SC 584

IN THE SUPREME COURT)
OF THE TERRITORY OF)
PAPUA AND NEW GUINEA)

CORAM : MINOGUE, C.J.
Monday,
3rd August, 1970.

BETWEEN THE DIRECTOR OF DISTRICT ADMINISTRATION AND TARIS WANAM ON BEHALF OF THE PEOPLE OF KAVUDEMKI VILLAGE AND MANDU SISI ON BEHALF OF THE PEOPLE OF MARUNGA VILLAGE

Appellants

AND JOHN KEITH DOWLING

Respondent

IN RE WAITAVLO

REASONS FOR JUDGMENT

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Apr 8,9
RABAUL.
Aug 3.
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The appellants appeal against a final order made by the Land Titles Commission on 14th February 1969 whereby the Commission declared it to be established that on the appointed date the respondent owned a leasehold interest in land, namely, an agricultural lease from the Administrator of the Territory of New Guinea for 99 years from the 1st July 1938 in respect of land described as Waitavlo at Henry Reid Bay, District of New Britain, and that the respondent was entitled to be registered as owner of that interest in the Register of Administration Leases. The final order directed that the boundaries were to be subject to survey and as far as possible to conform to the lines of the Henry Reid River (but excluding any part of the timber reserve) on the north-west, the shore of Henry Reid Bay on the south-west, the western boundary of Tol Extended on the south-east and on the north-east a line to be fixed to include in the lease an area of 160 hectares be the same more or less.

The decision was a majority one and was dissented from by the Acting Chief Land Titles Commissioner, Sir Colman O'Loghlen. The claim by the respondent before the Commission was for restoration to the Register of Administration Leases of a leasehold interest in Waitavlo Plantation containing 160 hectares more or less. He was unable to produce any original or copy of a leasehold document and in his claim stated that the date and term of the lease were unknown and that it was an agricultural lease. Further, he claimed to be entitled to be entered in the register as a purchaser from the original lessee, one Ross.

The evidence before the Commission in support of the claim consisted of:

(a) a photostat copy of an extract from the New Guinea Gazette of 31st August 1923 in which the Administrator proclaimed the area of Crown Lands as therein described to be a Timber Reserve;

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(b) a photostat copy of an extract from the New Guinea Gazette of 30th October 1937, notifying a meeting of the Land Board to consider sundry applications including one by Mr. & Mrs. Ross for an Agricultural Lease, 160 hectares, Henry Reid Bay;

(c) a sketch plan prepared for the Crown Solicitor by an unknown person showing an alleged overlapping of the area referred to in (a) with that comprised in the plan supplied by the Claimant for the purposes of the present claim;

(d) Statutory Declarations of A.H. Ross, the male applicant referred to in (b) and of E.P. Holmes, former Director of Lands in the Territory of New Guinea; and

(e) two wartime Terrain Studies, one showing by aerial photographs the considerable extent of the pre-war development of Waitavlo Plantation and the other showing its location.

There was also oral evidence to the effect that Mr. & Mrs. Ross had built a substantial house on Waitavlo and had planted 11,000 coconut trees. It appeared that Mr. Ross left the plantation to enlist in the Army early in 1940 and Mrs. Ross was evacuated to Australia in 1941. Neither returned to the plantation. Evidence was led on behalf of native objectors in opposition to the claim, in substance asserting that the subject land really belonged to them or their clans. There was also attached to the claim the original agreement made between Mr. Ross and the respondent for the sale of the leasehold interest.

The learned Acting Chief Commissioner had no hesitation in finding that at the Land Board Meeting held following the Gazette notification of 30th October 1937 the application of Mr. & Mrs. Ross therein referred to was successful, that shortly thereafter they went into occupation of the land, that they cleared a considerable portion of it, planted it up with a large number of palms and erected a substantial house of cement and timber and other improvements of a permanent nature. He went on to find that in so doing they had the express authority of the Administration and were in occupation by virtue of what is known as a granted application. In due course, he concluded, all formalities would have been tidied up, an agricultural lease would inevitably have issued in the form in the Schedule to the Land Ordinance 1922-1939 for the usual term of 99 years and the commencement date of the lease would have presented no difficulty because by Section 54 of the Ordinance the term of the lease was normally to be calculated from the date on which the application for the lease was granted.

The learned Acting Chief Commissioner also found that the successful application to the Land Board was not in fact followed by a

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survey. The land was not and could not be described with sufficient accuracy, no starting point could be determined nor the detail of the boundaries, nor the area thereby enclosed, without such a survey. The claimant was unable to assert that in fact a lease had issued or ever been signed pre-war and the Acting Chief Commissioner found that no lease had issued at the appointed date. He also found because of the absence of any evidence indicating that survey information sufficient for lease description purposes had been obtained, that no lease had been prepared to the stage where it was ready for signature let alone signed by the parties. Senior Commissioner Read in effect agreed with the Acting Chief Commissioner's findings and concluded that it was only the shortage of survey staff and the imminence of World War II which delayed the necessary survey and consequent issue of the leasehold document. Senior Commissioner Orken in substance agreed with the findings of the Acting Chief Commissioner although he did not specifically find that no survey had been carried out. However, I think it a fair inference from what he said in his reasons for decision that he accepted this fact. It is important I think to note that there was no evidence before the Land Titles Commission that the Administration had any title to the land in question save and except to the extent that the Timber Reserve proclaimed in August 1923 might be included in the 160 hectares in respect of which the application for a lease was granted to Mr. & Mrs. Ross in or after November 1937. This Reserve ran for 500 metres along the foreshore of Henry Reid Bay east of the Henry Reid River and was then bounded by a line running magnetic north for 2000 metres. At some unspecified distance along this length that line crossed the Henry Reid River and it may be that what appears as a roughly triangular piece of this Timber Reserve was or was intended to be included in the 160 hectares. No boundaries of the area claimed were set out in the claim nor specified at the hearing and I can see no warrant in the sketchy evidence to justify a conclusion that part of the Timber Reserve was in fact included in Waitavlo. As far as I can see it is a matter of sheer conjecture as to what might have been the boundaries of the 160 hectares contemplated in 1937. It is possible that the Rosses were in treaty with native owners of the subject land and that negotiations were in train for its acquisition by the Administration. But there is no evidence before the Commission upon which even this speculation could be based and it is of some significance that the Administration has not sought to establish its entitlement to be registered as either the owner of the land or of the reversion therein.

It will be convenient at this point to refer to the relevant legislation. By Section 13(2) of the Land Ordinance 1922-1939 the Administrator of the Territory of New Guinea was empowered to grant leases of Administration lands or lands the property of the Administration as provided by the Ordinance. By Section 15 leases of agricultural land could be for any period not exceeding 99 years. Section 17 provided that when an application for a lease was for land wholly or partly unsurveyed or for which

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for any reason a lease from the Administration in accordance with such application could not immediately issue the Administrator could nevertheless if he thought fit grant the application. Sub-section(2) of that Section provided that the granting of the application should not be held to guarantee the position, boundaries or area of the land described therein or the title of the Administration thereto and the granting of the application should be taken to be subject to survey and for such part only of the land therein as was Administration land. By Section 18 when any application for a lease under the Ordinance was granted by the Administrator the interest of the applicant therein could be assigned notwithstanding that a lease from the Administration had not been issued in respect thereof, and the section provided that an assignment was to be in one of the forms set out in the Second Schedule. In each of such forms the assignment is expressed to be of "all my right title and interest in and under the said application" (italics mine). By Section 19, upon registration of such an assignment the assignee succeeded to all the rights (if any) (italics mine) of the assignor under the granted application for the lease and the former could in like manner assign his interest therein and the lease could be issued to and in the name of the assignee under the last registered assignment. Section 20 directed that there should be kept at the Lands Office at Rabaul registers wherein were to be entered particulars of all assignments made under the provisions of the preceding two sections.

By a proclamation made on 15th July 1952 the then Acting Administrator purporting to act under Section 21 of the New Guinea Land Titles Restoration Ordinance 1951 (which I shall hereinafter refer to as the Restoration Ordinance) declared the Record of Granted Applications for Leases under the provisions of the Land Ordinance and the Register of Assignments of Granted Applications for Leases kept under the provisions of Section 20 to be lost registers. I can find nowhere in the Ordinance nor in the Regulations made thereunder any reference to or authority for the keeping of a Record of Granted Applications for Leases.

By Section 29 of the Land Ordinance it was enacted that survey fees as prescribed should be payable in respect of applications for land and that unless otherwise prescribed those fees should be deposited with the application. Where the Secretary, Department of Lands, Surveys, Mines and Forests certified that land in respect of which survey fees had been paid had in fact been surveyed and that further survey was unnecessary the survey fees were to be returned to the applicant. And by Section 31 if the fees were not paid as prescribed in the Ordinance or the Regulations thereunder the land applied (sic) for should not be granted. By Section 32 the Administrator was empowered to grant agricultural leases for any term not exceeding 99 years and the section contained special provisions for determination of rent in the case of such a lease for more than 30 years. If the term was for 30 years or less rent was to be payable during the whole term at the rate of 5% per annum on the unimproved value of the land.

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Regulation 7(5) of the Land Regulations directed that immediately upon an application being recommended by a Land Board the approved applicant should be called upon to pay the fee for survey. And by Regulation 7(6) upon payment, inter alia, of a survey fee being reported the Administrator was empowered to issue to the approved applicant if desired by him a permit to occupy the land, subject to survey and non-interference with any rights of natives or with any public rights. At the same time the applicant was required to pay the required rent or fee for occupation of the land and the fee for preparation of his lease. Regulation 7(8) and (9) directed that upon completion of the survey approved by the Chief Surveyor a lease of the land could be prepared and issued in accordance with the form in the Schedule to the Regulations. An application for a lease of native land could not be considered by the Land Board unless accompanied by a certificate signed by the District Officer of the District in which the land was situated certifying that the native owners were willing to transfer the land to the Administration and that the transfer would not be detrimental to native interests (Regulation 9). Regulation 23 contained detailed provisions for the conduct of the survey and for the survey fees to be deposited by the applicant.

Both the Senior Commissioners based their decision on what they conceived to be powers vested in them to act according to equity and good conscience contained in the Land Titles Commission Ordinance 1962-68 and in the Restoration Ordinance. On the appeal before me Mr. Gledhill, for the respondent, did not seek to uphold their decision on these grounds nor on any application of the provisions of Section 67(3) of the Restoration Ordinance. He was clearly right in his attitude because Section 67(3) applies only to claims for restoration to the register of freehold interests in land and Section 29 of the Land Titles Commission Ordinance does not allow the Commission to substitute its own notions of equity and good conscience for the law which it is called upon to apply. However, Mr. Gledhill sought to support the final order of the Commission by recourse to Sections 9 and 10 of the Restoration Ordinance and what he submitted was the proper construction thereof in their application to the facts of this case. He realized that it was incumbent upon him to establish, firstly, that Mr. & Mrs. Ross had an interest in land; secondly, that that interest had been properly assigned to the respondent and, thirdly, that such interest was registerable within the terms of Sections 9 and 10.

I turn first to the question of whether Mr. & Mrs. Ross were entitled to an interest in the subject land. The term "interest in land" is not a term of art and can have different meanings in different contexts. A perusal of Stroud's Judicial Dictionary or Burrows' Words and Phrases Judicially Defined is all that is necessary to give point to this statement; but in the context of the restoration jurisdiction it has but one meaning - that assigned to it by Section 4 of the Restoration Ordinance where it is enacted that:

> "interest" or "interest in land" means a proprietary right, title or estate in or in respect of land, whether corporeal or incorporeal, and whether legal or equitable, and includes a right appurtenant or appendant to any such right, title or estate, and an interest under a law of the Territory of New Guinea relating to mining or forestry, but does not include native customary rights.

It is I think clear beyond argument that if it were established that Mr. & Mrs. Ross had a leasehold interest by virtue of an Agricultural Lease then they, or Mr. Ross as the survivor of them, would have been entitled as at the appointed date to an interest in land and so have come within the first leg of Section 9 of the Restoration Ordinance. But the learned Acting Chief Commissioner found that no lease had issued on the appointed date. For my part I have no doubt as to the correctness of his conclusion that no survey as required by the Land Ordinance has at any relevant time been carried out over the subject land. As I have earlier stated, in my opinion the two Senior Commissioners concurred in this finding and until such survey was completed and approved by the Chief Surveyor no lease could have issued, and I am satisfied that in fact no lease ever did issue.

Mr. Gledhill, seeking comfort from observations by Senior Commissioner Read as to the procedure adopted in pre-war years with regard to applications for agricultural leases, sought to convince me that it was open to the Commissioner to find that a patrol officer's chain and compass survey had been carried out, and this may have been an adequate survey for the purposes of the lease. Mr. O'Neil, for the appellants, strongly objected to the use of these observations and indeed based one of his grounds of appeal on them. The procedure referred to by Senior Commissioner Read had not, so it seems, been referred to in evidence before the Commission nor had counsel for the appellants been given any opportunity to comment upon it nor to call evidence in opposition, if any existed. I am inclined to think that Mr. O'Neil's objection is sound but in the view I take it is not material to me to decide upon it on this appeal because in my opinion a chain and compass survey conducted by a patrol officer did not fulfil the requirements of the legislation and the Acting Chief Commissioner was quite correct in his view that no prescribed survey had in fact been carried out.

Mr. Gledhill then submitted that notwithstanding this finding the claimant could rely on the deeming provisions of Section 10 and so be entitled to registration in respect of a leasehold interest. In his submission when the Acting Chief Commissioner found that the Rosses had the express authority of the Administration to occupy the subject land and that in due course all formalities would be tidied up and an agricultural lease would inevitably be issued, it followed that if it had not been for the destruction of the registers then the inevitable process would have taken place and there would have been an entitlement to registration as at the appointed date and so his client would be deemed to be entitled to registration by virtue of Section 10(a). I cannot agree with this submission. It was not the destruction of

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the register which prevented registration but the failure to complete the process necessary for registration, that is the carrying out and approval of the survey and consequent preparation of the lease document.

Mr. Gledhill then turned to Section 10(b) and urged upon me a wide construction of that Section. He submitted, although without any evidence to support his submission, that there would certainly have been some documentation and indeed there may well have been a document prepared awaiting only the conclusion of the survey details and the necessary plan. However, on any view of the section I cannot see how such a document if it had existed could be described to be a document of an informal nature or one containing a mis-description and I reject this argument.

Finally Mr. Gledhill submitted that the proper application of Section 10(c) would achieve the result he sought. His argument was that if there was a granted application the claimant could in equity compel the Administrator to grant an agricultural lease to him. But I find no merit in this argument either. I cannot see any equity in the applicant under a granted application for a lease to compel the execution of a document of lease. Before this could be done certainty would have to be achieved with regard to the position, boundaries and area of the land. Section 17(2) specifically allows for the possibility of the Administration in fact having no title to the land and being unable consequently to issue a lease or for the possibility of some part at least of the land applied for not being Administration land; and as I have noted some significance should be attached to the fact that the Administration, so far as the evidence shows, has not claimed to have a freehold interest in this land restored to the register. And so in my opinion the learned Acting Chief Commissioner was right in his view that the claimant had failed to establish his claim to either a leasehold interest or registration thereof.

With respect to the claimed leasehold interest it is therefore unnecessary for me to consider whether the claimant has shown that he was at the appointed date entitled to that interest and to be registered as the owner thereof. For completeness I should add that some difficulty might have arisen in this regard because although the assignment from Mr. Ross to the claimant was made before the appointed date and the consideration for that assignment passed from the claimant to him also before that date the agreement between the parties was expressed to be subject to the consent of the Administrator and unless and until such consent should have been obtained to be void and of no effect. In fact the consent of the Administrator was not given until after the appointed date.

In a vigorous rearguard attack Mr. Gledhill finally brought up some new and previously undiscovered ammunition. He contended that if the claimant was not entitled to be registered as the owner of a leasehold interest he was at least entitled to be registered in the Register of Assignments of Granted Applications. This contention had not been raised before the Land Titles Commission and Mr. O'Neil, for the appellant, took strong objection to its being given consideration for the first time in the proceedings in this Court.

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I find it unnecessary to conclude upon the interesting and able arguments presented by both Counsel. In my opinion Mr. Gledhill fails in limine because whatever interest the Rosses or the claimant may have in a granted application it is not an "interest in land" within the meaning of the Restoration Ordinance. The permit to occupy under Regulation 7(6) of the Land Regulations which I am prepared to assume Mr. Ross had was not before the Court. I have no idea of the extent and boundaries of the land which he was permitted to occupy. But as I understand the effect of the Land Ordinance, while such a permit would make his entry and occupation lawful vis-a-vis the Administration it could give him no rights against anyone who might be proved to be the lawful owner of the land and it was specifically subject to non-interference with any rights of natives. Unless and until the Administration was shown to have title to the land which he was occupying he could not as I see it maintain ejectment or trespass and he had no more than a conditional licence to occupy. Section 17(2) prevented his having any proprietary right until it could be shown that he was on land to which the Administration had title. Consequently I am of opinion that the final order of the Land Titles Commission cannot stand.

There remains to consider what order this Court should make. On the hearing of an appeal from the Land Titles Commission the Court may affirm or quash the decision and if the justice of the case so requires substitute for the decision any decision that might have been given by the Commission. It seems to me that the justice of this case requires that I should do more than quash the decision simpliciter. I have no doubt that the Commission was correct in concluding that the application of the Rosses had been granted and it may be that the respondent will still be able to take steps to cause that granted application to mature into a leasehold interest. I could not on the material before me decide one way or the other on the question of native customary rights in respect of the subject land so as to preclude any of the parties asserting interests in jurisdictions other than the restoration jurisdiction. In any event, Clarkson J. in The Custodian of Expropriated Property v. The Director of District Administration; In Re Tonwalik Island (1), after a careful review of the relevant legislation took the view that once the Commission concludes that there was no registration nor entitlement to registration it is not required to pursue its enquiries further. Nor in my view is this Court if it comes to a similar conclusion. And I think that to avoid prejudice to any rights which may exist in or in respect of the subject land under the legislation or under the general law this Court should be careful to confine its decision strictly to the matters in issue before the Commission.

Accordingly the order of the Court will be:

(a) that the appeal be allowed and the final order quashed;

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(1) (unreported) Judgment No.526 of 2 Jun 69.

(b) that there be substituted for the decision of the Land Titles Commission a declaration that it is not established that the claimant was at the appointed date entitled to an interest within the meaning of Section 4 of the New Guinea Land Titles Restoration Ordinance 1951-66 in the land the subject of the provisional order in this case nor entitled to be registered or entered in a lost register as the owner of or the person entitled to that interest.

Solicitor for the Appellants: W.A. Lalor, Public Solicitor.

Solicitor for the Respondent: F.N. Warner Shand, Esq.