

JOHN SINA
NELSON EDIKERA
GEORGE GADO

1ST PLAINTIFF
2ND PLAINTIFF
3RD PLAINTIFF

-v-

ALLARDYCE LUMBER COMPANY LTD.
JOHN MARK MATUPIKO
ATTORNEY GENERAL

1ST DEFENDANT
2ND DEFENDANT
3RD DEFENDANT

High Court of Solomon Islands

(Palmer J.)

Civil Case: 327 of 1994
Hearing: 2/2/95, 3/2/95 & 15/2/95
Judgment: 21/2/95

P. Lavery for 1st, 2nd & 3rd Plaintiffs

T. Kama for 1st & 2nd Defendant

C. Ashley for 3rd Defendant

PALMER J: There are two applications before this Court. One is by Notice of Motion filed on the 16th of December, 1994 and the other is by Summons filed on the 28th of December, 1994.

The Notice of Motion seeks inter alia restraining orders against the First defendant from entering the customary land between the Kazo and Timbala rivers in Vella La Vella.

The summons filed on the 28th December, 1994 seeks inter alia, orders to have the Writ of Summons struck out.

This action was commenced by Writ of Summons filed on the 9th of December, 1994, together with a Statement of Claim filed also on the same date.

In an application for an interlocutory injunction the accepted criterias to be considered are as set out in the classic case, *American Cyanamid v. Ethicon Ltd* [1975] A.C. 396; the first of which is, whether there are serious issues to be tried. In conjunction to this question, is the requirement that there must be evidential backing for those issues.

In the Statement of Claim filed on the 9th of December, 1994 a number of issues have been raised.

In paragraph 1 of that Statement of Claim, the question of customary ownership over the land area between Kazo-Ongo River and the Timbala River has been raised.

There are three Plaintiffs that have filed suit against the Defendants, and their challenge of customary ownership is against the Second Defendant, John Mark Matupiko. However, I do note that in his submissions before this Court, Mr. Lavery did point out that the number of Plaintiffs had been restricted to three, in their representative capacities of their tribes. He pointed out that there could easily have been 10-12 Plaintiffs because there are actually a number of customary lands owned by separate tribes within that land area. However, for convenience and due to shortage of time in compiling affidavits etc, the claim had been limited to three Plaintiffs.

I will deal with this first issue first on the evidence before me, before going on to the other issues raised in the Statement of Claim. The purpose of this application is to determine whether there are serious issues to be tried on the evidence before me and at the same time to determine whether there are, or no issues in law or custom raised before me.

The three Plaintiffs claim to be representatives of three separate and distinct tribes, the Sauro, Songatiro and the Zodo tribes.

In the affidavit of John Sina filed on the 9th of December, 1994, he pointed out at paragraph 1 that he is the Chief of Sauro tribe and that the land area between Kazo and Timbala River is known as Sauro land, but now more commonly referred to as Irigila land.

Attached to his affidavit is a bundle of documents marked 'JS1', and in which a map of the area is shown at page 1. The land is divided into two parts, registered and customary land. At paragraph 2 of his affidavit, he pointed out that the registered part had been purchased from the Sauro tribe in 1907.

The purpose of introducing this piece of evidence, by Mr. Lavery, was it seems to try and show to this Court the proximity of the customary land in dispute to the registered land, and the accepted ownership in 1907 of that registered land, which should support in some way the claim of ownership of the Sauro tribe that it is more probable than not that they are also the owners of the adjoining customary land between Kazo and Timbala River.

With respect, the significance of the 1907 sale by the Sauro tribe of the registered portion of land to the question of ownership of the adjacent customary land in my view is minimal; for the simple reason that it is not binding on other parties or claimants.

In its claim by the Defendants to have the Writ of Summons struck out as having no basis in custom, one of the previous court cases dealt with in the Local court and on appeal to the CLAC was relied on by the Defendants. This was the case between Stephen Bosira, representing the Virasare and Povana tribes, and John Mark Matupiko, representing the Kubongava line. The area of land in dispute was the same area of land between the Kazo River and the Timbala River.

In the CLAC, the ownership was awarded to the Kubongava tribe. Mr. Kama relies on this to show that the Plaintiffs have no valid claim of ownership in custom against Mr. John Mark Matupiko. Also in support, the affidavit of Gomese Dululu was filed on the 5th of January 1995. In that affidavit Mr. Dululu alleges that he is the Chief of Sauro tribe and not the First

Plaintiff. At paragraph 2 of his affidavit, he explained how the chieftainship over the Sauro tribe was transferred to him and Nelson Vaevo. He also explained that he was responsible for the land area owned by the Sauro tribe from Timbala River to Paraso River, whilst Vaevo was responsible for the land area between Timbala River to Mundimundi.

At paragraph 3 he states that he was not consulted about this action and that he did not agree with it and neither authorised it.

At para. 4, he stated that the First Plaintiff belonged to a branch of the Sauro Tribe which was called Matusauro, which originated from Ranogga. He also pointed out that the real Sauro Tribe that owned land from Irigila to Mundimundi is the Ulukue Susu Sauro. He says that him and Chief Vaevo are members of that branch of the Sauro tribe.

Nelson Vaevo also filed an affidavit in support. on the 28th of December, 1994. Most of the things which he stated are similar to the things stated in the above affidavit of Chief Gomese Dululu.

Other affidavits too have been filed in support to show customary ownership over the said land. It is not necessary to consider them in detail at this point.

In his affidavit in reply filed on the 1st of February 1995, at paragraph 2, John Sina disputed Vaevo's chieftainship claim from Ulukue Susu tribe. He also denied the allegation that his tribe branch originated from Ranonga. He pointed out that both the Matasauro and Ulukue Susu originated from two twins Bilokovi and Ruakae, four generations after the first woman of Sauro named Vala. In support of this a copy of the genealogy of the Sauro tribe has also been filed attached to the affidavit of Nelson Edikera and marked "NE2".

At para. 3, John Sina denied the existence of such a meeting described by Mr. Dululu, Vaevo and others, in which they were appointed as chiefs by George Maelagi. He pointed out that George Maelagi handed over the authority and custom moneys to him as Chief in

accordance with custom. In support, the affidavit of Margaret Ngalasole Kingudona filed on the 1st of February, 1995, stated at para. 2, that George Maelagi appointed John Sina as Chief, three months before he died. At para. 5, she denied that there was any such meeting as described by Vaevo at para. 5 of his affidavit.

At para. 6 she also pointed out that Matusauro Tribe is not from Ranogga Island. She reiterated that the first woman of the Sauro Tribe was Vala from Vella La Vella.

I have gone into some detail into the claims in custom over chieftainship, origins of the Sauro tribe and the branch tribes and membership, to show that the Defendants have not shown conclusively that the First Plaintiff does not have a valid claim against them in custom.

The various conflicts and disputes in custom raised in the various affidavit evidences filed, showed clearly that there are serious questions to be tried. They showed too that the Defendants have not proven conclusively that the CLAC decision in case No. 5/80 between Stephen Bosira and John Mark Matupiko, is binding on the Sauro Tribe. They have not shown conclusively that the Virisare and Povana tribes' claim is exactly the same as the Sauro tribe's claim, and that therefore they are bound by that 1983 CLAC decision. The Sauro Tribe's claim of ownership over Sauro land or Irigili land, at this point of time is an arguable issue. The affidavit evidence filed showed that Sauro's claim is not based on the Virisare and Povana tribe's claim but, is separate and distinct.

I now turn to consider the 2nd Plaintiffs claim of ownership.

In the affidavit of Nelson Edikera filed on the 9th of December, 1994, at paragraph 2, he explained how ownership over Pikevo land came to be acquired:

"This Land has been ours from time before when my grandmother VALA bought the land from the SAURO TRIBE by payment of custom money and holding of a feast. This custom money is still held by Chief John Sina."

What is clear from this statement is that the Songatiro tribe's claim is based almost entirely on the validity or claim of right, of the Sauro tribe. If the Sauro tribe's claim of right fails then it would appear that the Songatiro tribe's claim, will also fail.

The Second Plaintiff's claim of ownership in custom therefore at this point of time, is also an arguable one. It is *not* totally without basis in custom.

The Third Plaintiff's claim of ownership in custom is different. At paragraph 2 of the affidavit of George Gado filed on the 9th of December, 1994, he stated:

"This land came into our ownership because the Virisare tribe compensated us for the accidental death of my grandfather whilst collecting Ngali nuts for them. The Land was given in compensation for his death in accordance with our custom".

Now, what is plain from this statement, is that the Zodo Tribe's claim of ownership is based on the ownership of that land by the Virisare Tribe. However, as pointed out earlier on, that land (known in the 1983 CLAC case as KAZO land) had been won by the Kubongava tribe as against the Virisare tribe. The Zodo tribe's claim of ownership therefore had already been adjudicated upon in the 1983 CLAC case between the Virisare and Povana Tribes, as against the Kubongava tribe. That being the case, the Zodo tribe is bound by that 1983 CLAC case, and estopped from asserting any fresh claims of ownership as against the Kubongava tribe.

The assertion therefore by the Second Defendant that the 3rd Plaintiff has no basis of any claim in custom as to ownership of any areas of land between the Kazo and Timbala River is correct.

The Third Plaintiff's name therefore should be served, and struck out as having no basis of a valid claim against the Defendants, in custom. I will direct that he be made to pay the costs of the Second Defendant.

The next issue raised in the Statement of Claim is that the grant of timber rights by the Second Defendant to the First Defendant is void, on the basis that the application 'form I' and determination of the Vella La Vella Area Council did not include the Kazo or Irigila land. Accordingly, it is alleged that no valid timber rights agreement could possibly have been entered into, and subsequently no valid licence could have been issued.

Again a number of affidavits have been filed in support of this claim. The affidavit evidence adduced that is not in dispute is that there were two applications for timber rights hearing considered by the Vella La Vella Area Council. The first one had to be aborted about half-way through the proceedings due to non-conformity with the procedural requirements as set out in section 5C of the Forest Resources Timber Utilisation (Amendment) Act 1990. As a result, the whole proceedings had to be re-commenced de-novo.

For purposes of comparison, I will consider the relevant parts of the minutes of the Vella La Vella Area Council in its first meeting.

The importance or significance of such a comparison is that the information in that minute should be very similar to the information contained in the second application. The reason being that the irregularities in the first hearing were on procedural grounds only and not on the substantive issues before the Area Council.

A copy of the minutes of that first meeting of the Area Council is annexed to the affidavit of John Sina filed on the 9th of December, 1994, in the bundle of documents marked exhibit "JSI", and beginning at page 5 of the bundle.

In attendance at that meeting, held at Liangai Village, Vella La Vella, in 1991, were some 100 or more people. Also present in that meeting was the Member of Parliament for Vella La Vella, Mr. Allen Paul.

At page 7 of the bundle at para. 1.4, the name IRIQILA LAND appears. Under the sub-heading 'Applicants List', no names are written. Normally, the 'Applicants List' consists of the names of the local customary landowners, who claim ownership over the timber rights, and are in favour of granting them to the Logging Company, for felling, extraction and export.

Under the sub-heading 'Objectors List', there is a long list of some 19 names, including the name of the First Plaintiff.

At page 9 of the bundle, paragraph 1/4/91, under the heading "IRIQILA REGISTERED AND CUSTOMARY LAND" it reads:

"All objectors listed above objected the Company, and whoever an applicants to IRIQILA Registered and customary Land."

At page 13 of the bundle, paragraph 1/12/91, we have the comments of the First Plaintiff recorded:

"Everything need mentioning to the Area Council today are already revealed by my two colleagues. The only thing I can and wish to add is my concern towards the well-being of the community as a whole in Irigila area. Finally, I totally object the operation of the Company in Irigila registered and customary land."

At page 15, paragraph 1/121/91 under the heading "DETERMINATION - IRIQILA LAND" the Vella La Vella Area Council made the following determination:

"The area Council of Vella La Vella examined the objections from B. Selevaga, Z. Ala, J.M. Nonita, J. Sina, W. Vouku, A. Diriniru and A. Zogo, and determined that objections are not related to timber Rights application, but mainly on land matters, some of the objections bears under the powers of the Chief of Irigila,

therefore the council give consideration on the objectors application, representing Irigila Registered and Customary land be excluded in the Form II."

(underlining mine)

The second meeting of the Vella La Vella Area Council was conducted at a number of villages, over a period of several days.

The Area Council first convened at Boro village, Dovele on the 25th of August, 1992. A copy of the minutes of the meeting held that day are attached to the affidavit of Marlon Kuve filed on the 31st of January, 1995, marked exhibit "MKI".

Those who were recorded as being in attendance that day included Mr. Hilton Taylor from the Ministry of Natural Resources, Kevin, a Company representative, and John Erick from the Western Provincial Office.

At page 2 of the minutes, at para. 1-4, the announcement made by the President of the Vella La Vella Area Council was recorded as follows:

"The President, Marlon Kuve announced the application under consideration covers from Bae point to Kazo by Allardyce Lumber Co. Ltd. in order to acquire Timber Rights to do the Logging."

(underlining mine)

At page 7 of the minutes at paragraph 3.3, the Hon. Allan Paul, member of National Parliament for Vella La Vella, spoke on behalf of the Applicants (those interested in negotiating with the Company over the question of grant of timber of rights). His comments are recorded as follows:

"He (Allan Paul) drew Vella La Vella Island map on the black board and explained the 1st Application by Allardyce Lumber Co. Ltd. on Dovele and (sic)

area where (sic) from Bae to Timbala. The Second Application by Allardyce Lumber Co. Ltd. again to Dovele Land area, where from BAE to KAZO. He continued to explain, that they have various meeting held about the contiguous land on the Irigila side (Kazo). He told the Area Council, that it will be heard and will be known at Irigila Timber Rights hearing by the objectors of the contiguous land."

(underlining mine)

The recorded statement of the Honourable member of Parliament is clear and unequivocal as to the land area, the subject of the Area Council's consideration and determination.

At page 9 under the sub-heading "QUESTION" at paragraph 5(e) a question was posed by Mr. Willington:

"Dovele land begins from where to where? (boundaries)

Paragraph 5(f) contained the answer:

"The President, Hon. Marlon Kuve answer it by saying from Bae to Kazo."

(underlining mine)

At paragraph 5(g), in the process of asking a question, one of the persons in attendance commented also about the boundary of the land in the application, the subject of the grant of timber rights:

"Jarius Marlava asked Question. In the map it was confirmed from Bae to Kazo".

(underlining mine)

At the last page of the minutes of that meeting there is a determination which read:

"The Vella La Vella Area Council referred back to the evidences on Dovele land area from Bae to Kazo and pointed out the contiguous land to be excluded, because the concurrences of the objectors was to be settle by the both parties later (Applicants and objectors) Kazo Contiguous land."

Mr. Lavery seeks to point out that the recorded minutes of that meeting couldn't be any clearer; that the Kazo Contiguous land was to be excluded, and secondly, that the area for determination of grant of timber rights by the Vella La Vella Area Council was expressly and specifically described, and referred to throughout the meeting not only by the President and various persons in attendance but also by one of the Applicant himself, the Hon. Allan Paul. Mr. Lavery also pointed out, that in attendance throughout that meeting was a representative of the First Defendant, and yet he did not point out or raise with the President of the Area Council, that the Company's application was in respect of land from Bae to Timbala or that it also included the area between Kazo and Timbala River.

In the meeting held at Irigila on the next day 26th of August, 1992, which was simply a continuation of the meeting from the previous day, almost the same things said in the previous day were repeated in that meeting.

The records showed at page 1, paragraph 1:

"Hon. Allan Paul explained the application by Allardyce Lumber Co. Ltd is from Bae to Kazo".

At page 2, paragraph 1, there is a note of what the representative from the Ministry of Natural Resources said

The representative of MNR's Mr. H. Taylor pointed out that Allardyce Lumber Co. Ltd's application form is not included in your Area."

The implication this statement raises seems to be that Irigila land is not included in the Company's application.

In the very next paragraph, it is recorded:

"Hon. Allan Paul referred to Dovele Timber Rights Hearing on 25/8/92. The Dovele land area boundary is from Bae to Kazo. He explained the contiguous land at Kazo as boundary. First application was from Bae to Timbala land. Second application is now from Bae to Kazo." He explained that the contiguous land were also interested by the Company and it is from objectors to decide. The contiguous (sic) land on Customary land. Mr. John Mark owns the registered land and Customary land, and he wants to include in the Form I application."

The above recorded comments again showed clearly that the area for determination before the Area Council was from Bae to Kazo. There is however, it seems an expression of interest in the last part of that paragraph, on the part of John Mark, to include his area of land (both registered and customary land) in the Form I application. There is no elaboration however, as to where and what, that land area is.

There is then below that a record of a number of objectors' comments.

Affidavits have been filed on behalf of the Defendants to show that the comments of the objectors in response to Hon. Allan Paul's comments were in effect a recognition of the Second Defendant's claim of ownership over the contiguous Customary land (see affidavit of Allan Paul filed on the 28/12/94 at para. 10; affidavit of Vaevo Nelson filed on the 28/12/94 at para. 9 and 10; affidavits of five Area Councillors filed on the 28/12/94, at para. 4 (but note that Caleb Moatakapu had subsequently filed another affidavit); and affidavit of John Mark Matupiko filed also on the 28/12/94 at para. 9).

Affidavits in reply however have also been filed by the President, Marlon Kuve, on the 31st of January, 1995 at paragraphs 4-9, disputing the above conclusion. Also the affidavit of Caleb Moatakapu filed on the 2nd of February, 1995 at paragraphs 3-5, supported Marlon Kuve's evidence, and the unsworn affidavit of Allan Lonipitu at paragraph 2.

Then we have the recorded statements of what appears to be two determinations by the Vella La Vella Area Council over Irigila land.

The first determination reads at the second, third and fourth paragraphs:

"The Vella La Vella Area Council members pointed out the boundaries of Dovele land Area Covers, BAE to KAZO was very clear and should give a clear determination to the applicants.

The objectors from portion land KAZO were later withdrawn in the Irigila Timber Rights hearing on the 26th August 1992.

The portion land KAZO were no (sic) included. The concurrences of the objectors was to be settled by the both parties later. (KAZO land).

The second paragraph is fairly clear. What it seems to indicate is that the Area Council could make a clear determination in favour of the Applicant.

The third paragraph however, is not so clear. It could mean on one hand that the objectors from the Kazo land areas had withdrawn their objections in respect of the Company's application for timber rights over the land area from Bae to Kazo. On the other hand, it could also mean that they were withdrawing their objections over their land area (Kazo land) and thereby allowing the second Defendant to be determined as the sole owner of the timber rights over that land.

The fourth paragraph however, seems to say that the Kazo land area was not to be included.

The second recorded determination is fairly clear and unequivocal. It reads:

- "Reason: (a) Realising the complexity of this area (Kazo portion land) the Vella La Vella Area Council reasoned for both parties to consider taking reconciliation measure between themselves.*
- (b) As part (a) did not materialise both parties were advised to battle this out competent authority to identify the land owning group. (Kazo portion land)".*

In his submissions before this court Mr. Lavery seeks to point out that all the documentary and affidavit evidence submitted on behalf of his clients showed, that the area determined by the Vella La Vella Area Council was in respect of the land area between Bae and Kazo. If that is correct, then the subsequent grant of timber rights and licence were a nullity from the beginning as there was no determination in respect of the land area between Kazo and Timbala.

I have considered the affidavit evidence adduced on behalf of the Defendants carefully. I am not satisfied however that what has been adduced had shown conclusively, or to my satisfaction, that there is no basis or claim in law in respect of the timber rights agreement and the licence issued.

What is clear in my mind is that there indeed exist serious questions to be tried in respect of the validity of the timber rights agreement and the validity of the licence subsequently issued. Sufficient evidence has been adduced to support this.

I am satisfied that there are rights being asserted with evidential backing which would be violated if this Court does not impose an interlocutory injunction. In the Statement of claim

filed on the 9th of December, 1994 at paragraph 6, it was alleged that the Company had indeed entered the said Land and commenced road construction and tree felling operations. The Company has however since the 16/12/94 undertaken not to operate over the said land until the outcome of this interlocutory hearing. There is no evidence submitted to show that the Company had not complied with its undertaking.

I am satisfied, that the status quo must be preserved pending trial proper of the serious questions raised in this action.

The application by summons filed on the 28 December, 1994, by the first and Second Defendants accordingly, is dismissed.

The application by Notice of Motion filed on the 9th of December, 1994, by the Plaintiffs for restraining orders is granted forthwith.

Orders:

1. *The First Defendant, its servants or agents are restrained from entering the Land between the KAZO and TIMBALA rivers in Vella La Vella as shown on the maps annexed to the affidavit of John Sina and Nelson Edikera filed on the 9th December 1994, until trial or further order.*
2. *The First Defendant be restrained from paying any royalty arising from the felling of timber within the said Land to the Second Defendant or any other person save as provided for in this order.*
3. *The First Defendant pay the sale proceeds of any timber extracted from the said Land into an interest bearing account until trial or further order.*

4. *The usual requirement for an undertaking for damages on the issue of such an injunction on the part of the Plaintiffs is dispensed with.*

5. *The costs of the First and Second Plaintiffs are to be borne by the 1st and 2nd Defendants.*

Further, I direct that a statement of defence be filed within 14 days.

I believe an action has been commenced under the Local Courts Amendment Act of 1985. That is a matter between the parties to pursue in the normal way and I am of the view that it is not necessary to make any referrals or directions at this point of time.

ALBERT R. PALMER

A.R. PALMER

JUDGE