

Land Appellate Jurisdiction

Between:

Mate Simeona & Semi Vine

Appellants

And:

Iosia Apelu & Apete Apelu

Respondents

BEFORE Tompkins JA
Paterson JA
Potter JA

Counsel: Laigane Italeli for the Appellant.
Filiga Taukiei for the Respondent.

Date of Hearing : 27 August 2014

Date of Judgment : 30 August 2014

Introduction

- [1]. This is an appeal against a decision of the High Court given on 21 February 2014 which dismissed an appeal against a decision of the Senior Magistrate given on 23 August 2013. Under the later decision the Senior Magistrate dismissed an appeal from the Land Court Appeal Panel given on 8 April 2013.
- [2] The series of proceedings which led to this appeal commenced with a decision of the Lands Court of Funafuti on an application by one of the present respondents, Mate Simeona, "to confirm the ownership of the land known as Teone."
- [3] Oliana was the appellant before the LCAP. The current respondents, Iosia and Apete, were by an order of the Senior Magistrate on 23 August 2013 substituted for Oliana as one of the parties to the appeal before the Senior Magistrate.
- [4] The decision of the LCAP given on 8 April 2013 after a hearing on 15 March 2013 is confusing. The minutes of the hearing state that Oliana's explanation for the appeal was:
1. I was not notified of the hearing on 1 November 2012
 2. Therefore the proceedings on 1 November 2012 was not fair as we were not present in court
 3. The decision of the Lands Court that we do not have a land at Teavamago, and
 4. We know very well that our grandfather Teagai owns a land at Teavamago

5. I humbly ask the Lands Court Appeal Panel to set aside the decision of the Lands Court on 1 November 2012.

[5] The reasons and decision of the LCAP read:

1. The appellant Oliana Stanley's appeal against the respondents Mate Simeona and Semi Vine regarding the decision of the Lands Court on 1 November 2012 that Teagai (appellant's grandfather) does not own a piece of land at Teone but at Teavamago.
2. Explanations that the court had received from both parties confirm that the Lands Court hearing on 1 November 2012 was made without the presence of both parties in Court.
3. The Court explained properly to both parties that Teagai Apete (appellant's grandfather) owns a piece of land at Teavamago but not at Teone. According to the cadastral map of Funafuti, the place known as Teavamago connects to the place known as Teone going further to the main wharf.
4. Therefore from all the evidence and explanations before the Court, it has reached a decision that:
 - a. The decision of the Lands Court on 1 November 2012 is set aside as both parties were not present during the hearing.
 - b. The Court has confirmed and found out that Teagai Apete (appellant's grandfather) has a land at Teavamago and Mate Simeona (respondent 1) has a land at Teone. These lands are connected to each other.

[6] The confusion arises from the LCAP statement that the appeal was by Oliana against a decision that she did not own land at Teone but at Teavamago when her own explanation was that the Land Court held she did not own land at Teavamago. That confusion is not resolved by the Land Court's minute.

[7] Paragraph 4(b) of the LCAP's finding confirms that Teagai, Oliana's grandfather had land at Teavamago and Mate Simeona has land at Teone. Despite the confusion this Court is of the view that the LCAP in allowing Oliana's appeal was clearly holding that Oliana, and not Iosia and Apete, was the owner of Teavamago. The parties by their subsequent actions including this appeal have accepted that the LCAP determined that the present respondents, Iosia and Apete, are the owners of Teavamago.

[8] The appellants Mate and Semi then appealed to the Senior Magistrate. Their grounds of appeal in a notice of appeal filed on 2 May 2013 were:

1. The Panel erred in law by allowing the Appeal of the Respondent to be heard without any solid evidence to prove her case.
2. The Panel erred in law by allowing the Appeal, as the decision made was similar in meaning to the decision made by the Lands Court dated 1st November 2012.
3. The Appellant further maintains the right to add further grounds of appeal before the court hearing date.

- [9] The appeal came before the Senior Magistrate on 8 July 2013 when the appellants did not appear. An adjournment was granted to allow the respondents to instruct a lawyer.
- [10] The next hearing was on 30 July 2013 when the appellants advised that they had not been able to retain a lawyer. The Senior Magistrate asked counsel for the respondent if he would be available to appear on the 23 August 2013. The minute of the Senior Magistrate included:

Court explains to the appellants the need to hear this appeal before counsel Isala left on again on the 26th August 13. Appellants agreed.

Adjourn this appeal to Friday, the 23rd August 2013 at 0900hrs. Parties to attend.

- [11] When the case was called on the 23rd August 2013, the appellants were not in court. The Senior Magistrate adjourned the case to give the appellants time to appear. The Court resumed at 9:40 am but the appellants were not present. There was no information on their whereabouts so the Senior Magistrate dismissed the appeal "because the appellants do not turn-up."
- [12] The appellants appealed to the High Court on the ground that the Senior Magistrate "erred in law in dismissing the appeal based solely on the absence of the appellants."
- [13] In a decision given on the 21st February 2014, Millhouse J dismissed the appeal. The judge noted that there had been a number of adjournments before the Senior Magistrate; that the explanation given by the appellant Semi Vine for non appearance on 23 August 2013 was nonsense; and the Senior Magistrate exercised his discretion and struck out the appeal.
- [14] In their notice of appeal to this court, the grounds stated are:
1. The Judge erred in law when he dismissed the appeal but did not consider that the appellant's were not legally represented the whole time during the hearings at the Senior Magistrate' Court.
 2. The Judge erred in law in upholding the decision of the Senior Magistrate in dismissing the appeal based solely on the absence of the appellants when in fact the Senior Magistrate did not hear the appellant's appeal proper and the main issue in dispute.

Decision

- [15] There are two issues which require consideration by this Court. First, did the High Court err in law by dismissing the appeal? Secondly, if the appeal were to be allowed and the matter remitted back to the Senior Magistrate to hear the appeal from LCAP, did the Senior Magistrate have jurisdiction to hear the appeal?
- [16] It is necessary to determine whether the Senior Magistrate has the power to dismiss the appeal for non appearance. The Magistrates Court Act does not give an express power to dismiss.

- [17] Under s53 Magistrates' Courts Act the jurisdiction vested in the Magistrates' Courts is to be exercised in a manner provided by the Act or by the rules of court, and in default in substantial conformity with the law and practice for the time being observed in England in county courts and courts of summary jurisdiction. There are no relevant rules of court.
- [18] The Court is however satisfied that the Senior Magistrate does have power to dismiss an appeal for non appearance. Section 26(4) Native Lands Act permits the Senior Magistrate "to make any order that ought to have been made and make such further or other order as justice may require and give all necessary and consequential directions."
- [19] This Court is of the view that s26(4) gives the Senior Magistrate the power to dismiss an appeal for non appearance. It is noted that a Lands Court may strike out an application if the appellant fails to attend and does not excuse the failure to the satisfaction of the court: Schedule 2 Native Lands Act.
- [20] There are qualifications. Section 26(5) Native Lands Act provides that before a Senior Magistrate determines an appeal both parties shall be entitled to make both oral and written submissions. Further, natural justice dictates that an appellant should be given an opportunity to excuse his non attendance. This right is analogous to the right of an applicant before a Lands Court.
- [21] It follows that while the Senior Magistrate had the power to dismiss the appeal he should not have done so without giving the appellants the opportunity to show that the Court should excuse the non appearance. This was not done.
- [22] The appropriate action would have been to adjourn the hearing and make an "unless order". This order would require the appellant to attend on the adjourned date and proceed with the appeal failing which the appeal would be dismissed.
- [23] This Court on an appeal has all the powers which the High Court has : s26 Court of Appeal Rules. The High Court had the power to dismiss the appeal if it determined it would be futile to remit the matter back to the Senior Magistrate.
- [24] Thus, while the Senior Magistrate erred in dismissing the appeal, this Court notes that in the circumstances referred to in paragraph 25 to 28 below, the Senior Magistrate would have been entitled to dismiss the appeal if he had known the circumstances. For this reason and because of the Court's finding on the second issue the appeal will be dismissed.
- [25] Semi Vine, is an affidavit sworn in support of the appeal to the High Court confirmed that the appellants agreed at the hearing on 30 July 2013 to the adjournment to the 23 August 2013. Paragraph 9 and 10 of his affidavit read:

9. The Senior Magistrate heard from counsel Isala on his availability to attend court. After confirming that from counsel Isala, both parties agreed to the date proposed by the Senior Magistrate of the hearing which is 23 August 2013.

10. The Senior Magistrate after hearing and considering all those preliminary matters from both parties and counsel Isala, adjourned the appeal to 23 August 2013.

[26] The reason given for the non-attendance of the appellants was that "the Senior Magistrate told both parties in court that the notices of hearing will be served on us at a later time to confirm the date of hearing." While this statement is uncontradicted, as the respondents did not file an affidavit in the High Court proceeding, it is noted that there is no reference to this alleged statement in the minute of the 30 July hearing made by the Senior Magistrate.

[27] The circumstances which are relevant in the case are:

- On 2 May 2013 the appellants filed a notice of appeal against the decision of the LCAP given on 8 April 2013. The notice of appeal was signed on their behalf by counsel.
- The matter was called in the Senior Magistrates' Court on 8 July 2013 and adjourned to 30 July 2013
- On 30 July 2013 the appellants agreed to a hearing on 23 August 2013 knowing of the Senior Magistrate's wish to hear the matter before the respondents' counsel left for overseas. The Senior Magistrate adjourned the hearing to 23 August 2013
- The appellants knew the matter had been adjourned to 23 August 2013 and should have attended court on that day.

[28] There were therefore grounds, if the appellant's affidavit had been before him so he knew of the reason given for non attendance, the Senior Magistrate would have been justified in dismissing the appeal. He was exercising a discretion.

[29] There is another reason why this appeal cannot succeed. Under s 26(1) Native Lands Act an appeal from a decision of the LCAP to the Senior Magistrate must be on the ground that the LCAP decision "was wrong in law".

[30] The grounds of appeal against the decision of the LCAP are set out in paragraph 8 above. Neither of the grounds are in the Court's view matters of law. The Senior Magistrate therefore did not have jurisdiction to hear the appeal.

[31] As worded the first point of appeal is not a matter of law. It appears to be an allegation that the LCAP misconstrued the facts. If so this is a factual matter and not a matter of law. If the ground were to be amended to plead as a matter of law there was no evidence before the LCAP to allow it to come to the decision it made, that ground could not succeed. Both parties were present and were questioned. It was the present appellants who produced the cadastral map which was before the LCAP. This was a hearing where both parties' views

were presented and the LCAP gave reasons for its decision. There was no error of law on this ground. An attempt to have the factual findings reconsidered does not amount to a matter of law.

[32] The second ground of appeal cannot succeed. Reference has been made previously to the confusion between the wording of the decision of the Land Court and the LCAP. Notwithstanding that confusion the LCAP addressed the fundamental issues and came to its decision. It was that decision which is under appeal. The relevant portions of the decision are expressed clearly.

[33] For the reasons given the appeal cannot succeed.

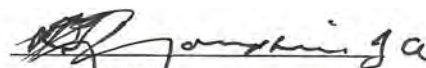
Decision

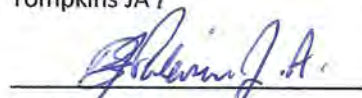
[34] The appeal is dismissed.

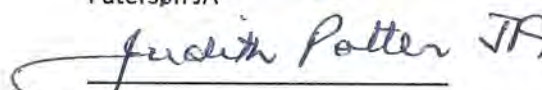
Costs

[35] The respondents are entitled to costs. They were represented by the Peoples' lawyer who does not claim costs. They are however entitled to their disbursements and if counsel are unable to agree the amount, respondents' counsel should file within fourteen days a memorandum.




Tompkins JA


Paterson JA


Potter JA