PAPUA NEW GUINEA

N461(M)

IN THE NATIONAL COURT )
)
OF JUSTICE )

CORAM: McDermott, J.

WAIGANI, N.C.D.

1984: April 13, 17
May 11

BETWEEN: AUGUSTINE OLEI
Plaintiff

AND: THE PROVINCIAL LAND COURT AT PORT MORESBY
First Defendant

AND: KWALIMU LOFENA
Second Defendant

AND: EDWARD IORIVE
Third Defendant

AND: BUE GOROGO
Fourth Defendant

O.S. No. 31 of 1984

Leave was granted to apply for judicial review;-

(1) By Augustine Olei on behalf of the Migul and Hambabu clans for an order in the nature of Certiorari to remove to this court and quash a decision of the Provincial Land Court at Port Moresby concerning land known as Vanapa East containing about 12,000 acres, shown on map 3/115A Brown-Vanapa, Central District, Department of Forests (Fol.24 District Land Court file 1968/49 Vanapa East). The land is also delinated in red on an untitled map attached to the decision of Commissioner F.D. Jones dated 20 August 1968 (Fol.36 of Land Court file).

And;

(2) By Edward Iorive on behalf of the Koneri Group for an order in the nature of prohibition directed to the Land Titles Commission to prohibit the hearing of an appeal from the decision of F.D. Jones of 20 August 1968 concerning the land known as Vanapa East, previously described.

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Real Property - Jurisdiction of Land Titles Commission vis a vis Provincial Land Court

Perogative Writ - Certiori - Provincial Land Court - To remove and quash - Review under s.34 Land Titles Commission Act - Jurisdiction not transferred by Land Disputes Settlement Act 1975

O.16 National Court Rules - meaning of 'sufficient interest' considered

Legislation:

Land Titles Commission Act 1962 Section 34
Land Disputes Settlement Act 1975 Sections 62, 75
Land Act Ch. 185 Section 74
Revision of Laws Act 1973 Sections 6, 7 & 9

Cases cited:

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|---|---|
| In re Portion 56 Morobe | (1971-2) P.N.G.L.R. 442 |
| Dentry v. Stott | (1947) V.L.R. 462 |

Pursuant to that leave, Augustine Olei commenced proceedings for judicial review.

As both are interrelated, argument was heard on the first.

It is necessary to give some background of the previous poceedings over this land. In 1966, pursuant to s.82, (now s.74) of the Land Act Ch. 185, the then Territory Administration applied to the Land Titles Commission for the appointment of an agent on behalf of owners to facilitate purchase of land. A further application was made under the same section in 1968 to determine ownership of this land and 'of interests therein including ownership of the timber thereon'. After due publication, this later application was determined by Commissioner Jones on 20 August 1968 who held the Koneri Group was the owner of the land and of the rights and interests to the timber thereon.

Bue Gorogo of the Varu clan requested a review of this decision under the provisions of s.34, the Land Titles Commission Act 1962. The review commenced on the 21 February 1972 and was adjourned for Senior Commissioner Kimmorley 'to take evidence and make enquiries on behalf of the Review Tribunal'. This was done in 1972 but thereafter, nothing.

On 5 June 1975, new legislation, The Land Disputes Settlement Act, Ch. No. 45 became operative. This provided that disputes concerning customary land be settled or determined in accordance with new machinery provisions and courts established under the Act. It provided a system of mediation and agreement through land mediators, the hearing of disputes as to interests in land by Local Land Courts and an appeal jurisdiction in a Provincial Land Court. The Act, as printed in the Revised Laws, uses different wording and omits 'Part VIII - Transitional'. In argument, the 1975 Act was used. I am unable to comment on the ommissions, but presume Part VIII was omitted because it was thought to have expired or have had its effect or been superseded - see s.6 Revision of Laws Act 1973. Section 7 of that Act presumably has been availed of to edit s.64(2), now s.66(2). Suffice to say that on 5 June 1975, the original wording and transitional provisions applied. They are provisions essential to the resolution of this application. The authors of the Revised Laws are not permitted by the Revision Act to make 'any change in the substance and effect of any law ...' (s.9). This could be the case when quoting from Ch.No.45.

In this judgment, I will refer to the Land Disputes Settlement Act in its earlier form as the appropriate legislation.

The Act affected the jurisdiction of the Land Titles Commission in two relevant ways;-

(1) Under s.64, on the establishment of a Local Land Court, the Commission ceased to have jurisdiction, subject to the proviso in s.64(2) which exempts 'applications under s.82 of the Land Act 1962, (s.74 Ch. No. 185), 'pending before, or subsequently made to the Land Titles Commission'.

(2) Under the transitional provisions in s.75, an application under s.34 of the Land Titles Commission Act 1962 'for a review of a decision given in relation to a dispute to which this Act applies over or in relation to land' pending at the time of the establishment of a Local Land Court, lapses and is 'deemed to be and has the same force and effect as a decision of the Local Land Court given on the day in which that court was established'.

On the 28 June 1975, Bue Gorogo was advised by the Secretary of the Land Titles Commission of the new Act's operation and told how he could appeal Commissioner Jones' decision in the District Land Court. He lodged a notice of appeal on 16 January 1976. However, the then Chief Commissioner considered that the jurisdiction of the Commission was preserved in this case by s.64(2) and set the review down for hearing. Because of his prior appearance on behalf of the Varu clan, he declined to hear the review and it was adjourned sine die on the 6 April 1978, pending appointment of a Deputy Chief Commissioner. The matter did not proceed. Instead, on 5 October 1983, the District (now termed Provincial) Land Court heard Bue Gorogo's review as an appeal and on 7 October 1983, dismissed it and affirmed the decision of Commissioner Jones.

Meanwhile, on 2 December 1980, Augustine Olei made application under s.15 of the Land Titles Commission Act for ownership of Vanapa East to be determined. The application is numbered 1968/48. I do not know the significance of this. (The matter determined by Commissioner Jones was No. 87 of 1968).

At the time of this application, the Commission simply had no jurisdiction (as previously) under s.15 'to hear and determine all disputes concerning and claims to the ownership by native custom of, or the right by native custom to use any land, water or reef, including a dispute as to whether any land is or is not native land ...'.

This application is the first time the group represented by Mr. Olei asserted an interest in this land, despite the well publicised and long drawn out proceedings regarding ownership of it. From the start, this has not been an inter clan dispute, it has been an inquiry initiated to determine ownership vis a vis the Administration, for purposes of ascertaining a prospective vendor. It has not been a dispute brought under s.15. Mr. Olei has not been a party to proceedings in the Commission or in the District Land Court. The proceedings were at the appellate stage. His interest has not been asserted at any relevant time set out in either Act.

If the Land Disputes Settlement Act applies, the question of ownership is now conclusively determined (see s.61). If the Commission still has jurisdiction to review, an application has not been made within the relevant time and an appeal to the National Court, presuming grounds exist, could only be brought now with leave, see s.34(1) and s.38(1AA) respectively of the Land Titles Commission Act. No application has been made to the National Court to date.

Notwithstanding the grant of leave for this application, it appears to me the question of 'sufficient interest' to maintain is properly raised on these facts. An order in the nature of certiorari is an appropriate remedy where it is alleged the land court made a decision without jurisdiction, but the grant is discretionary. All the applicant can say is:- 'I am not a party to these proceedings, but I claim an interest in the land, the subject of the proceedings. I ask that the ownership order of the land court be quashed as it acted without jurisdiction. This may enable me in some way to be heard in another court or tribunal which has jurisdiction to determine ownership'.

It seems to me the 'sufficient interest' of the applicant cannot be dissociated in this instance from his substantive argument on jurisdiction. But before I consider it, The Supreme Court Practice (1982) Vol.1 I.H. Jacobs (Ed.) commenting on the English practice on which O.16 of the National Court Rules is based says at p.875;

> 'The question of what is a "sufficient interest in the matter to which the application relates" appears to be a mixed question of fact and law: a question of fact and degree and the relationship between the applicant and the matter to which the application relates, having regard to all the circumstances of the case. The term "interest" should perhaps not be given a narrow construction, but should be regarded as including any connection, association or inter-relation between the applicant and the matter to which the application relates'.

It was submitted, I view, a person with 'sufficient interest' as a 'person aggrieved'. These later words appear in s.55(1) of the Land Disputes Settlement Act whereby such a person may appeal a Local Land Court decision to the District Land Court. It is because Mr.Olei is aggrieved by the decision, he has sufficient interest to bring the present action.

These words were considered in In Re Portion 56 Morobe (1971-2) P.N.G.L.R. 442 in relation to the appeal provisions in the Land Titles Commission Act. What emerges from the case and from the authorities considered as that a person need not have been a party to the earlier proceedings to be aggrieved. In that case, a final order restoring title to the then Administration was made. An appeal was lodged on behalf of certain landowning groups who were not party to the restoration proceedings but who now claimed ownership. Approving Dentry v. Stott (1947) V.L.R. 462, Frost S.P.J. concluded;

> '... the villagers in this case fall within the expression "a person aggrieved" as being persons who are really and directly interested in the proceedings as the effect of the final order was to deprive them of the rights they claimed to ownership and possession'.

It must be borne in mind that this court is not deciding the question of ownership. Mr. Olei and his group have a number of hurdles still to negotiate, hence the importance of the jurisdiction argument.

The jurisdiction of the Commission conferred by s.15 (determination of disputes) and s.15A (interim orders of Local Court) of its act, ceases in relation to land to which the Land Disputes Settlement Act - (the disputes Act) applies - see s.64(1). 'Disputes', 'land' and 'party' are defined in s.2 and it becomes clear the Act was intended to cover the field of inter and intra clan disputes over customary land. By s.64(2), the Commission's jurisdiction under s.82 (now s.74)

of the Land Act is retained for applications 'pending before or subsequently made'. This is an entirely diferent type of 'dispute' and I use that word advisedly.

The Land Titles Commission is still in existence. A series of appeal procedures are provided for, see s.34 and s.38 of that Act. These provisions are still operative. It is submitted that a matter properly before the Commission properly remains there through all appellate stages as well. This argument is blessed with common sense, otherwise a matter commences before the Commission and then is transferred to the Provincial Land Court for review as it is 'deemed to be ... a decision of the Local Land Court' - see s.75 of the disputes Act. But a s.82 matter is not one for the Local Land Court - it is simply not a matter to which the disputes Act applies and cannot become one at an appellate stage. The dispute settlement procedure of this Act is seemingly not designed for the situation envisaged by s.82 application.

But, is there a conflict between s.75 and s.64(1) and (2) of the disputes Act? I have been referred to the following passages in Halsbury 4th Ed. para.872;-

> 'Thus a statute should be construed as a whole so as, so far as possible, to avoid any inconsistency or repugnancy either within the section to be construed or as between that section and other parts of the statute. The literal meaning of a particular section may in this way be extended or restricted by reference to other sections and to the general purview of the statute. Where the meaning of sweeping general words is in dispute, and it is found that similar expressions in other parts of the statute have all to be subjected to a particular limitation or qualification, it is a strong argument for subjecting the expression in dispute to the same limitation or qualification'.

And para. 875;

> 'Whenever there is a general enactment in a statute which, if taken in its most comprehensive sense, would override a particular enactment in the same statute, the particular enactment must be operative, and the general enactment must be taken to affect only the other parts of the statute to which it may properly apply. This is merely one application of the maxim that general things do not derogate from special things'.

Reliance upon these construction aids to interpretation enables the sections to be reconciled. To change from one jurisdicion to another urged by Mr. Coady as the proper interpretation is not one I can accept. In my view, s.75 is a general provision, it takes care of the like matters in which the Commission's jurisdiction has ceased but it does not apply to s.64(2) matters.

There is one further argument on jurisdiction. The decision of the Provincial Land Court disposing of the Review/Appeal was given by Mr. Lofena sitting as the Provincial Land Magistrate. As he acted in an appellate capacity, his action contravenes s.48(1)(b) of the disputes Act, which requires the court to be constituted by three Provincial Land Magistrates.

Mr. Lofena has sworn an affidavit saying that he had noticed Mr. Olei's interest (the s.15 Application) on the court file but failed to notify him of the proceedings. He would have allowed Mr. Olei's right of appearance and hearing.

I have come the long way around. Whilst I have doubts about Mr. Olei's claims to ownership on the little that is before me, nevertheless, there is some interest and his standing is enhanced by the strength of the jurisdiction argument. I conclude that the s.34 Review cannot be determined by the Provincial Land Court and I grant the order as asked.

Order:

(1) Proceedings in the Provincial Land Court Port Moresby entitled No. 1968/48 Vanapa East be removed to the National Court.

(2) The Decision of Provincial Land Magistrate, Kwalimu Lofena given on the 7 October 1983 concerning Vanapa East is quashed.

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Lawyer for the Applicant/Plaintiff : The Public Solicitor
Counsel : J. Shepherd

Lawyer for the First,Second Respondent/
Defendants : The State Solicitor
Counsel : J. Goodman

Lawyer for the Third Respondent/
Defendant : Kirkes
Counsel : C. Coady

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