suit, or other original proceeding between a plaintiff and a defendant and any criminal proceeding;

'matter' includes every proceeding in a court not in a cause;"

It is necessary in our view for the reasons we have given that the full record of the proceedings before the Lands Court should be available to this Court and accordingly we order that this appeal stand adjourned until the first sitting day of the September session of this Court. We further direct that the Registrar of the High Court of Kiribati obtain for the September session of this Court a complete record of the proceedings held before the Lands Court of Abemama in case No. 106/71 (as required to be kept in accordance with Section 21 of the Native Lands Ordinance) and also of such minutes and notes of evidence (if any) as were taken in the proceedings before the Lands Court Appeal Panel, under appeal No. Abemama 1/76 and that the same be added to and form

part of the record in this appeal. It is to be regretted that this course entails further delay but the importance of the principle involved renders it necessary.

(sgd.) T. Gould  
VICE PRESIDENT

(sgd.) C.C. Marsack  
JUDGE OF APPEAL

(sgd.) B.C. Spring  
JUDGE OF APPEAL