SHAKESPERE QALOBOE AND OTHERS –V- JACKSON QALO

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

Civil Case No. 283 of 2002

Date of Hearing: 28th January 2003
Date of Judgment: 31st January 2003

Mr P. Tegavota for the Applicants
Mr G. Suri for the Respondent

JUDGMENT

Kabui, J. This is an application by Notice of Motion filed by the Applicants on 18th January 2003 seeking the following orders-

1. **That the applicants and or the respondents or any of them be allowed pay the costs involved in the sitting of the Customary Land Appeal Court (W) to hear and determine an appeal filed by the respondent against the determination of the Choiseul Provincial Executive concerning Kovarae land.**

2. **In the alternative, a third party to pay such costs of sitting of the (W) CLAC on behalf of the applicants and the respondent to determine such an appeal.**

3. **Such order as the Court sees fit**

The Background

One of the Applicants, Jimmy Pita, applied to the Commissioner of Forest Resources for a licence to fell trees on customary land in the Choiseul Province. The application was set out in Form 1 but was not dated. The Forestry Division received it on 12th April 2002. The timber rights hearing took place on 19th July 2002 at Choiseul Bay. At that hearing, the Choiseul Provincial Executive determined that the applicants were the persons entitled to grant timber rights over Kovorae (Polo) customary land. A Form 2 was issued to this effect dated 19th July 2002. The Respondent challenged this determination by lodging an appeal to the Customary Land Appeal Court, Western, on 8th August 2002. The appeal fee had been paid in the sum of $350.00. This appeal is yet to be heard. The delay is due to alleged lack of finance from the Government.

Lack of funds from the Government

There is no evidence to say that the Government is unable to provide money for the Customary Land Appeal Court, Western, to fulfill its duty under the law. The Applicant should have provided that evidence to prove the fact that the Government had no money to fulfill its obligation under the Constitution. Is that a material omission? I do not think so. This fact is well known in Solomon Islands and overseas as well. The Government is broke and cannot meet its obligations both locally and overseas. This fact is well known to the Courts for the Courts are

directly affected by this fact on a daily basis. The rule of law does run the risk of being reduced to nothing if the Government continues to ignore the need to provide money to keep the Courts of this country running. Both the Local Courts and the Customary Land Appeal Courts in this country are no longer functioning due to lack of funds from the Government. And yet they are the Courts that serve the rural people at the grass-root level. These are the Courts that represent the justice system in this country at the grass-root level. The Court premises are old and falling apart. The justices who sit on these Courts are not being paid sitting allowances. The Government is no longer being able to meet the cost of transport and accommodation. There are many cases waiting being heard in these Courts. Justice is being denied. Litigants are frustrated. The same is true with the Magistrate Courts in the Provinces. The Government is unable to meet the cost of travel and accommodation for Magistrates who should be touring and hearing cases in the Provinces. In the case of criminal trials, the Government cannot meet the cost of travel and accommodation for Police Prosecutors. The same applies to meeting the cost of travel and accommodation for Crown witnesses. The High Court is in the same position. The High Court judges cannot tour the Provinces for the same reasons. This state of affairs has been going on since the conflict on Guadalcanal or since that event. Requests for funding from the judiciary has fallen on deaf ears. The executive has continuously failed to respond to the needs of the judiciary. Law and order that the aid donors are talking about is not simply the enforcement of the criminal law by the Police. That is just part of the justice system in this country. The maintenance of law and order involves the role played by the Police in the detection of crime and arrests, including its prosecution section, the Director of Public Prosecution, the Courts and the Prison Service. All of these together serve as the indicia of maintenance of law and order in Solomon Islands. The politicians must get this right in their minds to get it right with the aid donors. Iam therefore prepared to take judicial notice of the fact that Government is unable to fund the sitting of the Customary Land Appeal Court in the Western Province. I had done this in previous cases of the same class in this jurisdiction.

Does the Court have jurisdiction to make the orders being sought?

(a) The Applicant's Case.

Counsel for the Applicant, Mr. Tegavota, based his application upon Order 69 of the High Court (Civil Procedure) Rules 1964 "the High Court Rules." Order 69 of the High Court Rules states that non-compliance with the High Court Rules or any rule of practice for the time being in force will not result in the proceeding being void unless the Court so directs. He must have realized that his application was a little unusual perhaps in terms of the rules of practice prescribed by the High Court Rules. Counsel also cited section 84(1) of the Constitution as being another ground upon which the Court can claim jurisdiction to hear this application. This section of the Constitution provides that the High Court does have the power to supervise the subordinate courts in Solomon Islands. Counsel further cited section 10(8) of the Constitution as being relevant to his application. This section of the Constitution protects the right of litigants to expect an independent and impartial tribunal to arbitrate and litigants being given a fair hearing within a reasonable time.

(b) The Respondent's Case

Counsel for the Respondent, Mr. Suri, opposed the application. He argued that the application was unprocedural and so the Court had no jurisdiction to make the orders being sought by the Applicants. He argued that the proper remedy was an order for mandamus. He further argued that the affidavit filed by Mr. Matai on 18th November 2002 should be rejected by

the Court because the deponent had no authority to make and swear that affidavit. Lastly, he said that previous cases of the same sort were decided by the Court on the basis that both parties had agreed to the order being made for the common interest of the parties. Whereas, he said, that was not the case here because the Respondent opposed the making of any such orders.

The right to be heard within a reasonable time

I think the concern of the Applicants is the ability of the Customary Land Appeal Court, Western, to hear and determine the appeal filed by the Respondent on 8th August 2002. That is a genuine concern because whilst the appeal is pending there can be no further progress in the intended felling of logs on the land. The evidence in support of this application is contained in Mr. Mata's affidavit. I do not see any reason why Mr. Mata should not have been allowed to make and swear the affidavit he filed on 18th November 2002. He describes himself as the co-ordinator for the logging project to be undertaken by the Applicants on behalf of Reko Enterprises Limited. There is no evidence to show that he is an incompetent witness. Counsel for the Respondent, Mr. Suri, argued that Mr. Mata's affidavit had not been indorsed showing on whose behalf it was filed. He said this was a non-compliance with the requirement of rule 10 of Order 40 of the High Court Rule. That affidavit, in my view, is really to show that Mr. Mata was ready to provide the funds to enable the Customary Land Appeal Court, Western, to hear the Applicant's appeal. It has no bearing on the land rights of any of the parties to the pending appeal. It lacks any element of controversy. Rule 10 of Order 40 cited above does give the Court discretion to allow the use of an affidavit with that defect uncorrected if the Court so directs. I therefore direct that Mr. Mata's affidavit be used for the purpose of this application despite the absence of an indorsement. Turning now to the pros and cons in this application. The right to be heard in a fair manner by an independent and impartial tribunal within a reasonable time is a fundamental right of every person protected by section 10(8) of the Constitution. Subsection 8 states-

"...Any court or other adjudicating authority prescribed by law for the determination of the existence or extent of any civil right or obligation shall be established or recognized by law and shall be independent and impartial; and where proceedings for such a determination are instituted by any person before such a court or other adjudicating authority, that person shall be given a fair hearing within a reasonable time..."

This subsection equally applies to civil trials as much as it applies to criminal trials. The Court clearly has jurisdiction to consider this application under this subsection. However, I would still think that the Court does still have inherent jurisdiction in the ordinary way in accordance with section 77 of the Constitution. (See **Olive Casey Jaundoo v. Attorney-General of Guyana** [1971] A. C. 972). This point of argument had not been raised in previous cases before me of the same nature and so I had not ruled on it accordingly. The fear that is obvious in the mind of the Applicants is that the Respondent's appeal may never be heard at all for the reason that the Government has no money. There is no information as to when the money is to be made available by the Government. The government's position is fairly clear on this point. There has been no money for the Courts since 3 years ago and the position may get worse with time. The Attorney- General is no longer being sued as a party to these class of proceedings because the story remains the same that there is no money for the Courts. The Attorney-General is well aware of this fact and like the local judges, his salary is always in arrears. There is nothing he can do but to confirm that money is lacking. I suppose, it will not be long before the litigants will be paying the local judges and magistrates to hear their cases quite like case in the mediaeval times in England. This practice is already being done in the case of the Local Courts and the Customary Land Appeal Courts. The parties have been meeting the cost of sitting

allowances, accommodation and transport for the justices to sit and hear the cases that come before them. There is therefore a case to say that the Applicants are being denied the opportunity to be heard within a reasonable time if he no one is allowed to provide funds for the Customary Land Appeal Court, Western, to sit to hear the Respondent's appeal, currently pending before it since July last year. The Applicants do not have to provide the funds personally so long as the funds are forthcoming from sources known to them. If the funds are coming from Reko Enterprises Limited in which he has an interest then so be it. The argument by Counsel, Mr. Suri, that the Court should not make the orders sought unless both parties agreed seems to run counter to the spirit of 10(8) of the Constitution. I think it is also in the interest of the Respondent that his appeal is heard quickly. If he changes his mind, he should withdraw his appeal. He should not stand in the way of efforts being made to ensure that a hearing of his appeal takes place. Iam a bit surprised that he is not interested in his own appeal being heard quickly. I do not think his referral of a land dispute over the same land to the Chiefs is a bar to his appeal being heard by the Customary Land Appeal Court, Western. As I have said, if he is not interested in the appeal, he must withdraw it. The Court would not stand in the way of the Applicants doing something to enhance the hearing of the Respondent's appeal within a reasonable time as demanded by section 10(8) of the Constitution. He cannot use his referral of a land dispute to the Chiefs to sabotage, as it were, the hearing of his own appeal. That would be an irresponsible approach to solve his problem in this case. I would not in principle reject this application. However, there is a slight problem. Whilst Mr. Mata has made an open offer to provide the funds, he has not specifically agreed to pay $10,000.00. I believe he has yet to be informed of the real cost of the Court hearing. Nothing as yet is certain about this. This can however be overcome through further discussion or consultation with Mr. Mata. I would say that I do not see any reason why the sitting of the Customary Land Appeal Court, Western, cannot be funded from outside the Consolidated Fund in the circumstance that Government has got no funds to do it. I would however say that the fund should be paid through the office of the High Court Registrar at Honiara like it was done in **John Sina and Others v. Allardyce Lumber Company Limited and John Mark Matupiko and Attorney- General**, Civil Case No. 327 of 1994 and **Sina and Others v. Sasapezoporo Dev. Co. Ltd and Others**, Civil Case No. 091 of 1997. This will be done at a later date when the fund is ready to be disbursed by the payer of the fund. For now, I will simply answer the wish of the Applicants as set out in the Notice of Motion. I simply say the application is granted. However, I think I should not make the order as asked for by the Applicants because there is no evidence that the Respondent is blocking the payment of the funds with physical threats or court action. I would simply rule that any of the parties to the appeal or a third party for that matter may provide funds through the office of the High Court Registrar to meet the cost of the sitting and hearing of the Respondent's appeal in the Customary Land Appeal Court, Western. I rule accordingly. I would order however that the Applicants may apply for further orders at the relevant time by Summons for directions before any funds are paid to the High Court Registrar. The parties will meet their own costs. I order accordingly.

F. O. Kabui
Puisne Judge