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TANGO MANELE -v- SOLOMON TIVA & OTHERS

**High Court of Solomon Islands**
**(Palmer J.)**
Civil Case No. 118 of 1992
**Hearing:** 4 December 1992
**Judgment:** 4 January 1993

**A. Radclyffe** for the Plaintiff
**F. Waleilia** for the First and Second Defendants
**C. Ashley** for the Attorney General

PALMER J: This is an application by the Plaintiff, Tango Manele, as representative of the Garava Tribe against the First Defendants, namely, Solomon Tiva, Joel Kiboa and Sedo; the second Defendant, namely the South Seas Evangelical Church; and the Attorney General as Third Defendants under an originating summons seeking the following orders:

> **"(i) the registration of the Defendant as perpetual estate owners of parcel Nos 192-032-1, 191-032-2 and 191-032-3 be cancelled under section 209 of the Land and Titles Act on the grounds that registration was obtained by fraud or mistake and**
>
> **(ii) for a declaration that there is no power under the Land and Titles Act to appoint an acquisition officer to acquire land for the South Seas Evangelical Church."**

Shortly after the hearing commenced, ground (i) of the application was withdrawn. Only ground (ii) therefore is relevant for the purpose of this judgment.

A preliminary point has been raised by the learned counsel for the Defendants, Mr. Waleilia pursuant to Order 58 Rule 2.
That rule states:

> *"Any person claiming any legal or equitable right in a case where the determination of the question whether he is entitled to the right depends upon a question of construction of any provision of a written law, may apply by originating summons for the determination of such question of construction, and for a declaration as to the right claimed."*

Mr. Waleilia seeks to argue that the Plaintiff must have a legal or equitable right to be able to rely on Order 58 Rule 2 to seek a declaration from this court and that declaration shall be limited only to the question of whether he is entitled to that right.

It is important therefore to identify what that right of the Plaintiff is.

The right relied on is found in paragraph (g) of section 104 of the Land and Titles Act. Those rights are referred to as 'overriding interests' and section 104(g) reads as follows:

*"The owner of registered interest in land shall hold such interest subject to such of the following overriding interests as may, for the time being, subsist and affect the same, without their being noted on the register -*

> *(g) the rights of a person in actual occupation of the land or in receipt of the rents and profits thereof, save where enquiry is made of such person and the right are not disclosed."*

The rights relied on by the Plaintiffs to seek a declaration under Order 58 Rule 2 are "the rights of a person in actual occupation of the land."

The preliminary point of Law raised by Mr. Waleilia is that Order 58 Rule 2 is quite specific about the type of question that this court can consider. The question is "***whether he (the Plaintiff) is entitled to the right***" of a person in actual occupation.

The question however that is being asked in this application is whether there is power under the Land and Titles Act to appoint an acquisition officer to acquire land for the South Seas Evangelical Church. Mr. Waleilia submits that this court should not entertain this application because it seeks to cancel the registration of Saura Land.

He says that this is wrong because the only action permitted by Order 58 Rule 2 is for a declaration on his rights(to the Plaintiffs rights) to actual occupation on a valid and properly registered piece of land.

The declaration that the Plaintiff is seeking is one that he should have brought on appeal as provided for under section 65 of the Land and Titles Act. The Plaintiff is now out of time(in fact some 6 years) and cannot be permitted to re-open such issues that challenge the indefeasibility of title of the defendants except on grounds of fraud or mistake (see section 209 of the Land and Titles Act).

He referred to section 100 of the Land and Titles Act, the relevant part of which reads:

*"The rights of an owner of a registered interest, whether acquired on first registration or whether acquired subsequently for valuable consideration or by an order of court, shall be rights not liable to be defeated except as provided by this Ordinance (Act)..."*

The only provision under the Act whereby such rights of such an owner of a registered interest can be defeated are provided for in section 209 of the Land and Titles Act and that is for fraud or mistake.

Section 209 Subsection (1) reads:

*"Subject to subsection (2), the High Court may order rectification of the land register by directing that any registration be cancelled or amended where it is so empowered by this Ordinance, or where it is satisfied that any registration has been obtained, made or omitted by fraud or mistake."*

Subsection (2) of Section 209 reads:

*"The land register shall not be rectified so as to affect the title of an owner who is in possession and acquired the interest for valuable consideration, unless such owner had knowledge of the omission, fraud or mistake in consequence of which the rectification*

*is sought or caused such omission, fraud or mistake or substantially contributed to it by his act, neglect or default."*

The power of the High Court to order rectification of the land register is therefore very limited.

Even if fraud or mistake is established, subsection (2) of section 209 further requires that there must be knowledge of the omission fraud or mistake in which rectification is sought. There is therefore an extra hurdle to overcome if fraud or mistake is being relied on.

Other than that, section 100 ensures that the title of a registered owner cannot be defeated.

Where the Plaintiffs therefore are not relying on section 209 then their application cannot it seems be entertained by this court under Order 58 Rule 2.

They cannot be permitted to bring an action that would have the effect if granted of either rectifying the register by amendment or cancellation, unless it is brought under the Provisions of the Land and Titles Act.

This would seem to be the simple and plain intention and purposes of section 100 of the Land and Titles Act, that those rights "*.......... shall be rights not liable to be defeated except as provided by this Act....*"

The rights of a registered owner cannot be defeated by overriding interests; although those rights are subject to the overriding interests (in the Plaintiffs case his rights to actual occupation of the Land).

The Plaintiffs therefore and I agree with the submissions of Mr. Waleilia, should not be allowed to bring an action under Order 58 Rule 2 to have a go at rectifying the register when the Land and Titles Act does not permit it. A valid registration has been effected and duly guaranteed by the state. The Plaintiffs have forfeited their rights to an appeal under section 65 of the Land and Titles Act and are not bringing an action under section 209 for fraud or mistake. Accordingly they should not be permitted to attack the registered title of the Defendants under the High Court Civil Procedure Rules, specifically Order 58 Rule 2. It would be an abuse of the processes of this court.

The other important point raised is to be found in the wordings of Order 58 Rule 2 itself. I am satisfied that the Plaintiff is entitled to have the question as to his entitlement to rights of actual occupation on the registered land determined by this court on a question of construction of any relevant provision of the Land and Titles Act. But that is as far as that right can be taken under Order 58 Rule 2.

Order 58 Rule 2 does not entitle him to seek a declaration on the adjudication and registration process or the powers exercised in the decision to acquire customary land.

Order 58 Rule 5 gives a discretion to this court to refuse to consider any questions of construction if in its opinion it ought not to be determined on originating summons.

I am satisfied the declaration sought cannot be brought under Order 58 Rule 2. Accordingly it is dismissed with costs to the Defendants.

I would have left this judgment here had I not thought that the question raised in the application raises an important legal point. Accordingly I would still consider the question as raised.

The question rephrased is, whether the Commissioner of Lands or Provincial Assembly have power under the Land and Titles Act to appoint an acquisition Officer to acquire land for the South Seas Evangelical Church.

The relevant provisions are sections 59 and section 60 of the Land and Titles Act.

Section 59 states:

*"Notwithstanding any current customary usage prohibiting or restricting such transaction, customary land may be sold or leased to the Commissioner in accordance with the provisions of this Division."*

The very important point to note about this section is that it does not in anyway state any qualification or restriction as to the sale or lease of customary land. It simply states that customary land may be sold or leased but does not say, for any public purposes only.

The only requirement seems to be that the sale or lease of customary land be "in accordance with the provisions of this Division."

The division referred to is Division I and headed ***"Purchase or Lease of Customary Land"***, under Part V of the Land and Titles Act.

Section 60 subsection (1A) provides for the appointment of an acquisition officer. It states:

*"Where a Provincial Assembly wishes to purchase or to take a lease of any customary land under section 59, the Clerk may appoint an Acquisition Officer to act as his agent for the purposes of the acquisition."*

Again subsection (1A) of section 60 does not impose any condition or requirement as to any purposes for any acquisition. It merely states ***"where a Provincial Assembly wishes......... "*** then an Acquisition Officer must be appointed.

The word **'wish'** is defined as:

*"have or express desire or aspiration for; want or want (person) to do; request, .........* **" (see the Australian Little Oxford Dictionary, Edited by George Turner):**

The word **'wish'** is a very subjective word. It personalises a decision - making process to a particular person, in this particular case either by the Commissioner of Lands or the Provincial Assembly.

The Land and Titles Act is administered by a Commissioner of Lands (see section 3).

Section 4 subsection (1) states:

> *"It shall be the duty of the Commissioner in addition to his other duties specified in his Act to advise the Minister, as often as he may be requested so to do, concerning land policy in Solomon Islands."*

Land policy in Solomon Islands is made by the Government of the day and implemented by the Commissioner of Lands. The Commissioner of Lands is responsible for land policy therefore.

Subsection 4 (4) states:

> *"The Commissioner shall have power to hold and deal in interests in land for and on behalf of the Government, and, subject to any general or special directions from the Minister, to execute for and on behalf of the Government any instrument relating to an interest in land."*

The Commissioner of Lands is recognised as the legal entity with power to hold and deal in interests in land for and on behalf of the Government, and for execution of documents relating to land.

Now what the Plaintiffs seem to be saying is that unless the Government has an interest in the acquisition of customary land and that those interests of the government are on grounds of public purposes, then any other acquisitions such as that in this case would be contrary to the spirit and the intention of the Land and Titles Act.

I do not think I can agree to this because it would be over simplifying what governments and provincial governments concerns and responsibilities are, and imposing an unnecessary restrictive approach.

Governments primary concern is always for the public good, welfare and benefit, but enshrined in the constitution is the responsibility to protect the rights and freedom of individuals and I would add private organisations. The freedom of association and assembly for instance is protected by section 13 of the constitution.

The government of this nation belongs to the people, and so whatever natural resources are vested in the government are held for and on behalf of the people of this nation.

Governments concerns are not necessarily restricted to the public good, public defence, safety, order morality or public health. It would in fact be unwise to do so. Governments concerns go right down to the grass roots level, to the individual, to church organisations and private organisations. This is why Government makes laws and regulation and sets policies to facilitate individual and private enterprise and allow growth and development to take place in the country.

It would be wrong in my view therefore to say that government or Provincial Assemblies cannot acquire land for purposes other than public purposes. It would be imposing a restriction on the powers of governments and provincial assemblies to say that they cannot acquire land on behalf of others as well.

It is clear they can acquire land on behalf of themselves. But it does not say that it shall only be for public purposes or only where government has an interest.

Sections 59 and 60 are so generally worded and it is my view that this is done purposely so that the hands of the Commissioner or the Provincial Assembly are not tied down.

Another important point to note about the decision to purchase or take a lease of customary land by the Commissioner or Provincial Assembly is that such a decision is not a legal decision but a policy decision. Matters of policy vary from Government to government and from provincial assembly, to provincial assembly and can be varied too by the government or Provincial assembly of the day. Matters of Policy do not belong to the courts, unless perhaps they are alleged to be in beach of the constitution or the laws of the country.

The decision to take a lease of customary land by the Guadalcanal Provincial Assembly for the South Seas Evangelical Church is a policy decision and it is not for this court to interfere with that decision. I do not find that it contravenes any Act of parliament or that it is inconsistent with the provisions of the Land and Titles Act.

As to the points raised by Mr.Radclyffe concerning the prescribed forms (Forms CL3, CL4 and CL5) and the requirements of paragraph 68(1)(d), these are procedural requirements that eventually lead to registration.

Section 68(1)(d) reads:

"*An agreement shall, for the purposes of sections 66 and 67, be implemented in the case of a lease of the land by a Provincial Assembly where a Clerk has appointed an acquisition officer, by the Commissioner.*

*(i) making an Order vesting the perpetual estate in the land in the persons named in the agreement as lessors;*

*(ii) requiring the persons so named to execute a lease in favour of the Provincial Assembly in accordance with the terms of the agreement,*

*(iii) paying to such persons after receiving the same from the Provincial Assembly any premium or initial payment of rent payable in accordance with the terms of the agreement, and*

*(iv) allowing the Provincial Assembly to take possession of the land.*"

Section 68 is the possession and vesting provision.

After the vesting order is made the persons so named should then execute a lease in favour of the Provincial Assembly. What has happened in this particular case is that the lease has been executed in favour of the South Seas Evangelical Church directly. This is a procedural error and can be a ground for rectification of the land register by amendment but not by cancellation at this stage.

The lease should have been made in favour of the provincial assembly and the provincial assembly can then in turn transfer the lease to the South Seas Evangelical Church. A short-cut has been taken in this particular case and one can understand the expediency of it. It would however be advisable that the requirements as set out should be complied with. Had

such a matter been brought up as a ground of appeal within the time limits, then it is possible the implementation process may be rendered defective.

The same approach has been taken with the filling in of the prescribed acquisition forms, CL3, CL4 and CL5. The agreement is made with the vendors for a lease to the Provincial Assembly on behalf of the South Seas Evangelical Church and should not be a direct lease to the South Seas Evangelical Church. Again this is an error on the form but cannot have the effect of nullifying the whole acquisition process.

The errors it seems appear to have been made more out of ignorance than intentional, and through a lack of proper understanding of the workings of the relevant provisions.

Section 70 of the Land and Titles Act is worth mentioning because this deals with the issue of compulsory acquisition of land. The only ground on which land may be acquired compulsorily is if it is required for a public purpose.

The significance of section 70 is that it can only be implied that land may be acquired for other purposes than for public purposes. When acquiring land for other purposes than public purposes the provisions of Division 1 may be used. These same provisions may also be used for acquiring land for public purposes. But Division 1 is not restricted to public purposes only.

Finally, a little peek into history and in this regard I am grateful to the learned author of the article *"Land Legislation from the Protectorate to Independence" David Ruthven, contained in the book, 'Land in Solomon Islands published by the Institute of Pacific Studies, University of the South Pacific and the Ministry of Agriculture and Lands Solomon Islands, 1979.'* That learned author records the first purchases of land by outsiders from Solomon Islands as occurring at about the 1850s. These were for small areas for trading stations and missions. From 1885, planters came in to the scene and bought land in a larger scale for coconut plantations. Purchases of land then were either recorded in the Government 'ground book' or a copy of the agreement was sent to the High Commissioner in Fiji for safe keeping.

In 1896, in an attempt to control such large purchases of land, the Queens Regulation No.4 of 1896 was passed. This regulation required that any purchases of customary land had to be submitted first to Government for investigation and approval by the High Commissioner before it became valid. From this we can see the very early involvement of government on private purchases and this is important to bear in mind, as from this scenario, it led eventually to the enacting of our current Land and Titles Act.

In 1914 a Land Regulation was passed which prevented the sale of customary land to non-Solomon Islanders.

> *"Under this law, any non-Solomon Islander wishing to develop customary land had to approach the Government. If Government approved the request Government would negotiate with the customary landowners and either arrange a Native Lease or purchase the land at a price acceptable to all parties, and then make a Crown Lease to the interested developer."*
> **[Ibid page 241 paragraph 2]**

Again an instance of government involvement. This system was used from 1914 until 1963 when the first version of our present Lands and Titles Ordinance was then brought into effect.

Between 1896 and 1914 to 1963 there was another type of lease to non-Solomon Islanders recognised. This was called a '**Native Lease**'. This system enabled customary landowners to lease customary land to non-Solomon Islanders through the agency of the Resident Commissioner.

In 1900 the notorious '**Solomons (Waste Lands) Regulation**' was passed. This law empowered the Government ***"to grant certificates to persons or companies*** to develop areas of land which were not '***owner cultivated or occupied by any native or non-native person.***' **(Ibid p.242 para.1)**

In 1918 a Deeds Registration system was set up which enabled deeds and documentary title to land to be filed with the government.

And in 1959 the present Land and Titles Act was forged from the 'Torrens' system of registration, in which individual title is guaranteed by the state, through a process of adjudication and registration.

In brief, the historical background assists us to understand the purposes and the objects with which the current Land and Titles Act was enacted. It cannot be divorced from Government direct involvement with individual and private enterprise.

The government of that day had in mind the economic, political, social and spiritual development of the country, but at the same time considered the customary aspects as vital and so after much soul searching it eventually came up with what we now have as the current Land and Titles Act.

In a Report of the special Lands Commission on Customary Land Tenure in the Solomon Islands by Colin H. Alan 1957 at Chapter 13 paragraph 43 he wrote:

> *"...................... in the field of land the type of legislation required is that which facilitates rather than compels. This is a primary consideration, since it enables progressive elements of the community to advance, but permits the more backward to follow always with the target infront of them. In particular, such legislation provides Government with the machinery with which to promote progress in those areas that are ready for it, leaving the others to take their time."*

The wordings of section 59 and section 60 of the Land and Titles Act are all consistent with this general facilitating approach to enable those communities, individuals and organisations willing to advance to be able to hold registered titles and pursue whatever development goals that they may wish to. In those days only government had the resources and the expertise to carry out the process of adjudication and registration. It was also a means of checking, to ensure that the customary landowners get a fair price, treatment and hearing. The Land and Titles Act therefore was so framed to reflect this facilitating approach of the government, and this in turn is seen in the generally worded provisions of the Land and Titles Act which in their ordinary and plain meanings allow Government and Provincial Assemblies to acquire land for and on behalf of others.

The decision therefore by the Provincial Assembly of Guadalcanal to acquire land for the South Seas Evangelical Church has always been consistent with the historical development of the Land tenure system and the Land and Titles Act. It is dependent so much on the governments or the provincial governments land policy of the day.

It is interesting to note that in **David Ruthven's article at p.247** when summarising the main things that the Land and Titles Act covered, he listed one of them as:

*"how government can buy or lease land for itself **or on behalf of others."***

David Ruthven by the way was the Commissioner of Lands in 1975. He certainly was aware of the historical background of the Land and Titles Act.

Finally, one only needs to look around the country to see leases and fixed-term estates being held by individuals, private organisations, and religious organisations etc. In some instances perpetual estates have been transfered to Solomon Islanders by the Commissioner of Lands, again depending on the policy of the Government of the day.

Certainly it would not be in the spirit of the Land and Titles Act and inconsistent with its historical development and background to try and box in the powers of the government or the provincial assemblies. It was intended to be a facilitating Act and therefore should be given a fair wide and liberal interpretation where applicable. It is still one of the best pieces of legislation that the Colonial government left for Solomon Islands.

The Order remains.

Application dismissed with costs to the Defendants.

**(A. R. Palmer)**
**JUDGE**