

HIGH COURT OF SOLOMON ISLANDS

ANDREW BUGA (Representing himself and the Descendants of Gounakwai tribe) -v- NAKANAKA

Civil Case No. 217 of 2003

Honiara: Brown PJ

Contempt - Customary Land Appeal Court decision given in 1985 - High Court application alleging breach of decision - power in the High Court to deal with lower court orders where contempt is alleged.

Contempt - Customary Land Appeal Court decision - language of the original order not couched in mandatory, prohibitive form - question of manner and extent of the CLAC a matter for CLAC - question of fact finding an issue for the High Courts consideration.

Practice and Procedure - rules of court - presumed power in the High Court to deal with contempt - need to find jurisdictional source of such power - considerations affect not issues which the High Court can pursue in the circumstances of customary land matters or matters arising whether other remedy available to aggrieved party - proper course to follow in the circumstances.

The applicant is a representative of the Gounakwai tribe in Kwai Island, East Malaita. He says that his tribe was given primary landowner rights over Gounakwai land which was clearly delineated in the hearing and decision of the Malaita Customary Land Appeal Court given on the 12 April 1985, subject to particular restrictions affording the respondent rights. He further says that the respondent has breached the terms of the CLAC decision and consequently comes to this court seeking remedy by way of leave to issue attachment for contempt of such decision.

- Held* 1. The principles to be applied, in considering whether the Courts discretion to grant leave, are those touched on by the White Book (Supreme Court Practice UK) as affected from time to time by this Court's deliberations.
2. A principle is that an essential prerequisite to a finding of contempt is that the factual basis shall be proved beyond reasonable doubt and that there shall have been *mens rea* (intent) on the part of the alleged contemnor.
3. With that principle in mind it is obvious that this Court should embark upon a factual enquiry of the CLAC award and the matters alleged by the complainant as giving rise to the breach of that award. Such a factual enquiry, going as it does into questions of custom and interpretation, immediately raises the issue of whether or not this Court has power in that regard.
4. The question whether the subject matter of this factual enquiry is one upon which this Court has authority to adjudicate must be answered in the negative for the Court is bound to follow the Court of Appeal ruling in Gandle Simbe's case, and the operation of s.254 of the Land & Titles Act (Cap. 133).
5. The fact that the High Court Rules presuppose a power to deal with contempt does not excuse this Courts obligation to be satisfied that it has power to entertain the claim.
6. The principle that this Court should be reluctance to allow process by way of contempt where, in civil proceedings, some other method of achieving justice is available, should be followed.
7. The CLAC is the appropriate forum to hear and determine complaint about compliance or otherwise of its orders and where it appears just, that lower court may seek this courts assistance in the carrying into effect of its findings and orders.
8. Leave is refused.

- Cases cited*
1. Gandle Simbe -v- East Choiseul Area Council anors Court of Appeal 1997.
 2. Beti -v- Allardyce Lumber Co. Ltd (1992) Court of Appeal No.5.
 3. Hamuel -v- George B. anors High Court CC 205/95.

- Legislation*
1. Land and Titles Act (Cap. 133) s.254.
 2. Local Court Act ss 12, 13, 14.
 3. Order 61 r.21 of High Court Rules.

Date of Hearing: 27th January 2004
Date of Judgment: 5th February 2004

***Michael Ipo* for the plaintiff**
***Ms Kersaw* for the defendant**

SUMMONS FOR LEAVE FOR APPLICATION FOR ATTACHMENT FOR CONTEMPT.

I am indebted to Mr Ipo, the Solicitor for the applicant for these brief facts.

"In 1984, the applicant's father namely Sade Uilae of Ngongositia Islands; Malaita Province took the Respondent in the present matter to the Malaita Local Court over the Gounakwai land. In the Local Court it was held that the applicant's father and the respondent both shared Gounakwa land. The decision of the Local Court was then appealed to the Malaita Customary Land Appeal Court by the present applicant. The Ground of appeals were outlined in the annexure "AB3" in the affidavit of the applicant namely Andrew Buga sworn on 25th day of August 2003. The Malaita C.L.A.C upon deliberation of the applicant's appeals held in its decision dated 12th April 1985 as follows: I quote:

"To make the matter clear we hold that the applicant and his line have primary rights over Gwaunkwai land and the

respondent and his line have secondary rights. This means the respondent and his line can continue to occupy and enjoy their homes and properties now on the land but they may not make any additions or alterations without first asking the consent of the appellant and his line."

As a consequence of what the applicant says is breach of the Customary Land Appeal Court Order (the Order) highlighted above, the applicant comes to this court for leave to apply for attachment for contempt, the alleged contemnor being the respondent and his tribe.

Leave is necessary for, by O61 r.21(1) the procedure for attachment shall be the same as in applications for Mandamus and *"Rules 2,4,5 and 6 of this Order shall apply accordingly to applications for attachment, so far as they are applicable."*

The evidence relied on by the applicant is that set out in his affidavit sworn on the 5 August and filed on the 28th August last. The evidence relate to factual matters about the erection of new houses *"for the conduct of running trade stores, fuel depot and dwelling houses without our consent as required by the said decision."*

Various photographs showing houses and other development were annexed to the affidavit. The material, as I say, is of a factual nature.

Order 61 r.2 provides that no application for an order of mandamus, prohibition, or certiorari shall be made unless leave has been granted in accordance with this Rule.

Such leave is a matter for the discretion of the court and must be exercised on proper principles. Our Rules spring from the United Kingdom Rules of the Supreme Court encompassed in the Annual White Books, so that the principles which a judge in this jurisdiction should have regard to, may be guided by those of the United Kingdom unless, in the judges view there is good reason to depart.

The first thing which comes to mind is the warning sounded by the White Book (Supreme Court Practice 1997 Vol. 1 52/1/3, 830).

"It is an essential prerequisite to a finding of contempt that the factual basis shall be proved beyond all reasonable doubt and that there shall have been men's rea on the part of the alleged contemnor".

The Court of Appeal in Gandle Simbe's Case (Gandle Simbe -v- East Choiseul Area Council Anors Cr of Appeal Case 1997 per McPherson J A, 19) said

"Schedule 3 (Constitution) and its provisions form part of the Constitution and are equal in status to other provisions in it. In providing that a local court is, subject to ss 8D, 8E and 8F of the Local Courts Act, to have exclusive jurisdiction in civil proceedings arising in connection with customary land, s.231 (1) of the Land & Titles Act does no more than provide for or regulate, within the meaning of cl. 3(3) of schedule 3, the proof or the manner in which, and the purposes for which, customary law is in this particular to be recognized, and the resolution of conflicts of customary law provided for. There is therefore no justification for regarding s.231 (1) as being in conflict with s.77 (1) of the Constitution and invalid. To the extent that a different view may have been adopted by Commissioner Crome in Fugui -v- Solmac Construction Co. Ltd (1982) SILR 100, 104, the decision should on this particular point, not now be regarded as authoritative".

Since that decision the Land and Titles Act (Cap. 133) has replaced the earlier Act (Chap.93) so that s.254 may now be read instead of the earlier s.231.

It reads -

s.254 -

"(1) A local court shall, subject to the provisions of this section, sections 12, 13 and 14 of the Local Courts Act, have exclusive jurisdiction in all matters and proceedings of a civil nature affecting r arising in connection with customary land other than -

- (a) any such matter or proceeding for the determination of which some other provision is expressly made by this Act; and**

(b) any matter or proceeding involving a determination whether any land is or is not customary land.

(2) A local court shall have jurisdiction to hear and determine any matter or proceeding of a civil nature referred to it by the High Court or a customary land appeal court under this Act.

(3) The decision of a local court given in exercise of its jurisdiction under this section shall be final and conclusive, and shall not be questioned in any proceedings whatsoever save an appeal under section 256.

(4) The provisions of this section shall have effect notwithstanding anything contained in any other law, other than sections 12, 13 and 14 of the Local Courts Act, or in any warrant establishing any local court.

(5) Nothing in the foregoing provisions of this section shall operate to confer or be construed as conferring, upon a local court any jurisdiction over any person who by reason of his status would not, apart from those provisions, be subject to the jurisdiction of a local court, except with the consent of such person.

The exclusive jurisdiction (in its appellate guise, having regard to the local chiefs role in determining custom bearing ss 12, 13 and 14 of the Local Court Act in mind) of the Local Court and a Customary Land Appeal Court in relation to "all matters and proceedings of a civil nature affecting or arising in connection with customary land (except (a) & (b) which need not concern us here)(Section 254 (1) Land & Title Act) was further recognized by the Court of Appeal where it found the jurisdiction of the High Court excluded (by the legislation) to issue certiorari in respect of a decision of a customary land appeal court given in the exercise of that courts jurisdiction. See Talasasa -v- Biku (1988) CAC 2/1987 at 4-5 and Paia -v- Talasasa (1980/81) SILR 93 approved by the Court of Appeal in Beti -v- Allardyce Lumber Co. Ltd (1992) CAC 5/92 at 9.

Clearly where matters of a factual nature must be investigated, and findings on facts applied to the Customary Land Appeal Courts decision, this Court cannot go behind the Court of Appeal's clear

imperative, and embark on a fact finding exercise. This Court has no jurisdiction. "Jurisdiction" is used in the sense of whether the subject matter of the litigation is one upon which the Court has authority to adjudicate. The combination of the Court of Appeals ruling in *Gandle Simbe's* case as it considered the Land & Titles Act, s.231 (now s.254) and the legislation, itself, plainly exclude this Court from entering upon a consideration of factual matters in this case. The appropriate place is the Customary Land Appeal Court.

The fact that the High Court Rules presuppose a power in this Court to deal with contempt, does not avoid the necessity to find jurisdiction to embark on the matter, and for the reasons that I have given, the High Court has no jurisdiction in these particular circumstances.

I was referred to three earlier decisions of this Court, where, Mr Ipo said leave had been granted. He did not point to any particular principle or methodology adopted, rather relied upon the fact of leave. I have been unable to locate the judgment of the Court in the first two, *Michael Aaka -v- John Moritana Anors* cc 1/93 or *Norman Malangina -v- John Mark Peleba* cc 209/01 but in *Hamuel -v- George B Anors* cc 204/95 I see that the case came before Commissioner (as he then was) Awich. The application appears not be the one for leave, rather the Commissioner appears to have presumed power to deal with apparent breaches of the CLAC Malaita order and entered upon a hearing by accepting evidence. It seems to have ignored the Court of Appeal warnings about the propriety of entering upon a fact finding exercise affecting customary land, although he was not satisfied, on the facts, that the complaint was made out. I am not constrained to follow the course of the Commissioner, and presume leave in the first instance. Nor do I consider the High Court can circumvent the intent of the legislature by considering to embark on a fact finding exercise in customary matters, by pointing to the Rule touching on contempt.

These supposed breaches of this order have continued since 1985. Clearly custom would have something to say about the apparent reluctance in the complainants to bring the transgressors to book before this. The Land & Titles Act expressly limits the time in which complaint may be laid by a party aggrieved by a decision of the CLAC and I must bear in mind the principles of "*laches*".

Leave is refused.

1. The court has no jurisdiction to embark on a fact finding mission involving custom in the context of the CLAC order.
2. The complainant has been guilty of "laches".
3. There is proper recourse by complaint to the chiefs and to the CLAC Malaita.
4. This courts injuncture powers may be utilized by the Local Court or CLAC to enforce its orders, provided such orders are in form able to be enforced (see *Gandle Simbe's* case, McPherson J A *obiter* at 22).

These other remedies, (instead of contempt proceedings) are urged as a general principle.

"Process by way of contempt should not be lightly employed, and not in aid of a civil remedy where some other method of achieving justice is available" (see White Book (1997) 52/1/3 - Other remedies - at 830).

Were an injunction to be sought, for instance, at the behest of the CLAC (reviewing its earlier order) to seek to enforce compliance, then this Curt would be properly seized of the cause. But when one looks at the language of the CLAC order or finding, this Court should be chary of hearing, even, a certified breach by the CLAC, when the language of the original order is not couched in mandatory, prohibitive form. Far better for the case to be remitted back to the CLAC as a formal complaint than to presume to know the manner and extent of its award.

Since these proceedings in this Court presuppose an aggrieved party, and the applicant here, relies upon the CLAC order of the 12 April 1985, I refer the affidavit of Andrew Buga of Kevai Island, East Malaita to the Malaita Customary Land Appeal Court as a request for clarification and elucidation of that order and for the Customary Land Appeal Court to hear such evidence in reply and make such findings and orders as it deems just in so far as it affects the matters raised by the applicant.

Leave having been refused, the summons of the 20th October 2003 and earlier motion is struck out. I make no order as to costs.

J.R. Brown
Judge