BURNLEY KIMITORA, DENNIS LOKETE AND ALI PITU OFA (representing the Nonoulu tribe of Marovo), **–V- THE MAROVO COUNCIL OF CHIEFS AND STEPHEN RIGEO, SIMEON ARI, MISAKE NAGOTO, SOLOMON KULU AND ELIHU LIPU** (representing the Konggukolo tribe)

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

Civil Case No. 220 of 2002

Date of Hearig: 13th November 2002
Date of Ruling: 20th November 2002

Mr J. Apaniai for the Plaintiffs
Mr P. Tegavota for the1st Defendants
Mr J. Sullivan for the 2nd Defendants

RULING

Kabui, J. By Notice of Motion filed on 2nd October 2002, the Plaintiffs seek the following orders-

1. **An order of Certiorari to bring up and quash the decision of the Marovo Council of Chiefs made at Seghe, Marovo, Western Province, on the 23rd September 2002, in a customary land dispute between the Plaintiffs and the Second Defendants whereby it was held that the land between the Kolo river and Jakili river is part and parcel of Konggukolo land known as Luga land and is owned by the Konggukolo tribe of which the Second Defendants are members.**

2. **If Order 1 is granted, that the said customary land dispute be referred back to differently constituted Marovo Council of Chiefs to be heard de novo.**

3. **Such further or other orders as the Court deems fit.**

4. **That the First and Second Defendants pay the costs of this application.**

At the hearing of the Motion, Counsel for the 2nd Defendant, Mr. Sullivan, raised two preliminary issues. The first issue is the standing of Messrs. Kimitora and Ali Pitu Ofa appearing as Plaintiffs in this case besides Mr. Lokete who is the proper party as the

Plaintiff. The second issue is the application of Order 61, rule 3 of the High Court (Civil Procedure) Rules 1964 **"the High Court Rules"**. Counsel for each of the parties took turn to argue these issues before me. On the first issue, Counsel for the Plaintiffs argued that Messrs Kimitora and Ali Pitu Ofa were members of the Nonoulu tribe and so they had equal right to represent the tribe just as much as Mr. Lokete had the same right to do the same. On the second issue, he argued that denial of natural justice by the Marovo Council of Chiefs was the issue to be decided and not the fact that the determination of the Council of Chiefs was pending before the Local Court. Counsel for the 2nd Defendant did not, on the first issue, dispute the correctness of the argument that Messrs Kimitora and Ali Pitu Ofa were members of the Nonoulu tribe and could also represent the tribe. The point, argued Counsel, was that Messrs Kimitora and Ali Pitu Ofa were witnesses for the Plaintiffs to be cross-examined on the contents of affidavits filed in this case. As such, argued Counsel, they should not sit in Court as Plaintiffs and hear other evidence and then give evidence themselves when they were called upon to do so. Such a scenario, argued Counsel, would be highly unfair to the 2nd Defendants. Counsel for the 1st Defendants also took up the same position and supported the 2nd Defendants. At the hearing, Counsel for the Plaintiffs indicated that he had 4 witnesses to call, two of who are Messrs Kimitora and Ali Pitu Ofa. Clearly, these witnesses should not be in Court before they are called. This is the practice both in criminal and civil trials. The pleadings in a criminal trial and in a civil trial are allegations to be proved by evidence of independent witnesses. The Plaintiff in a civil trial does not give independent evidence; that comes from witnesses who do not sit with the Plaintiff in Court. The witnesses are called in to give evidence from outside the Courtroom. So, in this case, Messrs Kimitora and Ali Pitu Ofa cannot defy that rule of practice. Mr. Lokete is already the Plaintiff in this case. Messrs Kimitora and Ali Pitu Ofa as his witnesses cannot be Plaintiffs and at the same time Mr. Lokete's witnesses. I would strike them out as Plaintiffs in this case. I do not think Mr. Lokete, as the Plaintiff would suffer any prejudice by the deletion of the names of Messrs Kimitora and Ali Pitu Ofa from this case. They will support him as his witnesses. I order that their names be deleted forthwith. I order accordingly.

The second issue is an important one in that it may form the basis for the adjournment of Plaintiffs' Notice of Motion. Counsel for the 2nd Defendant pointed out the effect of Order 61, rule 3 of the High Court Rules as pointing to the conclusion that the case should be adjourned until the Local Court had dealt with the dispute. He stressed that section 13(d) of the Local Courts Act by enabling the Local Court to substitute its decision for that of the Chiefs was a clear indication that any referral to the Local Court was in effect, an appeal. The power to return the dispute to the Chiefs, if necessary, with directions under section 13(e) of that same Act is also akin to the power of an appellate tribunal. So, Counsel for the 2nd Defendant was correct in saying that section 13(d) cited above was in the nature of an appeal provision though the word **"appeal"** was not used by Parliament. In terms of Order 61, rule 3 of the High Court Rules cited above, the Court may adjourn an application for leave to allow the time for an appeal to expire or where an appeal is already pending to allow that appeal to be

concluded. The reason for that rule, I think, is based upon common sense in that it is both foolish and costly for the Court to grant leave only to find later that the appeal is successful and there is no longer the need to quash the decision being appealed. Obviously, costs would have been wasted and the objective of obtaining certiorari defeated if leave had been granted in the face of a pending appeal. I doubt that Counsel had drawn the attention of the Chief Justice to Order 61, rule 3 cited above. I do not blame Counsel for that oversight because referral of the dispute to the Local Court under section 12(2) as read with section 13(d) and (e) of the Local Courts Act is not an appeal in an expressed term but is in the nature an appeal by implication. I am not surprised that Mr. Sullivan picked the point up for he is a sharp and meticulous lawyer. I am now to decide whether I should grant an adjournment as requested by Mr. Sullivan. There is now nothing I can do to change the decision reached by the Chief Justice in granting leave without considering an adjournment under Order 61, rule 3 cited above. In any case, granting adjournment is a matter for the discretion of the Court. This is not a case where the same issue has arisen at a later date and is being considered by another judge between two different parties, as was the case in **In the Estate of Felix Panjuboe**[1], Civil Case No. 241 of 2002. In this case, the issue remains the same between the same parties. Besides, I am being asked to adjourn the hearing of the Plaintiff's Notice of Motion and not the application for leave to apply for an order of certiorari. The reason for the requested adjournment however remains the same. If I refuse an adjournment and the trial proceeds resulting in the Plaintiffs being successful in the Local Court or the Customary Land Appeal Court, the cost of the hearing of the Plaintiffs' Notice of Motion would have been wasted because the Plaintiffs would have won their case through the appeal and not by certiorari action. So, it makes a lot of sense to wait until the hearing before the Local Court or the Customary Land Appeal Court is completed before the Plaintiffs can take any further step. Costs, which would have been wasted, will be saved. I would adjourn the hearing of the Notice of Motion to a date to be fixed if there is a need for the parties to come back to Court. Costs will be costs in the cause.

F.O. Kabui
Judge

[1] *In the Estate of Felix Panjuboe, Civil Case No. 241 of 2002.*