CLEMENT LAFEA -v- FRANK AFU (As Representative of his Tribe)
IN THE MATTER of Kwaruiasi Land also known as Kwairuiasi Land

In the Court of Appeal of Solomon Islands
(Connolly P.; Los and Goldsbrough JJA)
Civil Appeal Case No. 2 of 1991
Hearing: 12 August 1992
Judgment: 2 September 1992

A. H. Nori for Appellant
T. Kama for the Respondent

JUDGMENT OF THE COURT: The respondent is the occupier of certain land on Malaita known as **Kwairuiasi** or **Kwaruiasi** land. He received a letter of 28 March 1991 from Mr Nori, Barrister and Solicitor, written on behalf of the appellant, Clement Lafea and his line, drawing attention to a decision of the Malaita Customary Land Appeal Court of November 1990 in which Lafea was successful as against one Daumasia, warning him that in future, gardening on the land required Lafea's permission and intimating that if necessary Lafea could institute legal action against Afu to establish his "***superior rights***" which were said to be established by the fact that Afu's claim to ownership was based on the purchase in the past from "***the grandmother of Mr Daumasia, the loser in the case***".

Alarmed by this letter and its threat to the security of himself and his line, Afu instituted proceedings in the High Court, by originating summons, for a declaration that the sale in question, which is not disputed to have occurred, had the effect that the land is lawfully owned by the descendants of the purchaser, and that it is now owned by Afu and members of his tribe. Ward C.J. made that declaration on 2nd August 1991 adding the words "***as against the tribes of Farobo, Odu and Obed Sia***". There is no dispute that Lafea is a descendant

from Obed Sia, who in turn was a descendant from Farobo as was Lou. Daumasia was also descended from Farobo. It is apparent therefore that the 1981 decision was between members of the same line and can say nothing to the position of the purchaser and his line.

In fact the purchase has been consistently upheld in a line of cases going back to 1939, the year of the purchase by one Maefasia. On 12 July 1939 it was held, in a District Commissioner's Court, as between Farobo and the vendor, Marianifiu, that the latter had the title. A decision in 1942 by District Commissioner Bengough in a suit between Odu and Marianifiu was to the same effect. But in 1949, in ignorance of the 1939 case, District Commissioner Forster held Farobo to be the owner as against Maefasia on the ground that Marianifiu did not have title. This last decision was regarded as incorrect by Bodilly C.J. in 1974, in an extra-judicial memorandum on the ground that Marianifiu's title was res judicata.

Mr Nori, who argued this case for the respondent Afu, drew attention to section 15 of the Land Registration Ordinance, now repealed, but which was in effect from 1 July 1919 to 1 February 1968. That section provides, amongst other things, that every judgment or order of a court affecting land shall, so far as regards any such land, be void unless a memorial thereof be registered within three months from the date thereof. He says therefore that the decisions in 1939 and 1942 cannot be regarded as creating a res judicata on the subject for a search back to 1930 has not revealed the registration of those judgments. It is unnecessary for us to decide the precise effect of section 15 for the purposes of this case. These were not the last decisions on the subject and there have been later cases involving this land since 1 February 1968. But they do at least represent a long course of judicial opinion close to the critical events.

On 16 August 1978 Obed Sia of the line of Farobo lost a challenge to the title of this land of one George Amasia, a descendant of the purchaser, in the Local Court at Auki, which affirmed the validity of sale by Marianifiu. That decision was affirmed by the Malaita Customary Land Appeal Court on 22 March 1979. On appeal to the High

Court it was decreed, on 11 November 1981, that the land known as Kwairiasi land was owned by George Amasia and the other descendants of the persons who bought this land from Marianifiu.

Despite this decision, on 18 December 1983 a suit between Lafea and Daumasia was heard by the Malaita Local Court which held that the sale by Marianifiu was valid. On appeal the Malaita Customary Land Appeal Court on 19 March 1986 remitted the last mentioned decision to the Local Court, which on 28 June 1989 affirmed its previous decision. However the Customary Land Appeal Court overruled it on 9 November 1990 on the basis that there had been conflicting decisions in the Local Court as to whether the respondent Lafea was or was not a descendant of Obed Sia.

Now when the originating summons was heard by Ward C.J. it was not disputed that Lafea is in fact descendant of Obed Sia. This means that the decision of the Local Court on 18 August 1978, as affirmed by the Customary Land Appeal Court and by the High Court, really concludes the validity of the purchaser's title to this land as the result of the sale in 1939 and therefore the title of the purchaser's line, Mr Afu being a descendant of the purchaser. The litigation between Lafea and Daumasia was in effect friendly litigation, Daumasia not contesting the right of Lafea, and in any case, it says nothing to the interest of the purchaser's line because that line was not represented in the litigation. Mr Afu's concern is, however, understandable, for he was threatened with an action to dispossess him at the suit of Lafea. He reasonably apprehended that the Local Court and Customary Land Appeal Court would be likely to adopt the reasoning which had led to the decision in Lafea's favour in 1990 and he therefore sought the reassurance of a declaration from the High Court.

Now a number of grounds was taken in opposition to the declaration. It was suggested first of all that Afu should have appealed against the decision of the Customary Land Appeal Court, but Afu was not a party to that decision and more importantly, his line was not a party to the decision. It is true that the decision

suggested an approach which was inconsistent with his title but he was not directly affected by it and in our opinion the Chief Justice was right in the view that a declaration should not be refused on that ground.

The second point taken by Mr Nori was that matter could not be res judicata because the earlier decisions were not final judicial decisions. This submission relates to the decisions in 1939 and 1942 and the contention was that the 1893 Pacific Order in Council which was the legal foundation for the acts, legislative, executive and judicial of the High Commission did not give power to the High Commissioner and the Deputy Commissioners to adjudicate in land disputes between natives. Parts II, III and IV were largely revoked by an Order of 1961 and obtaining the text has been a little difficult but an examination of those parts shows that the courts of the High Commission were in fact given plenary judicial power within the territorial limits of the Commission and they were in force when the decisions of 1939 and 1942 were given. However, section 15 of the Land Registration Ordinance to which reference has already been made, makes it undesirable for us to rest our judgment upon those decisions.

Finally, Mr Nori takes a point which was not taken before Ward C.J. and that is that by virtue of section 231(1) of the Land and Titles Act the High Court had no jurisdiction to hear and determine a claim to the ownership of customary land. As this point was not taken before Ward C.J. we would be reluctant to entertain it but, in any case, we do not consider this case is within the mischief aimed at by section 231(1). The court is not asked to apply or interpret customary law or to establish the title to this land. The originating summons is, in substance, one which seeks the application of the principle that an issue once solemnly decided between parties is binding on those parties and their privies in any subsequent litigation. This principle, which has been held to apply to customary land in *Talasasa -v- Paia [1980/81] S.I.L.R. 93* is, nonetheless, one which appears to be resisted by some in Solomon Islands. It is however an important principle for the ordering of a civilised society and the High Court, in ruling on the

instituting summons, was, in truth, affirming that principle, the title having been established by the decisions of 1973-1980.

It should also be mentioned that Mr Nori contended that Afu had no standing to bring the proceedings he did because he relied upon an estoppel and, as it is often said, estoppel is not a sword but a shield. However, Afu's position was that he was threatened with proceedings to dispossess him and he set up the estoppel as a defence against an apprehended attack of this character. He was thus indeed using the prior decisions as a defence and not as a means of attack and we think there is no substance in that point either. The Court therefore affirms the decision of the High Court.

BY THE COURT

(P. D. CONNOLLY, P.)