

BADDLEY FAKANI BOSINI & HENRY OLOGA (As representatives of their families of Nonore Tribe) ~V~ JACK WANE AND OTHERS (As representatives of their families of Nonore Tribe)

High Court of Solomon Islands
(Muria, CJ)

Civil Case No. 162 of 2002

Date of Hearing: 19th August 2002

Date of Judgment: 19th August 2002

Mr D. Hou for the Plaintiffs

Mr S. Oru spokesman for the Defendants

(MURIA, CJ): The plaintiffs in this application seek two declaratory orders, namely:-

1. A Declaration that pursuant to the Civil Land Case No. 3/82 (Malaita Local Court) the Plaintiffs and the Defendants have equal rights in having a say in any business activities carried out on Asinawane Land.
2. Consequential to that grant of the said Declaration that the plaintiffs and the Defendants be entitled to receive their respective shares by consensus from any monies derived from the use of the land for any business activities.

The third order sought is for the defendants to pay the costs of and incidental to this application. The plaintiffs' application is centred on the decision of the Malaita Local Court in Land Case No. 3/82 made on 16th July 1982. I shall return to that decision later in this judgment.

Brief Background

The brief background to this case is that the parties in the present application represent the same parties in the Land Case No. 3/82. Mr Hou of Counsel for the plaintiffs confirmed this position of the parties. The Land Case No. 3/82, involved a dispute over a piece of land called Asinawane Land and concerned with the rights of the parties in that land. Having dealt with the evidence presented to it, the Local Court decided that Peter Tege had the primary right while Paul and Bosini had the secondary right over Asinawane Land. In addition the Local Court ordered that both Peter and Paul and Bosini were to enjoy using the land or cultivating it. The Court said that "*if anyone wants to make business or buy an area in Asinawane after this case both must agreed (sic) together before that particular person do the business.*" The Local Court further went on to state that "*any new project must be done by seeking the permission from Peter and Paul Fuita.*" The Orders now sought by the plaintiffs in the present application hinge on the proper interpretation of what the Local Court had stated in the context of the whole judgment of that Court.

Issues

There is basically one issue to be determined by the court in this application. That issue is whether or not in terms of the decision of the Local Court the parties must agree on any business activities to be undertaken on the land. This is the issue which is central to the plaintiffs' case. I feel however there is an additional issue that also has a bearing on the orders which this Court may make in

this application. That issue concerns the status of the parties as to their rights in the land in question. This is an important consideration also since the Local Court clearly recognized in its decision that Peter Tege has primary ownership right while Paul and Bosini have secondary rights over the land. This distinction is important not only in law but also in custom.

Law

The provision of the law relied upon by the plaintiffs is O.58, r.2 of the *High Court (Civil Procedure) Rules 1964*. That rule provides:

Any person claiming any legal or equitable right in a case where the determination of the question whether he is entitled to the right depends upon a question of construction of any provision of a written law, may apply by originating summons for the determination of such question of construction, and for a declaration as to the right claimed.

The discretionary power of the court in such a case is preserved in rule 5 where it provides that the Court shall not be bound to determine a question of construction asked of it if it feels that such a question ought not to be determined on originating summons. The Court's power under that provision is clear. While it can determine the legal or equitable right of a claimant upon a construction of a provision of a written law, it remains within the discretion of the Court to grant or refuse to make declaration sought.

Arguments

Mr Hou contended on behalf of the plaintiffs that while conceding that the plaintiffs were adjudged to have secondary right over the land in question they have equal rights to use the land. Therefore, argued Counsel, any business undertaking on the land must have the agreement of both the families of the plaintiffs and defendants. That, Mr Hou urged, is the construction to be given to the decision of the Local Court. Consequently, as the defendants had allegedly allowed one Steward Macoro to operate a store business on the land in 1997 and one other Peter Aufiu to operate petrol sale business in April 2002 without the agreement of the plaintiffs, they were acting outside the decision of the Local Court.

On the other hand, Mr Oru who spoke on behalf of the defendants contended that the plaintiffs do not have equal right of ownership over the land since the Local Court clearly accorded them only secondary right. As such it is said that the most that the defendants, who are primary owners, can do is to communicate to them what they were doing on the land. In other words, the most that can be done is to inform the plaintiffs but not to seek their agreement if the defendants were to do business on the land.

Mr Oru further argued, and perhaps it is his stronger ground, that there is no evidence before the Court to substantiate the allegations that the defendants allowed others to do business on the land without the agreement of the plaintiffs. The affidavit materials filed by the plaintiffs were mere allegations.

Decision

A declaratory order is always a matter of discretion and the Court may grant or refuse to grant it. This the Court will do so, taking into account the legal principles applicable and the circumstances of the case as a whole. In particular in this case I take into account the decision of the Local Court

which clearly recognized the land rights of the parties in the case before it and who are now before this Court.

In the Local Court Peter Tege had been adjudged to be the primary owner while Paul and Bosini had been granted secondary right. While in custom the party with a "primary right" (for want of a better description) has the first say in land matters, "secondary right holders" (again for want of a better term) have often been granted equal right to the use of the land. The right to own and the right to use land are two distinct rights even in customary land. In the present case, the plaintiffs were not simply allowed to use the land but were granted the secondary right through adoption into the tribe. As such the Local Court, in recognition of this fact, ordered that any business in or land dealings over Asinawane Land must have the 'general agreement' of both parties, to use Mr Hou's expression. This is reiterated by the fact that the Local Court also decided that any new project on the land must receive the permission of Peter Tege and Paul Fiuta.

The Local Court's decision is clear and it is not for this Court to disturb that decision simply because one party allegedly does not follow it. The Local Court knows the parties and the custom of the area, and it had decided that the primary right of ownership vested in Peter Tege with the use right to be equally enjoyed also by the Paul Fiuta and Bosini. In such circumstances, peaceful and harmonious co-existence demands that the parties consult each other on matters affecting the land. However where a person outside of the parties here wishes to go into the land to do business or purchase a piece of the land in question or undertake new project on the land then it is only prudent that in such a case the agreement or the endorsement of both parties be sought before 'that particular person' carries out the business or development on the land. What if the parties do not agree, that is a different matter. When that happens, either of the parties may wish to seek further clarification from the Court. But that is not the question before this Court at the present.

The plaintiffs' ask for declaration because of the alleged permission granted by the defendants to two people to do business on the land. The allegation in this case is not simply that the defendants had allowed the two named persons to do business on the land but that they had done so in breach of the order of the Local Court. In such a case the supporting evidence expected from the party making the allegation required substance and not simply an allegation in the affidavit. We do not know, at least the Court does not have the benefit of knowing whether the defendants actually granted such permission or not to Steward Maeoro and Peter Aufiu. From the materials before the Court, there is only the allegation. I feel in the circumstances, it would not be proper to grant the order sought in the absence of some evidence to show that the defendants have not conformed to the Local Court's decision. Simply an allegation contained in an affidavit would not suffice and O.58, r.4, of the *High Court (Civil Procedure) Rules* empowers the court to require appropriate evidence in cases such as the present one.

Thus while reiterating the judgment of the Local Court, I feel in the exercise of Court's discretion, the Court must refuse the declaration sought.

Each party to bear its own costs.

(Sir John Muria)
CHIEF JUSTICE