

IN THE KIRIBATI COURT OF APPEAL]
LAND JURISDICTION]
HELD AT BETIO]
REPUBLIC OF KIRIBATI]

Land Appeal No. 1 of 2011

BETWEEN BEEN WAYSANG APPELLANT

AND ERITAIA REITI RESPONDENT

Before: Paterson JA
 Williams JA
 Barker JA

Counsel: *Batitea Tekanito* for appellant
 Taoing Taoaba for respondents

Date of Hearing: 27 August 2011
Date of Judgment: 31 August 2011

JUDGMENT OF THE COURT

INTRODUCTION

1. In a judgment given on 30 July 2010, the High court, sitting in its land jurisdiction, dismissed an appeal from the refusal of the Single Magistrate to order the eviction from a piece of land of the respondent Mr Reiti.

2. The appeal was dismissed because the Court was not prepared to upset the Single Magistrate's finding of fact that the respondent

had bought the lease and because after 20 years the principle of certainty applies.

APPLICATION TO ADDUCE FURTHER EVIDENCE

3. In an application dated 19 August 2011, Mr Waysang sought leave to introduce an affidavit from the appellant's father on the grounds of fairness and equity, because the appellant had not been given an opportunity to be heard on the issues of acquiescence or promissory estoppels and ownership.

4. Rule 22(2) of the Court of Appeal Rules states:

The Court of Appeal shall have full discretionary power to receive further evidence upon questions of fact, either by oral examination in court, by affidavit, or by deposition taken before an examiner or commissioner:

Provided that in the case of an appeal from a judgment after trial or hearing of any cause or matter upon the merits, no such further evidence (other than evidence as to matters which have occurred after the date of the trial or hearing) shall be admitted except on special grounds.

5. The appellant is required to show "special grounds" before this Court can allow the application. There are two reasons for this Court's view that the application should not be allowed.

6. First, the application before the Single Magistrate was heard in May 2009 and the decision given on 12 June 2009. Both the appellant, who was present at the hearing, and his father were well

aware of the issues two years before the application to adduce further evidence was made to this Court.

7. The High Court heard the appeal on 30 July 2010 and the appellant was represented by counsel. A ground for this appeal was that the Single Magistrate relied on Mr Reiti's evidence to determine that he had bought the lease from the appellant's father without calling evidence from the father to explain his side of the story. The appellant knew that his father's evidence was relevant but took no steps to seek leave to have his evidence given at the High Court hearing. An application should have been made at that time. It is far too late to be applying now.
8. Secondly, this Court's jurisdiction is confined to errors of law made in the High Court. The evidence sought to be adduced does not suggest that the High Court erred in law in determining the issue.
9. The application to adduce further evidence is declined.

BACKGROUND

10. In the application before the Single Magistrate, Mr Waysang sought an eviction order as he wanted to move back to his leased land. The lease he was relying upon was according to his evidence entered into when he was very young. His father made the application.
11. Mr Reiti's evidence was that he had taken over the lease from the appellant and had paid \$384,194 for the buildings on the land. He had also paid interest.

12. The evidence showed that the appellant had been granted a lease of the land in May 2008 backdated to January 1997. It does appear as though the appellant or his father were lessees before January 1997, but for some reason a formal lease was not entered into by the Republic until 2008.
13. The Single Magistrate found that the appellant's father had developed a business on the leased land before 1997. The respondent was given the responsibility to run the business.
14. There was also a finding that the respondent entered into an agreement with the appellant's father to buy the buildings and the leasehold interest. Under this agreement the amount paid was \$412,751 (this amount presumably included interest).
15. The Single Magistrate's final finding was that the respondent could not be evicted because the appellant was bound by the arrangement his father had made with the respondent and the respondent now owns the leasehold interest and buildings.
16. Before the High Court counsel for the appellant relied upon clause 9 of the lease to the appellant, which was a normal restriction on assigning the lease without the written consent of the lessor.
17. Counsel for the appellant submitted that as a result of the respondent's evidence, the Single Magistrate should have subpoenaed the appellant's father. The High Court correctly pointed out that it was for a party, and not the Court, to subpoena a witness.

18. The High Court gave judgment in the terms set out in paragraph 2 above.

GROUNDS OF APPEAL

19. The Notice of Appeal alleges three errors of law and fact. This Court does not have jurisdiction in respect of errors of fact.
20. The three grounds, after deleting the references to errors of facts, are:
 - (a) *Erred in law to allow the respondent to occupy the lease when Section 10 of the State Lands Act is a complete bar to any equitable estoppels.*
 - (b) *The High Court erred in law in allowing the respondent the right to occupy when he was only a licensee.*
 - (c) *Erred in law in holding that respondent should continue to occupy the lease when the respondent's entry was done outside the knowledge of the appellant the owner of the lease.*
21. Counsel's submissions concentrated on two issues. One need not be discussed further as it repeats the allegation that the High Court should have called the appellant's father to give evidence. That obligation rests with the appellant which must live with his decision not to seek leave to call him.
22. The substantive issue is whether section 10 of the *State Lands Act 2001* applies. The relevant part reads:
 - (1) *Subject to subsection (3) no person shall cause any land governed by this Act to be alienated or charged in any manner, nor shall any occupation of such land, other than by the family be allowed, except –*

- (a) *By transfer back to the State; or*
- (b) *By Ministerial permit under section 13.*

(2) *A purported transaction in contravention of subsection (1) shall be of no force or effect, and any occupation under such transaction shall be deemed to be a trespass.*

23. The appellant says the *State Land Act 2001* applies. The respondent says it does not.

SECTION 10 STATE LAND ACT 2001

24. The existing lease was entered into after the Act came into force. It states in clause 1 that it is subject to the "State Land Act 2011". On the face of it the Act applies.
25. If it were not for clause 1 of the lease, the position would have been far from clear. The Explanatory Memorandum of the Act states that "No one's present land holding is affected by the Act". There are provisions in the Act which suggest that it applies to residential land and that land does not become subject to the Act until the Minister has declared the particular land to be subject to the Act and a strategic plan has been issued. On the other hand the Explanatory Memorandum states that the Act's use will be mostly in the Line and Phoenix Groups, where this land is situated.
26. It is unfortunate that this issue was not raised in the High Court. ~~There are factual issues to be resolved as to whether this land is~~ subject to the Act, notwithstanding the provision in the lease. The case will be remitted to the High Court to rule on this issue.

27. If the High Court determines this land is subject to the Act it is also to determine whether consent has been give under section 10 of the Act. This is another disputed point raised on appeal which cannot be resolved on the evidence which was before the High Court, and was not argued in that Court.
28. If consent has not been given the respondent should be given the opportunity to apply for such consent. As he has paid over \$400,000 it would seem he has reasonable grounds to obtain such consent. If he needs, and does not get consent, there will be issues of the appellants or his father's obligation to repay money to the respondent.

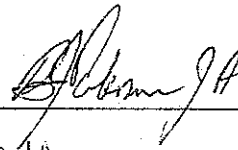
DECISION

29. As there are two issues which cannot be determined by this Court the matter will b remitted to the High Court to consider the appeal from the Single Magistrate de novo.

COSTS

30. Because the need to remit the matter back to the High Court arises because of the manner in which the appellant conducted his case in the High Court and then in this Court, the appellant will pay the respondent's costs in this Court, to be agreed or fixed by the Registrar.
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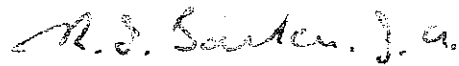
31. While it is a matter for the High Court, the preliminary view of this Court is that the respondent will be entitled to costs in the further hearing in the High Court, regardless of the result.



Paterson JA



Williams JA



Barker JA