IN THE FIJI COURT OF APPEAL

Civil Jurisdiction

Civil Appeal No. 4 of 1979

Between:

NEI TAONAMAINA SMITH — Appellant

- and -

TAUTEI NAUNTA — Respondent

Date of Hearing: 15th September 1980
Date of Judgment: 30th September 1980

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

JUDGMENT OF THE COURT

This appeal first came on for hearing before this Court on 10th July 1979. The relevant facts are fully set out in two separate orders of this Court dated 25th July 1979 and 27th June 1980 and need not be repeated. By order of the Court dated 25th July 1979, the case was remitted to Kiribati High Court to settle a list of all persons whose lands might be affected by the present proceedings; to give notice to all such persons; and, to provide that evidence might be given by them personally or by affidavit before a Magistrate at Kiribati specially appointed for that purpose. It was stressed by this Court that as a matter of importance further evidence by affidavit or otherwise as to the relevant native customs affecting land on Abemama would be received and considered by this Court.

In due course, there was forwarded to this Court a full statement of the evidence taken at Abemama on 4th January 1980 before the Magistrate specially appointed by order of this Court dated 27th June 1980. It appears that all persons likely to be affected by the judgment on this appeal were notified of the proceedings and had an opportunity of putting forward their evidence and their arguments to the appropriate tribunal.

The hearing of the appeal was resumed before this Court on 2nd June 1980 when due consideration was given to the record of evidence taken before the special examiner; submissions were made by Mr. Ramrakha for the appellant and Mr. J.R. Reddy for the respondent. The Court came to the conclusion that before it could decide the appeal it would need a full record of the original proceedings before the Lands Court. Judgment was accordingly given on 27th June 1980 that the appeal stand adjourned until the September sitting of the Court; meanwhile the Registrar of the High Court, Kiribati, should forward to this Court a complete record of the proceedings held before the Lands Court, Abemama. The Registrar duly forwarded copies of Abemama cases heard on 27th November (case 106/71) and 6th December 1971 (case 117/71), together with copies of some relevant correspondence. Both these cases dealt with the transaction between Bauro II, son of the High Chief Tekinaiti Tokatake, and Tautei Naunta. This Court now has before it all relevant material and is in a position to give judgment on the appeal.

At the sitting of the Lands Court on 27th November 1971 (case 106/71) that Court approved the sale from Bauro II to Tautei Naunta for $230 of two plots of Uea lands (chiefly lands) - viz Tabonibuka and Teriki, (although approval to the last-named land was given subsequently, as the incorrect name for this

plot had originally been given by Bauro II). The appellant was not present at this Court sitting. On 6th December 1971 the appellant, who is a member of the High Chief Tekinaiti Tokatake's family, and Tiaon appeared before the Lands Court and complained that the High Chief's lands were nearly all "sold out" by the High Chief's son, Bauro II. The appellant stated :

> "When Tekinaiti was made High Chief, these lands remain with him and were not shared between us, the issues of Tokatake. The idea regarding these lands was that they will be owned by the one who became Chief. And when Tekinaiti was chosen as High Chief I presumed that no chiefly lands have been sold by him. Now that Tekinaiti is in the Solomons who is the only recognised High Chief on Abemama, how did our son Bauro get the authority to sell out chiefly lands in the absence of his father who has the only authority over these chiefly lands?"

The President of the Court in reply stated :

> "I consider your proposal that you put before this Court to be a sound one but one thing that I want to inform you is that you are now too late since the majority of the Uea lands have been sold out by Bauro to people, and regarding your query as to the authority for Bauro to sell these lands, I am afraid we cannot give you the correct answer only because there have been four Magistrates before me with whom Bauro had made the land transactions and nobody had objected. With the present land transactions, we have allowed Bauro to sell out the lands in the same way that they were dealt with by the previous Magistrates. Had you appealed against the sale of the lands, we would have made our decision. Now that you have come to complain about the sale of the lands, Bauro should stop now pending the determination of your claim. However, we cannot finalise your claim but this will be dealt with by the Commissioner when he comes."

Appellant appealed in respect of these two blocks of land Tabonibuka and Teriki sold by Bauro II to Tautei Naunta, and her appeal was upheld by the Lands Court Appeal Panel on 14th February 1976 which set aside

the transfer. On appellant's appeal the Lands Court Appeal Panel dealt with numerous other transactions relating to the sales of Uea lands going back as far as 1950, and set aside all these sales on the ground that lands registered as Te Uea lands cannot be sold. Tautei Naunta the respondent appealed against the decision of the Lands Court Panel to a Commissioner of the High Court who allowed his appeal in a judgment dated 16th November 1976; the Commissioner in his judgment also ordered that if any of the other lands referred to in the Lands Court Panel's judgment had been re-transferred to Te Uea then the same must be re-transferred to the registered proprietors. Further, the Commissioner purported to allow 30 specified appeals to the Senior Magistrate for the year 1976 that presumably affected other royal lands which had been dealt with in similar fashion.

We hasten to point out that on this appeal we are concerned solely with the transaction between Bauro II and Tautei Naunta in respect of the sale of the lands Tabonibuka and Teriki; there are no appeals to this Court in respect of the other sales set out in the judgment of the Lands Court Appeal Panel and referred to in the judgment of the Commissioner of the High Court. Accordingly, we are not concerned with these other sales of Te Uea lands nor do we propose to comment thereon. We are restricted on this appeal solely to a consideration of the sale of the chiefly lands Tabonibuka and Teriki by Bauro II to Tautei Naunta.

As stated in the previous orders of this Court, there are two classes of land in issue: lands held by the Chief as his own personal property, and Uea or chiefly lands held by the Chief in his capacity as the High Chief Te Uea and occupied and used by him

in that capacity; lands which are not for his personal benefit or that of his family are held by Te Uea for the benefit of the people as a whole.

The appellant now appeals to this Court against the decision of the Commissioner of the High Court. The appellant claims that the High Chief Tekinaiti Tokatake was resident in the Solomon Islands at the material time that the sale to Tautei Naunta was effected, and that his son Bauro II had no authority to make the sale of Te Uea lands; the appellant also claimed that Te Uea lands should not be broken up or sold. The grounds for appeal were framed by the appellant herself and may be briefly summarised as follows:

(a) that there were a number of appeals lodged in respect of the sale of High Chief lands for the period 1958-1971 of which the learned Commissioner was not aware. We do not propose to consider or deal with this ground of appeal as we have already stated that on this appeal we are restricted to the transaction between Bauro II and Tautei Naunta;

(b) that the High Chief, Te Uea, has no right to sell lands vested in Te Uea since they are not his property but belong to the public.

There was a further ground, but it was couched in very general terms and amounted to a complaint that if the present trend continues in respect of the sale of Te Uea lands there will eventually be none left for the general public or families of the High Chief.

Mr. Ramrakha submitted first that the proceedings surrounding the transfer of the lands Tabonibuka and Teriki to Tautei Naunta were irregular and that the matter should be referred back to the Lands Court for proper investigation. He submitted that the transfer of the lands was governed by Section 13(1) of the Native Lands Ordinance (Cap.22) which reads as follows :

> "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 utilization of native land."

Mr. Ramrakha submitted that the Land Code which is annexed to the Native Lands Ordinance had no applicability and that the validity of the transfer should be determined in accordance with local customary laws; Mr. Ramrakha submitted secondly that the proceedings were irregular in that the Lands Court had not "heard and adjudicated" upon the transfer and that the approval by the Lands Court was purely an administrative act and that the Lands Court had failed to perform its judicial function; that there had been no enquiry as to customary law; that the decision of the President of the Lands Court Appeal Panel should be restored and failing restoration of that decision the matter should be sent back to the Lands Court in Kiribati for proper investigation as to the customary law.

Mr. Lala appeared on behalf of Mr. J.R. Reddy and relied upon the submissions made at the sitting of the Court on the 2nd June 1980 by Mr. Reddy.

The Native Lands Ordinance Section 4(1) provides that titles to native lands registered by the Commission as evidenced by the Register of Native Lands, and registered by the Court pursuant to the provisions of the Native Lands Ordinance shall be indefeasible; further that when the Court under the powers conferred upon it approves the transfer of native land as a result of causes arising subsequent to the proceedings of the Commission - and such transfer has not been varied on appeal - the title obtained shall be indefeasible; the Land Commission apparently completed its duties in respect of Abemama in 1948. Section 5 provides that native lands shall not be alienated, whether by sale, gift, lease or otherwise, to a person who is not a native; the definition of "native" is set forth in the Native Lands Ordinance. It is clear from a perusal of the Land Code annexed to the Ordinance that no specific reference is made to royal or Uea lands, except in the case of the island of Makin. It is apparent from a perusal of the Land Code that different considerations apply to the various islands within the Republic of Kiribati in respect of the dealings in and sales of land: and there are no less than 18 different islands governed by the Code. In our view therefore the validity of the sale of the lands from Bauro II to Tautei Naunta depends firstly upon local customary law, and secondly upon the authority of Bauro II to act on behalf of the High Chief in making a sale of royal or chiefly lands. Taking the last point first, it is clear from the evidence taken before the Magistrate on the 4th January 1980 that Bauro II received authority from his father Tekinaiti Tokatake the High Chief to sell royal lands for the purposes of paying taxes. Uriam Kaiteie gave evidence before the special examiner on 4th January 1980 and said :

"I wish to talk about royal lands according to my understanding, they came down from Tem Binoka to Bauro and during the time of Bauro Timon I was then able to understand things. Royal lands with Bauro Timon were few as they had been distributed to people in every village and they remain with them from the time of Bauro to the time of Tokatake. At the time of Tekinaiti he took all royal lands from the people and put them together under him and gave some to Tangitang Co. Ltd. so that they could cut copra from them and have the money from the copra and in return he had a share in Tangitang. When Tangitang was abolished from Abemama all those royal lands returned to Tekinaiti and stayed with him until he left for the Solomons and then the lands remained with his son Bauro II. Bauro II was unable to pay tax on the lands and that was the reason why he started selling those lands."

In cross-examination he was questioned as follows:

"Q: Is it true that Bauro II sold those lands because of the tax?

A: I confirm this because in the first place I was a scribe and telegram from his father came from the ship 'Aratoba' to the Lands Court which said: 'I authorise Bauro II to sell lands because of the land tax'."

Tautei Naunta in giving evidence before the examiner said :

> "In 1957 the son of the High Chief, Bauro Tekinaiti (Bauro II) was often fined for failure to pay off land tax on royal lands on the islands of Kuria, Aranuka and Abemama and he was fined by the Court for that and the decision of the Court was that if he could not pay the fine (meaning taxes plus penalty) before 6 p.m. he will be put in jail."

Further he said in evidence :

> "Takabiri then telegraphed Tekinaiti Tokataka at Banaba when he was there on his way to the Solomons asking him whether he authorised Bauro to sell royal lands because of their taxes or not. Tekinaiti replied and authorised Bauro to sell royal lands only for their taxes

> On receipt of this cable Takabiri stated in Court approve the sale of royal lands. Had Tekinaiti refused authority royal lands could have been sold at very low prices for their taxes. Bauro then promised that he would give me 20 acres and I would pay him for that in instalments."

The Commissioner of the High Court in the course of his judgment dated 16th November 1976 said :

> "The authority of Bauro to act for the High Chief has not been challenged in these proceedings."

Accordingly, in our view having regard to the evidence and the record it is clear that Bauro II had authority from his father, the High Chief Tekinaiti Tokatake, to sell lands for the payment of taxes. It would seem also from the evidence that the lands sold by Bauro II to Tautei Naunta were sold to enable Bauro II to pay taxes on the royal lands. The Landowners Taxation Ordinance (Cap.53) provides that if a land owner has failed to pay his land tax in certain circumstances, the Council concerned can take steps to have the land in question transferred to the Council; if the tax continues to remain unpaid for a further year, the Council is empowered to sell the land. It may seem somewhat incongruous that sophisticated legislation imposing a tax on lands in Abemama could co-exist with what appellant contends is local customary law forbidding the sale of royal or chiefly lands. It appears from a perusal of the legislation that Te Uea lands can be sold for non-payment of land tax; there does not appear to be any customary law militating against such course of action; nor does the Landowners Taxation Ordinance exempt Te Uea lands from payment of land tax.

Mr. Ramrakha submitted that unless there is clear evidence to the satisfaction of the Court that Te Uea is entitled to sell chiefly lands the Court should hold that Te Uea had no such right. Mr. Reddy

submitted that any lands registered in the name of Te Uea were capable of being sold, unless there was proof of local customary law forbidding any such dealings of chiefly lands.

Halsbury 4th edition volume 12 para. 426 reads:

> "All customs of which the courts do not take judicial notice must be clearly proved to exist, the onus of establishing them being upon the parties relying upon their existence."

In this case the appellant would have the burden of proving that local customary law precluded the sale of royal or chiefly lands. It is interesting to note that in her evidence before the special examiner held on the 4th January 1980 when cross-examined regarding sale of royal or chiefly lands she was questioned as follows:

> "Q: You want all the lands that have been exchanged to be re-transferred back?"

The appellant's reply was :

> "A: Only the lands exchanged by the one who is not the High Chief (like Bauro) but those exchanged by High Chief Tekinaiti Tokatake should be left as they are."

On the question as to whether royal or chiefly lands can be sold evidence was given by a lands scribe, Tioti Taaia, before the special examiner as follows:

> " I was the Lands Scribe in 1948 and wish to point out that there was a minute of the decision of the UNIMANE regarding Uea lands as Taonamaina had said. I do not remember the exact wording but I know that there was a minute about it. (The minute referred to was found in Minute Book No. 1 page Ex. 'A').

Case or Min. 122/48, this is what it sats:

> 'The issues of Tokatake should not distribute the lands of Bauro. They should go to the Uea (High Chief), to Uea Lands (royal lands) but none to his family. The Uea (High Chief) is free to do what he seas fit on royal lands and also free to do what he considers fit on his lands from his family.'"

Generally the evidence given before this special examiner on the 4th January 1980 as to the existence of any local customary law permitting royal or chiefly lands to be sold was equivocal; the evidence was conflicting, as one witness who was present when the Unimane gave its decision deposed that under that decision "royal lands are forbidden to be sold". One witness, Berenatata Boriki, gave evidence that he had sold royal lands. Another witness, a Member of the House of Assembly for Abemama, deposed that nearly all the royal lands on Abemama had been sold out. A further witness, Kirimaba, who was a member of the Lands Court, gave evidence that he did not know of any rule that Uea lands were forbidden to be sold; and that some Uea lands had already been sold. Witness Kum Om stated that High Chief Bauro had sold several royal lands without interference from the Lands Court.

The learned Commissioner in the High Court in the course of his judgment said :

> "The Panel was unable to discover any authority in custom or elsewhere as to the disposal of royal lands while the office of High Chief is still in existence. In my opinion there was very persuasive evidence of a customary right of the High Chief to dispose of royal lands. Between 1958 and 1971 there were over 60 cases of transfer of royal lands. There was also an isolated case in 1950. These transactions have been questioned on only two occasions. The first was in 1973 when in Appeal No. 1/73 (noted above) the Panel held that the High Chief could, subject to custom,

deal with royal lands as he sees fit. The second is this. In the first case the appeal was about two years after the transaction. In this about five."

It is not possible for this Court to hold on the evidence, that Te Uea lands are subject to any special limitations, arising from local customary law, in the matter of alienation. It is clear that many sales of land have taken place with the full approval of the Lands Court; and in one or two cases, according to the evidence, such sales have been actually negotiated by the Lands Court. But nowhere in the evidence is it established that the approval of the Lands Court did, or did not, apply to the sale of Uea lands. It is we think clear that the Lands Court must have known whether or not lands, the sale of which was submitted to the Court for approval, were, or were not, lands held by the High Chief as Te Uea. No reference is made in the course of the evidence to any instance where the Lands Court has refused to confirm a transfer on the grounds that the lands involved are of the class known as Te Uea.

In this case, however, the lands appear to have been sold by Bauro II for the purpose of obtaining moneys to pay land taxes. On the facts of this particular case, and having regard to the evidence it is not possible to hold that local customary law precluded Bauro II from selling the lands Tabonibuka and Teriki, particularly if it was for the express purpose of paying land taxes; further he appears to have had the authority of his father - the High Chief - so to act.

Accordingly we dismiss the appeal. In the circumstances there will be no order as to costs; in the hearings before the Lands Court Appeal Panel and the Commissioner of the High Court no costs appear to have been awarded.

Appeal dismissed.

(Sgd.) T. Gould
VICE PRESIDENT

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

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