MANNSAH BUARIFI -v- J. FOMANI

High Court of Solomon Islands
(Palmer J.)
Civil Case No. 198 of 1992
Hearing: 15 October 1993
Judgment: 21 January 1994

J. Remobatu for Appellant
M. Samuel for the Respondent

PALMER J: This is an application by way of an originating summons for a number of declarations.

The history of this application go as far back as 1965. In that year, a land dispute concerning ownership of Ore Ore Land was brought before the West Kwarae Native Court. The Court heard the case on or about the 20th of October 1965. In its decision, the court gave to the Respondent, part of Ore Ore land, starting from Ore Ore going down to Fauabu. The other part of Ore Ore land, called Anoidau and Anokarefo and coming down for Baneo River, was given to the Applicant.

The Applicant was not happy with the decision of the Native Court and so appealed to the High Court of the Western Pacific, in case No. 1 of 1967. The appeal was dismissed by the High Court. A copy of that oral judgement of the court is marked 'annexure B' and is attached to the affidavit of Mannasah Buarafi, dated the 2nd of April 1992. The gist, of the appeal of the Applicant to the High Court, as gleaned from the judgement of the Court, was the question, of possession of the shrine at Ore Ore Land, and also called Ore Ore. In its judgement, the High Court re-affirmed the decision of the Native Court, as to the boundary between the two parties, but added that the right to occupy and use the shrine, Ore Ore, vested in the Respondent.

Some three years later, the Respondent went to see the Chief Justice in Chambers, and stated to him that there was a mistake in the description of the boundary, by the Native Court. The mistake alleged was, that the boundary ran from Ore Ore down to BIFONU, and not to Fauabu, as described in the Native Court decision. By a memorandum dated the 6th of April 1970, (a copy of this is marked annexure c and attached also to the affidavit of Mannasah Buarafi dated the 2nd of April 1992)., the Chief Justice, wrote to

the District Commissioner at Malaita, to make enquiries with the 3 court members, who sat to hear the land dispute case in 1965. The three court members were identified as Dausabea, Lagatani, and Eleson.

By memo dated 22nd April 1970, the District Commissioner responded that the three court justices had been interviewed and confirmed that there had indeed been an error.

As a result of that investigation, the High Court re-convened at Auki on the 2nd of June 1970, for the purpose of correcting the purported mistake as contained in the Native Court decision dated the 20th of October 1965. At that hearing it is not disputed that both parties were present.

Mr Remobatu submits that the power relied on by the High Court to amend its own decree from an earlier final judgment, was Order 30 Rule 11. He submits however, that the Court had no power under this Rule because the error committed was or cannot be classed as a clerical error. Order 30 Rule 11 reads:

> *"Clerical mistakes in judgements or Orders, or errors arising therein from any accidental slip or omission, may at any time be corrected by the Court on motion or summons without an appeal."*

Mrs Samuels submits on the other hand that there was a clerical error.

I accept that the clerical error alleged was originally from the Native Court's decision of the 20th October 1965. From the facts as already described we know that the alleged error was brought to the attention of the learned Chief Justice some 3 years after the oral judgment of the High Court dated 16th June 1967, and some 5 years after, the decision of the Native Court, dated the 20th of October 1965.

The record of proceedings and correspondences as contained in Civil Appeal File No. 1/1967, which I take judicial notice of, show that the Honourable Chief Justice, Mr Justice Bodily, initiated the enquiry into the alleged error, after he had been seen in Chambers by the Respondent. In a memorandum to the District Commissioner, dated 6th April 1970, the Honourable Chief Justice stated:

> *"Fomani has now called upon me in chambers to say that the line described by the court clerk as running from Ore Ore shrine to Fauabu is all a mistake and that what the court really decided was a line running from Ore Ore shrine to Bifonu and that in the course of last month the Native Court has actually marked on the ground a spear line running from Ore Ore to Bifonu and not from Ore Ore to Fauabu as described by the court's decision and upheld by*

me on appeal. The members of the Native Court who heard the original case were:

Dausabea
Lagatani
Eleson

If it is true that when the court clerk referred in the record of the court's decision to Fauabu he made a mistake and that the court intended Bifonu then I suppose we shall have to start all over again, but I am very doubtful if there was any mistake because at the time of the appeal the matter was not raised by either side though that might have been because the appeal concerned the whole of the land and was not concerned with the position of any line dividing it.

I wonder if you could enquire of the three court members as to whether a mistake has been made in the recording or translating of their decision and let me know."

The first question to be asked is, under what authority did the Honourable Chief Justice seek to make the enquiry and subsequent rectification of the error?

In the High Court Civil Appeal File No. 1/1967, of which I had referred to, there are correspondences together with the record of proceedings of the High Court, which should assist to show under what power or authority the court sought to rely on to rectify the error.

In response to the Honourable Chief Justice's memo, the District Commissioner replied by memo dated 22nd April 1970 as follows:

"*Thank you for your memorandum 1/1967 of 6th April.*

The landowners involved in the dispute have recently been to tell that they are dissatisfied with the boundary decided by the Native Court.

I interviewed Dausabea, Lagetani and Eleson on Wednesday 22nd April and it seems that a mistake indeed has been made in the recording of their decision.

They informed me that the spearline starts approximately half a mile West of Ore Ore shrine at a pool called Namorade in the Banio River. From here it follows a stream called Otesae through a place called Ininela; across the main Dala/Fauabu road through Asilau and down to the sea.

Fomani owns the land on the Northern side of this line and Baurafi owns the Southern side.

I did not interview S.M. Jeriel who recorded the Court's decision as he is no longer employed by the Council."

A copy of this memo is annexed to the affidavit of Mannasah Buarafi dated 2nd April 1992 and marked 'annexure D'.

Subsequent to this, his Lordship wrote another memo dated 24th April 1970. This has not been deposed to in any affidavit, however, I take judicial notice of it from the file contents of file No. 1/1967. His Lordship stated:

"I suppose someone ought to raise an application for rectification and prove the error, but that will be asking too much. I think in the circumstances the most practical thing to do is for the three justices to swear a joint affidavit to the effect that the decision of the court regarding the position of the spear line as determined by them at the trial was wrongly recorded in error and specifying the position of the spearline which they in fact decided. Upon receipt of that I shall summon the two parties before me at the next convenient sessions in Auki and call upon them to show cause why the error should not be corrected. I dare say it will all end up in a bit of a dog fight before the court with imprecations concerning the honesty and parentage of the unfortunate court clerk, Mr. Jerid. In this connection I think that it would be useful if you also summoned Mr Jerid before you and obtained from him an affidavit to the effect that the error was a bona fide clerical error committed without mala fides in the course of his duty.

If you can think of any better way of sorting this out please let me know, but if not I should be grateful if you would proceed on the above lines. There are no rules other than the observance of natural justice governing this kind of contingency in appeals from Native Courts exercising land jurisdiction."

From the above comments of the learned Chief Justice, it is clear in my view, that his lordship was dealing with the issue of rectification, in the appellate jurisdiction of the High Court, from an appeal from the Native Court exercising land jurisdiction. This view is supported by the fact that in the Amended Decree of the Court dated the 8th of June 1970, it is worded "Amended Decree on Appeal" and immediately below that in brackets the following words are written "Section 138 of the Land And Titles Ordinance."

Section 138 of the now repealed Land and Title Ordinance is the equivalent to the current section 231 of the Land And Titles Act. It deals with the jurisdiction of the Native Courts. The relevant provisions of section 138 read:

> *"138(1) A native court shall, subject to the provisions of this section have exclusive jurisdiction in all matters and proceedings of a civil nature affecting or arising in connection with native customary land other than-*
>
> *(a) any such matter or proceeding for the determination of which some other provision is expressly made by this Ordinance;*
> *(b) any matter or proceeding involving a determination whether any land is or is not native customary land.*
>
> *(2) A native court shall have jurisdiction to hear and determine any matter or proceeding of a civil nature referred to it by the court.*
>
> *(3) Any matter or proceeding over which a native court would, apart from this subsection, have exclusive jurisdiction may, with the consent of the District Commissioner given upon application to him by a party to the matter or proceeding, be heard and determined by the Court.*
>
> *(4) The decision of a native court given in the exercise of its jurisdiction under this section shall be final, conclusive, and not subject to any appeal, save that-*
>
> *(a) if the jurisdiction was exercised pursuant to subsection (2), the decision shall be subject to such appeal (if any) as the Court may, upon application made to it in that behalf, permit or as may be specified in the order of referred.*
> *(b) if the jurisdiction was exercised pursuant to subsection (I), any party to the matter or proceeding who is aggrieved by the decision may, with the consent of the District Commissioner given upon application to him by such party, appeal to the Court."*

The submission therefore of Mr Remobatu that the Court had no jurisdiction under Order 30 Rule 11 of the High Court Civil Procedure to deal with the rectification does not apply in this particular instance. I think it cannot be denied, that the error as submitted by Mr Remobatu, was an error committed in the Native Court below, and not the High Court. The way that the High Court then exercised jurisdiction to enquire into the error and rectify it however, was by way of its appellate jurisdiction, as specifically provided for under section 138 of the Land and Titles Ordinance. Under subsection 138(2) it specifically provided that "A native court shall have jurisdiction to hear and determine any matter or proceeding of a civil nature referred to it by the

Court." It seems that this provision possibly was relied on by the learned Chief Justice when he instituted the enquiry, and directed that affidavits be obtained from the clerk and the justices, about the clerical mistake.

One of the submissions of Mr Remobatu was that, the affidavits as sworn, was not sufficient to move the court to amend its own decision. I will come to the question of the amendment of the Courts judgement at a later stage, but for now, I will deal with the question of the approach taken by the court in obtaining the affidavits. It must be remembered that the court was dealing with a purported clerical mistake from the court below. The approach it took therefore, as stated by the learned Chief Justice, but which I also accept, was a practical approach. The alternative, was to ask the Native Court to re-convene and for the Native Court to then correct the clerical error and re-submit its corrected decision to the High Court. The distinctive point about a clerical error is that, it is a matter solely for the court justices and the clerk to correct. No new decision or judgment was being given. The judgment or decision was merely being corrected so that it reflected the correct and true judgment or decision which the court intended to give anyway on the 20th of October 1965.

The approach therefore taken by the High Court to enquire into, and to obtain statutory declarations, in my view was not so serious an irregularity, as to render the subsequent judgement a mullity.

In ***Halsbury's Laws of England, 3rd Edition, Vol.22 para. 1665,*** the learned author stated:

"*..... when there has been some procedural irregularity in the proceeding leading up to a judgment or order, which is so serious that the judgment or order in question ought to be treated as a nullity, then the court will also set it aside. There is no decisive test for ascertaining which irregularities render a judgment void, as opposed to those which render it voidable, but one test which may be applied is whether the irregularity has caused a failure of natural justice.*"

One of the tests propounded by the learned author as to whether such irregularity can be regarded as so serious, is whether the requirements of natural justice had been complied with. The learned Chief Justice recognised this test clearly, as can be seen in his memo of the 24th of April 1970 to the District Commissioner. I reiterate what he said:

"*There are no rules other than the observance of natural justice governing this kind of contingency in appeals from Native Courts exercising land jurisdiction.*"

This brings me to consider whether the principles of natural justice were observed.

Pursuant to the direction of the learned Chief Justice to obtain affidavits from the Native Court justices and the Court Clerk, the District Commissioner managed to obtain statutory declarations from them on the 1st of May 1970. The originals of these are contained in the Civil Appeal File No. 1/1967. These are taken judicial notice of by me. In his declaration, the court clerk stated:

".... that I made a mistake when I recorded the decision concerning the boundary of the Ore Ore Land. Instead of recording exactly where the spearline should be I put down an approximate boundary. I have no interest in the land, nor am I related to any of the landowners. I did not mean to defraud anyone. It was simply a clerical error in the recording of the decision."

The three court justices made a combined declaration which read:

"....that the decision of the Court regarding the position of the spear line as determined by us at the trial of the Ore Ore land was wrongly recorded in error and we now specify the position of the boundary which we decided in Court.

The spearline starts approximately half a Mile West of Ore Ore shrine at a pool called Nemorade in the Banio River. From here it follows a stream called Otesao through a place called Ininela across the main Dala / Fauaubu road and on the South side of Asilau and down to the sea."

On the 2nd of June 1970, the High Court convened at Auki to deal with the question of rectification. The court records of the proceedings read:

> *"Court explains as follows: It has come to light that there was an error made in the record of the native court case No.5 / 65 at Aimela Native Court on the 20 / 10 / 65 in recording the spear line by which the court divided the Ore Ore land. The Clerk made an error and recorded a wrong point in the line. The High Court heard the appeal and as the line was not in dispute upheld the Native Court judgment as recorded and entered in its judgment the erroneous spearline. The matter now is to rectify that line. Affidavits from each of the three justice have been obtained to the correct line and an affidavit from the clerk that he made an error in the bona fide course of his duty.*
>
> *<u>Buarafi:</u> called on for anything he may have to say.*
>
> *I do not know of a stream called Otesao. I say there is no stream from Inuela to Asilau. I do not believe we will find any stream there at all. I would like the Court to go with us to the land and show us the spear line.*

Fomani: *I would like that too and then we will know.*

Order: *Decree to be rectified accordingly with corrected spearline and N.C. to be directed to go to the land and show on the ground both parties exactly where the line runs. Each party to mark the line as shown to them."*

The first point to note about the actions of the court, in reconvening on the 2nd of June 1970, was in giving both parties an opportunity to comment or make objections, about what the court was doing, before the rectification was formally adopted by the court and an amendment subsequently made to its previous decree. This is consistent with the requirements of natural justice.

Secondly, this raises the question asked earlier, about the power of the court to amend its own orders or judgment.

I can accept and understand that once it was accepted by the Court that a clerical error had been committed by the Native Court in its decision of the 20th October 1965 and that, that error materially affected the decree earlier made by the court on the 8th of June 1970, the court was placed in a dilemma. It could either amend its former decree to conform with the decision of the Native Court, or leave the order alone and perpetrate injustice indefinitely.

Earlier on I pointed out that the Court has powers of amendment of clerical mistakes in judgments or orders, or errors arising from any accidental slip or omission as submitted by Mr Remobatu pursuant to Order 30, Rule 11.

In the book ***'The Annual Practice' 1964, Vol.1, at page 951,*** the learned author stated:

> *"So long as an order has not been perfected, a Judge on the application of a party or on his own initiative has a power of reviewing a matter. The Court has jurisdiction to alter the record of its order, so as to make it conformable with the order actually pronounced."*

A possible argument in favour of the exercise of the courts powers under Order 30 Rule 11 is that, the decree of the court on the 16th of June 1967 had not been perfected, in view of the clerical error committed in the Native Court's decision of 1965. The Court's record of the order accordingly, needed to be varied so that it could conform with the order actually intended to be pronounced. The court did not make the mistake of its own volition. The clerical mistake originated from the Native Court. Plain common sense would say that if the clerical error is corrected in the Native Court, then it should

also be corrected in the High Court to conform with the true and correct order as intended.

On the above basis, I can accept that the court had power under Order 30 Rule 11 to correct the record of its decree made on the 16th of June 1967 to reflect the true and correct order as intended to be pronounced.

Apart from Order 30 Rule 11, there is also an inherent power in the court "...to vary its own orders so as to carry out its own meaning and to make its meaning plain." *(The Annual Practice 1964 Vol.1,* which contained Rules of the Supreme Court, at page 462).

In the same book at page 463, quoting Lord Watson, in the case of ***Hatten -v- Harris, [1892] A.C. 560,*** with reference to the inherent power of the Court the learned law lord stated:

> *"where an error of that kind has been committed it is always within the competency of the court, if nothing has intervened which would render it inexpedient or inequitable to do so, to correct the record in order to bring it into harmony with the order which the Judge obviously meant to pronounce."*

And further down the same page, the learned author stated:

> *"The error or omission must be an error in expressing the manifest intention of the court, the court cannot correct a mistake of its own in law or otherwise, even though apparent on the face of the order."*

One thing is clear to me, that the court in its judgement, delivered on the 16th of June 1967, had no intention, to amend or to substitute its own judgement as opposed to the decision of the Native Court in 1965, as to the boundary dividing Ore Ore land between the parties. The appeal, heard by the court on or about the 16th of June 1967, was more about the possession of the pagan shrine at Ore Ore. It was not about the boundary dividing the land between the parties.

The relevant part of the oral judgment of the court read as follows:

> *"For the above reasons, therefore, and having studied the record of proceedings in the court below very carefully and having heard both parties to the appeal, I dismiss the appeal (sic) demarcates the boundary dividing the land belonging to the two parties by a line running from the shrine known as Ore Ore to Fauabu on the coast, that portion lying to the north of such line being the land of the respondent and that portion lying to the south of that line being the land of the*

appellant. I also make a declaration that the right to occupy and use the shrine Ore Ore itself vests in the respondent."

So, when the High Court gave its judgment with reference to the boundary dividing the land between the parties, it is clear, that it was in its mind, simply reiterating what it believed was the decision of the Native Court. In a further appeal to the High Court, by the same applicant in this case, heard on or about the 28th of April 1971, the court records read, (again this is taken judicial notice of):

"Parties informed that the boundary line marked in 1965 by the Aemela Court is final."

In other words, as far as the High Court was concerned, there was only one final and conclusive decision as to the boundary. This was the decision of the West Kwarae Native Court delivered on the 20th of October 1965. That decision has not been varied in any way. The only correction was inrespect of the clerical mistake made in the recording or translation of that decision.

That correction was simple, but crucial, as it then made clear what the boundary was then, as decided in 1965, for the court records.

The inherent power of the High Court therefore was invoked for the purposes of bringing into line or harmony, the order of the Court as it was obviously intended to be pronounced by the Chief Justice. The intention of the learned Chief Justice was not to re-state or re-define the boundary as decided by the Native Court. It was to make plain what was intended by the Chief Justice to pronounce. And in doing so, an amendment was necessary to be made of the decree dated the 16th of June 1967.

A further point in favour of the dismissal of this application is that the 'Amended Decree on Appeal' of the 8th of June 1970 was made by consent. Both parties were present and after giving them an opportunity to comment, they agreed to the amendment. This was expressly stated in the Decree of the Court. I note that the Applicant in this case has argued that he did not consent. With respect, the reference to it by the High Court in that decree, is conclusive evidence as to that matter. The relevant portion of the decree stated *"...and having heard both Fomani and Buarafi and they consenting...."*

A final point to note is that the Applicant was given a further opportunity to appeal to the High Court under its appellate jurisdiction, pursuant to the provisions of the Western Pacific (Courts) Order in Council, 1961. The appeal hearing was convened at Auki on the 29th of April 1971. Again, both parties were present in person. The record

of the court proceedings, of which I take judicial notice of, are contained also in the file No. 1/1967. The court records read:

> *"Court outlines to parties position.*
>
> *Parties informed that the boundary line marked in 1965 by the Aemela Court is final. It was shown again at the order of this court to the parties by the Native Court accompanied by the ex President Mr Dausabea on 23.7.70 and that whether the parties agree or not that line is final. Court warned parties that if they refuse to obey the Decree of this court as to that line they will be dealt with by way of contempt of court.*
>
> *Both parties say they understand."*

In terms of the requirements of natural justice, I do not think it could ever be successfully argued that the parties were not given a fair hearing to make any points or raise any objection.

I am satisfied that for the reasons stated, this application must be dismissed with costs.

(A.R. Palmer)
JUDGE