

**ERIC DICK AND ALICK DENNIE -v- NORTH NEW GEORGIA
TIMBER CORPORATION AND KIKIBOY LASI AND OTHERS**

HIGH COURT OF SOLOMON ISLANDS
(F. O. KABUI, J.)

Civil Case No. 313 of 1995

Date of Hearing: 24th June 2002
Date of Judgment: 26th June 2002

Mr A. Nori for the Plaintiffs
Mr J. Apaniai for the 2nd to the 10th Defendants

JUDGMENT

(Kabui, J): This is a Notice of Motion filed by the Defendants on 23rd January 2002 seeking the following orders-

1. **That the Writ of Summons filed herein by the Plaintiffs on the 13th October 1995 be struck out under Order 27 Rule 4 on the grounds that the claim is frivolous and vexatious and is otherwise an abuse of the court process in that the Plaintiffs have no standing to bring the action.**
2. **Consequent upon granting the order in paragraph [1],:-**
 - (a) **that the application filed herein by the Defendants on the 16th November 2001 seeking the release of \$1,500,000.00 from the Gerasi Tribe Account No. 01-208488460-16 with the National Bank of Solomon Islands be stayed permanently.**
 - (b) **that the interim orders dated 18th October 1995 and 30th November 1995 restraining the withdrawal of funds by the Defendants from Gerasi Tribe Account No. 01-208488460-16 with the National Bank of Solomon Islands be discharged forthwith.**
3. **That the Plaintiffs pay the Defendants' costs of and in connection with this application and this action.**
4. **Such further or other orders as the court deems fit.**

This application was supported by two affidavits. One was filed by Gordon Rence on 16th December 2001 and the other was filed by James Apaniai, the Defendants' Solicitor.

The Facts

The proceeds of logging operation on Gerasi land on North New Georgia were held in the "**Gerasi Account**" in the National Bank of Solomon Islands. The Plaintiffs were able to obtain an injunction against the Defendants on 30th November 1995 to stop the Defendants from distributing the profits until their claim was determined. The Plaintiffs' claim was that they were also members of the Gerasi tribe and had so far not received any part of the royalties due to the Gerasi tribe. The balance in the Gerasi Account on the date of the injunction stood at \$1,600,000.00. By a consent order dated 8th June 1998, \$800,000.00 was withdrawn from that Account. The sum of \$19,580.00 was paid to the Plaintiffs. The balance went to the Ramada members of the Gerasi tribe. By a decision dated 17th March 1999, the Roviana Local Court ruled that the Plaintiffs were not members of the Gerasi tribe. The Plaintiffs not being satisfied appealed to the Customary Land Appeal Court (Western), which on 12th October 2001 upheld the decision of the Roviana Local Court. The Plaintiffs' appeal was therefore dismissed. The Plaintiffs again appealed to the High Court. They filed their appeal directly in the High Court on 3rd January 2002.

The Applicants' Case

Counsel for the Applicants, Mr. Apaniai, originally based his case on the fact that the Plaintiffs did not appeal against the decision of the Customary Land Appeal Court (Western). He said the period of 3 months had lapsed without an appeal. However, he later conceded that the Plaintiffs did appeal. However, he argued that the appeal itself had not been filed in accordance with Order 60A of the High Court (Civil Procedure) 1964 "**the Court Rules**" and therefore there was no appeal. He argued that that being the case, the position must be that there was never an appeal so that the last day for an appeal being 12th January 2002 had lapsed. He urged me to grant the orders he sought on that basis.

The Plaintiffs' Case

Counsel for the Plaintiffs, Mr. Nori, argued that the Plaintiffs had complied with section 256(3) of the Land and Titles Act (Cap. 133) and therefore the appeal was well within the 3 months time limit.

The Issue

The issue is clearly whether or not an appeal filed in time directly in the High Court together with the appeal fee is no appeal in terms of Order 60A of the High Court Rules. The intention of Order 60A above is clear. An appeal under section 256(3) of the Land and Titles Act above must be by notice of appeal to be filed with the clerk of the Customary Appeal Court, who in this case is the Magistrate at Gizo, Western Province. The appeal becomes effective on the day it is filed with the clerk or when the appeal fee has been paid but that no appeal would be entertained after 3 months specified by section 256(3) of the Lands and Titles Act.

Determination of the Issue

There is no dispute that the appeal was filed on 3rd January 2002 in the High Court Registry and not with the Magistrate in Gizo. A fee of \$500.00 was also paid on the same day the appeal was filed. The General Treasury Receipt Number is 243567. Section 256(3), formerly section 231B (2), of the Lands and Titles Act was first considered by Daly, C. J. in **Seselono v. Kikiolo** [1982] S.I.L.R.15. In that case, the appellant had filed an appeal within time but were struck out because the grounds of appeal did not comply with subsection 3 of section 256. The appellant then filed a fresh appeal complying with subsection 3 but unfortunately was out of time. The second appeal was struck out as being out of time. At page 17 Daly, C. J. said, ..."**I have already read the terms of that subsection. There are two limitations in that subsection. First, that an appeal must be brought within three months from the date of the order or decision of the Customary Land Appeal Court. Second, that the appeal must be on the basis that the order or decision was erroneous in law or that there was a failure to comply with a procedural requirement of a written law. It will be noted that there is no provision in the Act giving this court discretion to extend the time limit so specified.**

To be a valid appeal then the appeal must comply with both these limitations. In other words to give this court jurisdiction an appeal must be commenced within the three months and this appeal must show that there is a matter raised which gives this court jurisdiction to hear the appeal. If there is no such matter raised within the three months then at the end of that period there is no valid appeal before the court. There is nothing that the court can properly consider as it is only the terms of section 231B (3) of the Act which give the court jurisdiction.

If there is nothing that is lawfully justiciable before the court at the end of the three months period then no act by any one thereafter can cure the matter as that act would constitute bringing an appeal outside the period of limitation”... In **Kaupoi v. Principal Magistrate (Malaita)** (1985/1986] S.I.L.R.95 Daly, C.J. considered the application of section 256(1), formerly section 231B(1), of the Lands and Titles Act in the case of an appeal from a decision of the Local Court to the Customary Land Appeal Court (Malaita). The fact was that the appellant had written a letter expressing her wish to appeal and enclosed therewith \$150.00 fee. Both the appeal and the appeal fee had been received within 3 months but due to an oversight the appeal time had lapsed before her letter was sighted and actioned. The appellant had also paid \$110.00 as security for costs but was returned on the ground that the appeal was out of time. Daly, C.J. cited His Lordship's earlier decision in **Seselono v. Kikiolo**] 1982] S.I.L.R.15. His Lordship held that the appeal was a valid one. However, the point raised here did not arise in the cases before His Lordship so it may be said that the cases I have cited cannot be precedents for this case. Whilst that may be so the substance of section 256(3) of the Lands and Tiles Act must not be forgotten. For an appeal to be valid under subsection 3, it must be filed within 3 months and the appeal fee paid. However, the point here is that the appeal must be filed in accordance with Order 60A of the High Court Rules. As I have said, there is no dispute that the appeal in this case had not been filed with the clerk at Gizo, contrary to Order 60A of the High Court Rules. Does this non-compliance invalidate the fact that the appeal was filed in the High Court within 3 months in satisfaction of section 256(3) above with the fee paid? Order 69 of the High Court Rules says that non-compliance with any of the High Court Rules or any rule of practice in force is not fatal to any proceedings unless the Court says so. However, such proceedings may be set aside in full or in part as irregular, or amended, or otherwise dealt with in such manner and upon such terms as the Court thinks fit. I do not think that non-compliance with Order 69 of the High Court Rules can kill an appeal that reaches the High Court by direct route together with the appeal fee. I do not however mean to suggest that Order 60A of the High Court Rules should be regarded as defunct. The procedure specified in Order 60A of the High Court Rules is in order because of the fact that Customary Land Appeal Courts do operate in the Provinces and their decisions are made there. It is therefore logical

that appeals arising from their decisions are filed with the clerk of the Court. The procedure is both convenient and practical for those who appear before those Courts. However, what I have said is that any departure from that procedure is not fatal to an appeal if that appeal is directly filed in the High Court and the appeal fee paid therein within 3 months as specified in section 256(3) above. Having said that, I do not wish to be taken as encouraging the flouting at will of Order 60A of the High Court Rules. Any one who does that will pay costs. In the result, the application by the Defendants is premature and must fail. The final position of the Plaintiffs is yet to be decided by the High Court at a later date. This application is dismissed. The Plaintiffs will pay the cost of this application. In order to regularize the position, I ORDER that the Registrar return the Notice of Appeal filed in the High Court to the Magistrate at Gizo for processing in the normal way. In the event that the Registrar has already done this, this order can be disregarded by the Registrar. As already laid down by **Patatoa v. Talauai** [1983] S.I.L.R.112 and **Kaupoi v. Principal Magistrate Malaita**) cited above, payment of security for costs on an appeal is not a relevant part of the Court fee so as to affect the validity of the appeal under section 256(3) cited above. The orders of this Court therefore are that-

1. This application is dismissed.
2. The Registrar return the Notice of Appeal to the Magistrate at Gizo for processing if not already done.
3. The Plaintiffs pay the cost of the application.

F. O. Kabui
Judge