FRANCIS KEKEBUA -v- AUGUSTINO OIOFA AND PIO FIKUMAE

**High Court of Solomon Islands**
**(Muria, CJ.)**
**Land Appeal Case No. 9 of 1995**

Hearing: 10th October 1995
Judgment: 11th October 1995

**B. Titiulu for Appellant**
**T. Kama for Respondents**

MURIA CJ: This is an appeal against the decision of the CLAC (Malaita) in a dispute between the appellant Francis Kekebua and the respondents Augustino Oiofa and Pio Fikumae over Kao Land. There are four grounds of appeal raised by the appellant.

On the record, it is obvious that the parties have been disputing each others right over Kao Land. The matter was first brought before the Chiefs, then to the Malaita Local Court, then to the CLAC (M) and now to this Court. The appellant had been unsuccessful before the Chiefs as well as before the Local Court and CLAC.

Grounds 1 & 2 relate to an allegation of impropriety against the President of the CLAC. Ground 3 complains of the court's decision to exclude the appellant's principal tambu place on the upper boundary of Kao Land. Ground 4 alleges an error on the part of the court in not allowing the appellant to call his witness. The prayer of the appellant is to set aside the CLAC decision and remit the case back to CLAC (M) differently constituted to re-hear the case.

It is convenient that I shall deal with ground 3 first. This ground alleges an error of law on the part of the CLAC by accepting the respondent's evidence as to the upper boundary of Kao Land which in effect excludes the appellant's tambu place from Kao Land. With respect, this is not a question of law but rather it is a question fact. The CLAC clearly considered the evidence in this regard taking into account the survey report and the evidence in court. The CLAC had this to say on the matter at page 3 of its judgment:

> *"During the survey we visited Kao principal tambu place where both parties agreed with it since their ancestors worhsipped in Kao principal tambu place. However, at Nanaki tambu place, the appellant claimed that it is his principal tambu place where his ancestors who died in Kao had to be brought from Kao for burial. The Respondent said he has nothing to do with Nanaki as it was a different tribe's tambu place.*
> *We then take the view that as Nanaki is a different tribe its principal tambu place must not be located in Kao land. We therefore, accepted the Respondent top boundary from lagwathauthau to Fatanidoleau to run in a straight line putting Nanaki outside of Kao."*

The CLAC is in the best position to decide that question of fact and they did so. This court would not interfere with a finding made by the CLAC based on facts or custom unless it is shown that no reasonable tribunal could have reached such a decision on the evidence before it. The CLAC in this case quite properly considered the issue of the upper boundary of Kao Land and came to the decision which it made. I see no reason to differ and so ground 3 is rejected.

I turn to ground 4 of the appeal. Basically, the appellant alleges that "*the court will not allow any witnesses to be called*" by the appellant and the respondents. Apart of the assertion by the appellant, there is absolutely no evidence to support this allegation. There is evidence however that the President introduced the court members to the parties and "*explained the procedure and both parties understood*"

The record does not show that the President told the parties that they were not allowed to call any witnesses. Mr Titiulu sought to argue that because there was no record of the parties calling witnesses then that is evidence of direction from the court not to call witnesses. That cannot necessarily be so. An absence on the record of witnesses being called equally meant simply that no witnesses were called. This is not surprising since CLAC does not rehear the case in full but rather considers the record and any submissions on it which the parties wish to make. It can nevertheless allow witnesses to be called in which case the party wishing to call such evidence must make an application to the court and must show good reason why the evidence he now wishes to bring was not called in the Local Court. To keep back a witness for the appeal would be wrong as was stated in *Temasuu -v- Taupongi (1983) SILR 103*

The record would appear to support Mr Kama's contention that the court explained the procedures to the parties who understood it. That include the procedure of calling witnesses on appeal.

The allegation raised in ground 4 receives no support from the record nor from anything now put before this court. It too must fail.

I now turn to grounds 1 and 2 which can be conveniently dealt with together. The allegations in those grounds stem from an alleged meeting between the President of the CLAC and Pio Fikumae who is one of the respondents at the Auki Market.

The allegation was raised in court and it was denied by the President and the respondent Fikumae. Before that, the appellant raised the allegation with the police who advised him to report it to the court.

The court, excluding the President, then dealt with allegation. The appellant gave evidence of what he alleged to have seen. The police officer Sgt. Samo, also gave evidence and so were the President and the respondent Fikumae. At the end of the evidence the court found no basis for the allegation and dismissed it. The appellant then made an apology to the court for making the allegation.

Not only that the allegation was found to be lacking in substance and thereafter retracted by an apology, it was plainly stated by the appellant in court that he raised the complaint but did not want the

President to step down from sitting in the case. In what sense can the appellant now raise a complaint based on bias, partiality, prejudice and lack of appearance of justice? If X complains against B of bias or partiality and then says that he only complains but accepts B to continue to sit to hear his case. How can X possibly turn around after the decision goes against him and attack B of bias or partiality having consented to B sitting in his case? For to raise the complaint in those circumstances would be devoid of merit.

In the present case, the appellant is doing exactly the same. He consented to the President to continue to sit in the case although he raised the allegation of appearance of bias against him. The allegation also was found to be baseless and the appellant ended up apologising for the allegation. In those circumstances it would be utterly contrary to the principle of justice and common sense to allow the appellant to rely on the point raised as a ground for appeal.

Another way of putting this is that the appellant had waived his objection to the President sitting in the case by consenting to the President to continue to sit despite his allegation of bias. This similar question was considered in *Wakefield Local Board of Health -v- West Riding & Grimsby Railway Co. (1865-1866) 1 LRQB 81*, where a justice of the peace had an interest in, the proceedings before him. At the hearing objection was taken to him sitting by a party but the objection was subsequently abandoned. The justice heard and determined the matter. On appeal the same party sought to rely on issue of justice's interest in the matter. On this cockburn CJ had this to say at p.86:

> *"I am therefore of opinion that, although Colonel Smyth (the justice) may have been interested so as to incapacitate him from acting, yet, as the parties were aware of the objection and waived it, he had jurisdiction to make the order; and nothing is clearer than that having thus waived the objection of interest, and taking the chance of a decision in their favour, the parties cannot afterwards raise it."*

Professor de Smith *in Judicial Review of Admin. Action, 4th Ed. page 275* also has this to say on the point:

> *"However there is also no doubt that a party otherwise entitled to impugn a decision for breach of the rule may forfeit his right to do so by his own conduct in approbating the proceedings"*

Both authorities were relied on in *Kevisi -v- Talasasa (1983) SILR 87*, which is a case where there was a waiver in the Court below of the breach of the impartaility rule by the party entitled to rely upon it. It was held that the right to rely upon that breach later on appeal had been forfeited and cannot be revived.

In *Rade & Soso -v- Sautuana* (1985 - 1986) SILR 55 two members of the CLAC who were objected to by the appellant and who did not sit with the Court during the hearing did later retire with the justices after the hearing and before judgement was given. The Court held in that case that the objector (appellant) did not have to prove that the justices who retired with the sitting members actually took part in the decision making by the Court. The question was whether there was reasonable suspicion of bias on the part of the Court..

It must be pointed out, however, that in *Rade & Soso -v- Sautuna* the alleged event, that is, the two justices actually retiring with the sitting members, did occur. As such the test of real likelihood of bias or reasonable suspicion of partiality was the appropriate one to apply in such a case. In the present case before the Court, the alleged meeting between the President of the Court and Fikumae was found to be baseless and as such it was a mere allegation which do not warrant the test laid down in *Rade & Soso -v- Sautuana* to be applied. To speak of the test in section 10(8) of the constitution and the tests as expounded in *Kevisi -v- Talasasa* and *Rade & Soso -v- Sautuana* in the circumstances of this case would therefore be of no real practical purpose other than for an academic exercise, an exercise which this court does not enter into.

On the question of standard of proof, the appellant attempted to place too much of an emphasis on the expressions "proof on the balance of probabilities" and "presumption of innocence until proven guilty" as used by the CLAC. It was argued by Counsel for the appellant that the CLAC failed to indicate which standard it used when considering the allegation of bias against the President but that the likelihood was that the CLAC relied on the criminal standard. That argued Counsel led the court to an erroneous conclusion.

My reading of the CLAC's ruling on the appellant's allegation of bias does not reflect that CLAC was applying the criminal standard of proof beyond a reasonable doubt. In fact the CLAC expressly stated that

> *"This is a serious allegation therefore, the appellant must prove on the balance of probabilities that his complain is true."*

The use of the expressions relied on by the appellant did not in my view mean that the CLAC was using the higher standard of proof as in criminal cases. They are words which bore out the seriousness of the allegation and so the appellant bore the burden of making sure that the allegation did in fact occur. For once this was donce then the appellant need not go on to prove that the meeting with the President would affect the way the case would be decided. The test as set out above would clearly apply.

I feel the CLAC's ruling must be read as a whole and in the context in which it was made. To pluck words out of judgment and view it microscopically in order to give sense to the court's decision would be a wrong method of reading judgment and the sooner such a practice is discarded, the better.

In all fairness to Counsel for the appellant, the grounds of appeal were not drafted by him but by the appellant's former solicitor. Counsel admirably argued the grounds of appeal based on instructions he was given by his client. For the reasons stated, grounds 1 and 2 must also follow the fate of the other grounds.

All the grounds having failed, the appeal is dismissed with costs to be taxed if not agreed.

(Sir John Muria)
CHIEF JUSTICE