IN THE HIGH COURT OF KIRIBATI 2020

CIVIL CASE NO. 59 OF 2019

	[NEBOATETAAKE AREKE WITH SIBLINGS	
	[FOR ISSUES OF MAIBINIMONE TIBWE	**APPLICANTS**
	[	
BETWEEN	**[AND**	
	[	
	[MINISTRY OF LANDS AND AGRICULTURAL	
	[DEVELOPMENT	**RESPONDENT**

Before: The Hon Chief Justice Sir John Muria

20 May 2020

Ms Taaira Timeon for Applicants
Mr Monoo Mweretaka for Respondent

JUDGMENT

Muria, CJ: By their application filed on 27 July 2019, the applicants are now seeking leave to issue proceedings for *mandamus* against the respondent. The application is supported by the amended affidavit of Beiauea Kataunati filed on 23 September 2019.

Brief background

2. The dispute between the parties in this case stems over the accreted portion of the land Antebuka 835-e. The applicants were registered as owners of the land Antebuka 835-e, succeeding from the original owner Maibinimone Tibwe. Over the years the land has accreted and in Case

No. 154/03, the applicants have also been registered as owners of the accreted portion of the land.

3. The applicants and the Government have an existing lease over the land Antebuka 835-e signed between Maibinimone and Government on 12 July 1962 and approved in Case No. 65/62. Pursuant to the existing lease, the Betio Town Council permitted squatters to settle on the accreted portion of the said land, paying rents to the Council.

4. The applicants are not happy with the Council's action and have initiated steps to amend the Head-Lease with the Government by suggesting the addition of an '*Addendum*' to the Head-Lease which would exclude the accreted portion of the land from the Head-Lease. The respondent has not indicated whether they agreed to or rejected the applicants' proposed '*Addendum*' to the Head-Lease. The respondent has taken the position that the accreted portion of the land is included in the existing Head-Lease.

Issues

5. There is no question that land accretion had taken place and thereby increasing the size of the land Antebuka 835-e. The Land Surveyor, Romano, confirmed it in Case No. 154/03.

6. The only issue for the Court to determine in this case is whether the Accreted portion of the land Antebuka 835-e forms part of the Head-Lease signed between the parties on 12 July 1962. If that were to be so, then entering an 'Addendum' to the Head-Lease would be unnecessary.

7. There is a further issue here with regard to the power of the Court to issue an Order of Mandamus against a Minister exercising the power of the Republic. This point, however, is not part of the respondent's case and was never argued by Counsel. This issue will have to wait for another day.

Determination

8. The case for the applicants as put by Ms Timeon is that the respondent has a legal duty to execute the proposed 'Addendum' to the Head-Lease. That legal duty, argued Counsel, stems from section 12 of the *Native Lands Ordinance*. As it now stands, section 12 states:

> **"12(1) No lease or sublease shall be granted for a longer period than 99 years or of any parcel of land of greater extent than 10 acres without the approval of the Minister.**
>
> **(2) Subject to subsection 12(3) and to any specific provision to the contrary in a lease or sub-lease; the extent of land leased by a lease or sub-lease shall be deemed to and shall include any accretion of land after the commencement of the lease or sub-lease as the case may be, and conversely any erosion after the commencement of the lease or sub-lease as the case may be, diminishing the extent of the land, shall be disregarded.**
>
> **(3) the lessor and lessee in the lease or sub-lease, as the case may be, may at any time <u>in writing signed by both of them</u> exclude or modify expressly or impliedly the provisions of subsection 12(2)".** [Underlining is mine].

9. It is true that section 12(1) creates a legal duty on the Minister to approve a lease or sub-lease of a land greater than 10 acres. However, in the present case, the applicants have two hurdles to overcome.

10. The first is to show that the deeming provision in subsection (2) does not apply to the Head-Lease signed on 12 July 1962. Clearly, Parliament recognized the effect of accretion and erosion when it enacted the 1983 Amendments to

section 12 of the *Native Lands Ordinance* over "**land leased**" by Government or any other lessee or sub-lessee. The land Antebuka 835-e is one of such "**land leased**" by the Government prior to the 1983 amendment. There is no evidence placed before the Court to show that the deeming provision in subsection (2) does not apply to the Head-Lease of the land Antebuka 835-e.

11. The second hurdle is that the proposed "*Addendum*" to the Head-Lease must specifically show that it creates a legal obligation on the Minister to perform. For that to occur, the applicants must show that the accreted portion of the land does not form part of the Head-Lease despite the deeming provision and that the parties (applicants and Government) have signified their acceptance in writing that the accretion portion of the land Antebuka 835-e be excluded from the Head-Lease or the Head-Lease be modified to reflect the situations provided in section 12(2) and (3).

12. In the Court's view, the deeming provision in section 12(2) of the *Native Lands Ordinance* applies to the existing Head-Lease signed between the parties on 12 July 1962. As such I accept Mr Mweretaka's contention that no legal duty on the Minister exists in this case to sign the "*Addendum*" to the Head-Lease.

13. Even if, for argument's sake, the accreted portion of the land Antebuka 835-e is to be excluded from the Head-Lease, no legal duty or obligation has been created by the proposed "*Addendum*" until both parties agreed in writing to exclude or modify the Head-Lease. That has not yet been done as arrangements have yet to be made following approval from Cabinet. Until that is done and parties signify their agreement in writing, no legal duty or obligation exists, requiring the Minister to do anything.

15. **ORDER:** 1. Application refused.

2. Costs to the respondent to be taxed, if not agreed.

Dated the 20th day of May 2020

SIR JOHN MURIA
Chief Justice