HIGH COURT OF SOLOMON ISLANDS]

JACKSON SIPISOA AND MAHLON TOITO'ONA (1st plaintiffs) ROBERT FA'ARADO (2nd plaintiff) -V- PETER TAFEA NE'E, WILSON NE'E AND ALVIN IDUKELEMA (defendants)

Civil Case No. 069 of 2002

Honiara: Brown PJ

Date of Hearing: 16th June 2003
Date of Judgment: 29 August 2003

Registered land	*first registration by Provincial Government – no consideration – subsequent transfer to original sellers – customary representatives – other customary owner thwarted proposal for development-claim for rectification of register on ground of mistake.* *Land & Titles Act (Cap 93)*
Limitation of action	*claim or interest in land – customary landowner – registered land – proceedings instituted within 12 years date claim arises.* *Limitation Act (Cap 18)*

The 1st plaintiffs were customary landowners and remain occupiers of land near Auki, Malaita Province, known as Ambu. The 2nd plaintiffs are also occupiers of part of the land at the invitation and will of the 1st plaintiffs. In 1992, the defendants sought the 1st plaintiff's agreement to develop the land by building a motel and housing on part of the land. To facilitate development, the Provincial Government appointed an acquisition officer who acquired the land for the Province from the defendants who were representatives of the various customary landowners. No appeal was taken at the time to the acquisition. Soon after, the Province transferred the land back to the representatives, these defendants.

The plaintiff instituted these proceedings seeking rectification of the land register so that the Commissioner of Lands would become owner, and subsequently, transfer the perpetual estate to the customary landowners, the 1st plaintiffs included.

The facts are shown in the judgment.

Held: (1) The proceedings are properly seen as falling within S.20 of the Limitation Act (Cap 18) for the plaintiffs are persons, having been in possession of the land, and entitled to the land, who have been disposed by act of he Provincial Government's first registration on the 2 December 1992 and consequently these proceedings, having been instituted by summons of the 13 March 2002, are within the time allowed by S.9 (2) of the Act, namely 12 years.

(2) While the Land & Titles Act (Cap 133) S.66 allows an appeal against an act or determination of an acquisition officer within 3 months of the act complained of, the plaintiffs in this case are complaining about the "wish of the Province" to acquire the land and do not rely on the acquisition officer's actions. Nevertheless, the Provinces power to acquire land is clearly provided for in the Provincial Government Act (Cap 118) Ss.35, 36 and the manner of such acquisition is set out in the Land & Titles Act, Part V, Division L and "the wish of the province" to acquire the land is evidenced by the fact of the appointment of the acquisition officer by the Secretary of the Province, the manner in which the acquisition officer published an agreement and notice showing the Province as purchaser, and the fact of the subsequent registration of the Premier as owner of the perpetual estate.

(3) The 1st plaintiffs had knowledge of, and tacitly approved the defendants intention to register and develop the land for building, housing and a motel, and consequently the subsequent registration by transfer of the defendants as perpetual estate owners reflected the intention of 1st plaintiffs and defendants at the time of their meeting in April 1991.

(4) The plaintiff, Jack Sipisoa and his tribe "are born male of Ambu land has primary right of leadership over Ambu land" so that it is appropriate to order rectification of the land register to acknowledge the fact for the defendants are registered owners in their representative capacity, as customary owners also.

(5) Registration of the defendant as owners has not been shown to be by *mistake* and consequently no grounds have been shown to set aside registration of the defendants in favour of the Commissioner of Lands.

(6) The use of term "the boss of the land" by counsel does not properly describe customary land – holding incidents, and should be eschewed.

(7) The 2nd plaintiffs interest should also be recorded on the register for he occupies at the will of the principal landowner.

Cases cited

Sipisoa -v- Acquisition (Land Appeal 8/96)

Mr. A. Radclyffe for the 1st & 2nd plaintiffs
Mr. A. Nori for the defendants

Summons and Statement of Claim

Reasons for decision

On the 9th July 1993, the defendants became the registered owners of land described as Parcel No. 171-002-18 at Auki, Malaita Province.

Their perpetual estate in this registered land was by transfer, without consideration, from the Premier of the Province who had obtained the original perpetual estate after acquisition proceedings of this parcel known as Ambu land on the 2 December 1992 by First Registration under Part V, Division I of the Land & Titles Act (Cap 93).

The 1st plaintiffs came to court as patrimonial descendants and customary owners of Ambu land, claiming that the acquisition of Ambu land by the Premier of the Province was not valid.

The 2nd plaintiffs are occupiers of part of the land at the invitation of the 1st plaintiffs, since long before the acquisition proceedings and claims an interest in the land as a consequence.

The defendants are "cousins" (some distance removed) of the 1st plaintiffs, for they trace their geneology through the female line and also claim to be entitled by custom, to Ambu land.

The Plaintiff's claim for rectification of the Land Register

The plaintiffs seek rectification of the Land Register by cancelling the fact of the transfer of the perpetual estate to the defendants and reverting title to the Commissioner of Lands as the appropriate vesting customary lands authority so that the parcel of land may then be then transferred to the 1st plaintiff as the proper representative of Ambu land.

The basis of the Plaintiff's claim

The first registration proceedings under Part V, Division 1 of the Land & Titles Act (Cap 93) were ultra vires the provisions of the Act and consequently the registration of the Premier was a nullity. The purported transfer of the perpetual estate was also null and void since it relied on a valid title in the Premier.

The Defendant's case

The defendants say that the 1st plaintiffs were well aware of the original acquisition proceedings by the Premier and countenanced the acquisition for the purposes disclosed by the defendants. They intended to build a motel and houses on the 27 acre block. The boundaries of Ambu land the subject of this acquisition was agreed by the plaintiff, Jack Sipisoa, as evidenced by his signature to map, signed on 11 September 1991.

The defendants say that this map was given to Jack Sipisoa by Peter Tafea. Earlier in 1991, in about April, Jack Sipisoa had met with Peter Tafea (one of the defendants) when development of this land was discussed and it was agreed to register the customary land.

As a consequence, Philip Tegavota, a lands acquisition officer, went to Auki at the instigation of the Province, when the prescribed hearings took place and the land was first registered in the name of the Premier. The plaintiffs never objected for they were party to the agreement to the registration. The defendants also relied upon this claim being well out of time.

The plaintiffs joined issue and further said that, irrespective of knowledge or not of the acquisition proceedings, the manner of the acquisition was wrong in law and the plaintiff's awareness or acquiescence cannot rectify this mistake in law.

Are the plaintiff's time barred?

The first issue to resolve is whether the plaintiff's proceedings are statute barred. I should say that I am satisfied both plaintiffs have standing to bring their proceedings, the 1st because of their paternal lineage, the 2nd because of their long permissive occupation, at the will of the traditional occupiers.

The Limitation Act (Cap.18) Section 20 provides:

(1) Where the person bringing an action or commencing an arbitration to recover land, or some person through whom he claims, has been in possession of the land, and has while entitled to the land been disposed or discontinued his possession, the cause of the action shall be treated as having accrued on the date of the dispossession or discontinuance.

In these proceedings the date of dispossession must be the date of registration by the Premier of the perpetual estate on the 2 December 1992. These proceedings were instituted on the 13 March 2002. I am satisfied they have been commenced within the 12 year period of limitation provided for by S.9 (2) of the Act. The arguments about delays in commencing proceedings have no validity in the face of the clear wording of the Act. Both plaintiffs then are within time to bring these proceedings.

The defendants say, however, that the plaintiffs cannot sue the defendant for recovery of land for it had not, prior to first registration, been established by a court that the plaintiff were entitled by custom to the land, nor were they ever registered as owners, nor dispossessed by the mistake of the defendants.

The first assertion is a *non sequitur,* for the section provides an opportunity for people in that situation, without the assurance of prior court finding of ownership, to seek redress. The plaintiffs clearly fall within that category of person described by S.20 as having been in possession of land as a customary landowner, and by virtue of registration of that customary Ambu land have had their rights to possession affected by the fact that the defendants have indefeasibility of title as registered owners. Whilst they remain on the land, their unfettered right to possession has been affected by the fact of registration of the land, and I am satisfied that affect falls within the expression "been disposed" in the section of the Act.

But part of the Land and Titles Act (Cap 133) deals with the rights of persons aggrieved by an acquisition officer's findings and determination of those

customary owners having the "the right to sell or lease the land and receive the purchase money or rent" (S.64) for by S.66 any such person may, within 3 months, appeal to a Magistrates Court. In other words, the defendants say the plaintiffs right to complain is found in this part of the Act, and has long expired.

I cannot agree, for the plaintiffs are not aggrieved so much by the acts or determination of the acquisition officer, as envisaged by S.66 (1) but rather by the "wish of the Province" to acquire the land. This was the argument put by Mr. Radclyffe on the plaintiff's behalf, and S.66 (1) is no answer. Consequently the plaintiff's right to argue this point, is not barred by the Land and Titles Act requirements as to appeal, and may rely on S.9 (2) of the Limitation Act which allows 12 years to institute proceedings.

The proceedings are properly brought within in S.9 (2) and not S.5 (1). I will deal with the "mistake of the defendants" later in these reasons.

The next question, which must be addressed, is whether the manner of acquisition is wrong in law and if so, does the plaintiff's awareness or acquiescence (if proven) validate the act of first registration by the Premier.

The plaintiff relies on the earlier decision of my brother Judge Kabui PJ in Sipisoa -v- Acquisition Officer (Land Appeal 8/96) and says that case, "on all fours with the present one" held, at 4 "*It is not the intention of Parliament that Provincial Assemblies may acquire customary land at large at the request of any members of the public*". The Court there *held* that the acquisition procedure conducted in that case was invalid, null and void. Consequently, the plaintiff says, whether they knew about the acquisition or not, was irrelevant to the effect of the illegality of the acquisition. (I should say I do not agree with my brother judges phraseology, with respect, for this court should not endeavour to find parliaments intent, rather, interpret the legislation)

The defendants answer the plaintiff's reliance on the decision of Land Appeal Case 8/96 this way. They say that earlier case can be distinguished in that the land there, under dispute, had yet to be registered ie the appeal process had been invoked. The answer shortly is that an aggrieved person may appeal within the 3 months period to the Magistrates Court, but nevertheless; the absence of an appeal does not validate proceedings, which may inherently be *ultra vires* the power of the Act. Putting it another way, the fact that no-one complains within the 3 months does not validate acts, which are outside the power of the statue. Individuals, by their failure to complain, do not validate executive acts which are found to be beyond power.

The second point, that in the earlier case there was no evidence that the Provincial Government desired to acquire the land for development purposes, is a point which clearly distinguishes that case from this one.

The Main Issue

Do the circumstances of the acquisition by the Premier (and the fact of his subsequent grant to the defendants) conform with the provisions of Part V, Division 1 of the Land and Titles Act (Cap 133).

The plaintiff does not deny (for he says he knew nothing of it) the fact that the acquisition officer posted a notice of agreement (as agent) dated the 28 June 1991 affecting Ambu land at the Auki Post Office, Auki market and Kwaibala area. (This agreement is under S.62 (b) of the Act). The agreement was with *"Peter Tafea Nee and Alwyn Idukelema who claim to represent the Ambu land holding group"* and the acquisition officer on behalf of the Provincial Secretary, Malaita.

Again, on the 1 July 1991, (by Public Notice in form required by S.64) he confirmed that he held a public hearing and *"determined that the following persons have the right to sell the land and to receive the purchase money – Peter Tapea Ne'e of Ambu Village and Alwin Idukelema of Ambu Village".* (The notice also warned any person aggrieved to lodge notice of their claim with the Magistrates Court within 3 months). No appeal was lodged.

Matters had moved quickly for two letters apparently gave rise to this acquisition by the Province. They were introduced into evidenced by the defendants and copies exhibited. I reproduce the material parts.

27th May 1991

Alvin Indu
PO Box G8
Honiara
Solomon Islands

Lands Officer
Malaita Province
Auki
Malaita Province

Re: Need for Auki Township Expansion for Future Development

As was experienced, Auki Township is in need of immediate expansion

I was particularly approach with the view to register my customary land by a handful of business houses who wish to establish business activities in the vicinity of Auki Township.

The other day I met with the parliamentarian for the area indicating that Bina Harbour will be acquired for future development and certainly highlighted the need to house personnel engaging on the project.

As this will be a right move to development of our Province and our resource, may I respectfully ask your good office to bring to the attention of the authorities concern, our willingness to acquire our land for purpose therein.

Yours faithfully

Alvin Indu

MEMORANDUM

TO: The Commissioner of Lands *4/9/4*
Ministry of Agriculture and Lands
Honiara *3/6/91*

Re: PRIVATE LAND ACQUISITION – PART OF AMBU LAND/NEAR AUKI TOWNSHIP FOR HOUSING ESTATE MORTGAGING DEVELOPMENT

Auki Township is now experiencing Land shortages for further housing development for staff accommodation especially those private people who wish to establish private business in Auki town.

We are not able to manage to acquire any further land for the Government for this process as people are reluctant to lease direct to the Government or Province.

We are however being encouraged by a number of people who wish to register their own customary land on the outskirt of Auki purposes of housing development and therefore renting to other people who do business in the town.

For this purpose, we are submitting an application for your approval, the application by Peter Tafea and his brothers and Alvin Idu. (See the site plan (Land Area) proposed).

Please approve and let me know for further follow-up.

D. Totorea
Land Officer
For: Provincial Secretary
MALAITA PROVINCE

cc: Mr. A. Indu
C/- GPO Box G8
HONIARA

cc: Mr. Peter Tafea
C/- PO Box
Auki/Kwaibala Bridge

The essence of the correspondence appears from the Lands officer's letter, in para 3, where he speaks of people wishing to register their own customary land for the purposes of housing development and rental to others. In other words, registration of land for private purposes, as the evidence of the defendants before me left me in no doubt. This intention was borne out by the subsequent transfer, by the Premier, to these defendants. In other words, the original acquisition appears to have proceeded on the basis of Provincial development, but the landowner group proposed to develop. Thus the transfer to those very persons with whom the acquisition officer had contracted, customary representatives of the land. This aspect was never appealed and is time expired.

It did not correspond with the intention of Alvin Indu (short for Alvin Idukelema) *"to acquire our land for purpose therein"* ie for private housing development. In fact, they intended to build a motel which would have fitted their purpose admirably.

The Land Appeal Case No.8/1996

I wish now to address Mr. Radclyffe's argument on the applicability of the reasoning in my brother judges findings in that earlier case which he relies on, as being "on all fours" with this one. In that case, the judge said:

There being no evidence of the Malaita Provincial Assembly wishing to acquire Namona'ako land within the meaning of section 60(1A) of the Act, the acquisition procedure conducted in this case is therefore invalid, null and void" (H.C. Land Appeal Case 8 of 1996 at 7) (old S.60 (1A) is now S.61 (2)).

In this case before me there is ample evidence of the Provincial Government's wish to acquire Ambu land. The acquisition officer's powers are found in S. 61(2) of the Land & Titles Act (Cap 133)

S.61(2) *Where a Provincial Assembly wishes to purchase or to take a lease of any customary land under section 60, the Provincial Secretary may appoint an Acquisition Officer to act as his agent for the purposes of the acquisition.*

His public notice and form of agreement in terms of Ss 62 & 64 of the Act recite the fact that the Provincial Secretary, Malaita Province is the purchaser. So the Provinces wish to purchase is evidenced by the fact of the appointment of the acquisition officer, the manner in which the acquisition officer published these two exhibits and the subsequent registration of the Premier, Malaita Province as the first registered owner. Clearly these facts evidence the wish of the Province to acquire the land.

In this case before me, there is no suggestion the administrative procedural requirements arise for judicial review, so that the maxim *omni a praesumuntur rite et sollenniter esse acta* (it is presumed that all the usual formalities have been complied with) is appropriate. The plaintiff's assertion that he knew nothing of the acquisition procedure, I do not accept, although that ignorance, in itself, in the plaintiff, is not evidence of a failure to follow prescribed procedure by the Province.

Where the Land and Titles Act (Cap 133) acknowledges a power in the Province to acquire land (S.61 (2)) and the Provincial Government Act (Cap 118) (S.s.35 & 36) enables the executive so to do, it is not for this court, (especially since the Province is not a party to the proceedings) to adopt Mr. Radclyffe's argument that this matter is "on all fours" with that earlier case, when it can be so clearly distinguished on facts. That case then cannot avail the plaintiff in these proceedings.

The transfer back to the vendors

But then the transfer back to the original customary vendors took place. No consideration was paid for this transfer and there was no purchase price paid to the vendors by the Provincial Government. The realization that the land-holding group, these defendants, could not develop the land, must have dawned on all concerned for when the defendants sought to raise money on security of the land, it was then in their name. The Province was not going to develop the land, rather the defendants were. I am satisfied, on the evidence of the defendant Alvin Idukelema, that the plaintiff Jack Sipisoa was fully appraised of the proposal to build a motel at a meeting at Peter Tafea's residence in April 1991 and that Jack Sipisoa's approval was a prerequisite for he was a principal customary landowner. I am further satisfied that Mr. Sipisoa acquiesced, and that he acknowledged the Ambu land the subject of the acquisition of this purpose, by signing the sketch plan. I am not moved by the plaintiffs denials that he knew nothing about the proposals or that he did not remember these various meetings, proposals, or the sketch for it is beyond

belief that the acquisition proceedings should have proceeded, unnoticed by Mr. Sipisoa. Where there is conflict in the evidence, I prefer that of the defendants.

So the transfer back was to facilitate the original purpose, the building development of the land, which had the tacit approval of Mr. Sipiosa at that time.

The various court cases since evince a clear change of attitude by Mr. Sipisoa, but nevertheless, I am satisfied that change was related to his perceived offence in the defendants registration of land in their sole names which, on its face, ignored his primacy as a customary landowner. This status was again acknowledged in this court. In cross examination Mr. Idukelema, after saying Mr. Sipiosa's consent to develop was not necessary, (rather he was invited to the meeting for discussion since in custom they all own the land) conceded that in custom, Mr. Sipisoa was "boss of land", on that phrase being put by Mr. Nori in re-examination.

This phrase is one, which is of pidgin usage, possibly for simple explanation before foreigners and should be eschewed, but does not, in my view, properly address the complexities of customary land rights. To suggest it does, as Mr. Nori did in this case, is patronizing to the court, and I do not propose to place weight on that phrase, rather rely on the more weighty evidence of meetings the defendants had with Mr. Sipisoa at the time of the acquisition proceedings, meetings which recognize the need in the defendants, by custom to include Mr. Sipisoa in the proposals. Mr. Sipisoa's change of heart, however, effectively scuppered the implementation of the proposals, but the change does not detract from the defendant's evidence of the earlier agreement by Mr. Sipisoa to the proposals.

The plaintiff wants the register corrected, so that the Commissioner for Lands becomes registered on behalf of the customary landowners. Yet here those registered are customary landowners. There is no issue with that aspect. The issue really is the apparent need for formal recognition of the 1st plaintiff as a member of that land-owning group. The difficulties stem from that failure.

The plethora of cases in the court since reflects this issue. Clearly the Chief's decision of the 6th May 1998 summarises the situation.

"Accordingly to Malaitan custom, Jack Sipisoa and his tribe who are born male of Ambu land has primary right of leadership over Ambu land – south side. Alvin Idu and Peter Tafea born female of Ambu land has secondary right".

The land the subject of this application is registered, but the defendants who hold as registered owners are the customary representatives who sold to the Province in the first place. They have never taken issue with the 1st plaintiff's right to primacy. The 2nd plaintiff, as occupier at will of the 1st plaintiff, is entitled, as it were to, such an estate, notwithstanding the registration of the land. The right of the 2nd plaintiff are well established and recognized by the 1st plaintiffs, so the ownership of the defendants must be held, subject to the right of primacy of the 1st plaintiffs, concurrently with the right of occupation by the 2nd plaintiff. At the time of the registration, the defendants clearly were on notice of these interests and as I say, they really are not in issue. The argument falls back on the 1st plaintiffs wish to set aside the original registration and transfer.

As I have found, the registration is within power, and the subsequent transfer, indefeasible on registration since it has not been obtained by fraud, mistake or in circumstances giving rise to a right in the plaintiffs to object, pursuant to the terms of the Land and Titles Act. (Mr. Sipiosa's subjective view of the defendant's actions are understandable in the customary context, but these defendants have been thwarted by his actions ever since).

Mr. Nori has conceded for the defendants that the Court has power to rectify a mistake in the Registrar of Lands, but that no mistake has been shown. I have found, there is no mistake for the defendants have become registered as originally envisaged by all the parties. They clearly acknowledge they hold for the customary owners, or tribe, (for that was the purpose of the original meeting with Mr. Sipisoa) but this does not show on the Register.

It is a customary obligation or trusteeship of which they are cognizant. The whole tenor of Mr. Iduku's evidence was acceptive of this.

The plaintiffs have not satisfied me they have grounds to rectify the register to the extent which they seek. The defendants have become registered in accordance with the original purpose to develop the land, a purpose thwarted by the 1st plaintiffs.

For abundance of caution the rights of the 1st plaintiffs and the interest of the 2nd should be endorsed on the register.

There is no suggestion this is logging land and consequently the Forestry Resources Act (and any constructive trusts arising from Area Council determinations) do not apply. The defendants hold as representatives of the

Ambu land-holding group. The mention of "trusts" is inappropriate in these circumstances. The customary relationship between members of the land-holding Ambu group should not be confused by the use of adopted terms, such as "constructive" or "implied" trusts. These defendants hold the land in accordance with their customary obligations, and recognition may be endorsed on the Register.

I accordingly order:

1. The Register be amended to record the interest of the 1st plaintiff Jack Sipisoa as a joint owner.

2. The Register be amended to record the interest of the 2nd plaintiff as an occupier at the will of the registered owners.

3. The remaining claims for relief of the plaintiffs in their summons are refused.

4. Liberty to apply.

5. The plaintiffs shall have their costs of the proceedings.

J R BROWN
PUISNE JUDGE