OBED ALEMAENA & LUKE ETA V. BULACAN INTEGRATED WOOD INDUSTRIES (SI) LIMITED & ATTORNEY-GENERAL

High Court of Solomon Islands
(Palmer ACJ)

Civil Case Number 155 of 2002

Hearing: 31st July 2002
Judgment: 7th August 2002

A. Radclyffe for the Applicants/Plaintiffs
P. Tegavota for the First Respondent and Third Respondents/First Defendant and Third Defendants
F. Waleanisia for the Attorney-General

Palmer ACJ: The Plaintiffs apply by Summons filed 18th June 2002 for orders inter alia to restrain the First Defendant, its servants and agents from continuing with all logging and associated operations on West Barora Ite customary land (hererinafter referred to as "West Barora land"), Isabel Province. The Plaintiffs are representatives of their Taraoa and Kikituru Clan respectively. They assert claims of ownership and usage over the said customary land going back for many generations.

They also contend that the felling licence number A10011 dated 1st May 2002 which was granted to the First Defendant to cut, fell and take away timber from East Barora Ite customary land and extended to cover West Barora land is void to the extent that the Plaintiffs consent had not been obtained. They say that the provisions of the Forest Resources and Timber Utilisation Act had not been complied with in that no meeting had been held in the area of the land and no timber rights determination made as required by law.

They claim damages for trespass, conversion of trees, an injunction against the First Defendants and a declaration that the felling licence A10011 is void to the extent that it purports to grant rights to fell trees on West Barora land.

The First and Third Defendants Arguments

The First and Third Defendant's ("Defendants") oppose the application for interlocutory injunction. They say that the triable issues raised essentially fall within the exclusive jurisdiction of Custom Chiefs and the Land Courts under sections 12, 13 and 14 of the Local Courts Act and section 254 of the Land and Titles Act (Cap. 133). This court therefore has no jurisdiction and cannot issue any injunction until there is a final decision in favour of the Plaintiffs. Learned Counsel Tegavota relied on the decision in *Gandly Simbe v. East Choiseul Area Council and Others Civil Appeal Case 8 of 1997 judgment of the Court of Appeal delivered 9th February 1999* ("Gandly Simbe's Case") and also *Nathan Kere v. Paul Karana CC 258 of 2000 judgment delivered 27th November 2001.*

Triable Issues

Are there serious issues to be tried? Have the Plaintiffs shown they have legal or equitable rights, which are amenable to the jurisdiction of this court? The hurdle, which the Plaintiffs have to overcome is that they have to show they have sufficient interest in the West Barora land that is capable of supporting their claim to impugn the timber rights agreement of the 1st and 3rd Defendants (see Gandly Simbe's Case).

Sufficient interest

Do the Plaintiffs have sufficient interest? Plaintiffs rely on two affidavits of Obed Alemaena filed 18th June 2002 and 19th June 2002. They say they have exercised rights of ownership over the said customary land for many generations consistent with their claim and that it had not been challenged until the granting of the licence to the First Defendant. Secondly, they say they have not sat back but had sought to pursue and protect their interests over the said land right from the beginning (see first affidavit of Obed Alemaena filed 18th June 2002 and exhibits "OA4", "OA5", "OA6", "OA8", "OA10", "OA11", "OA12" and "OA14"). Thirdly they had commenced proceedings before the Chiefs (see Exhibit "OA15"). Fourthly, they say there is no binding decision or any final decision of the Land Courts in respect of any claims between them and the Third Defendants.

Exhibit "OA4" is significant because it showed that well before the licence had been issued the Plaintiffs had acted promptly in making known not only to the Commissioner of Forests but other relevant authorities of their potential claims of ownership over the said customary land. They had also not sat back but had actively sought to have the matter referred to the Chiefs pursuant to the Local Courts Act. These seek to demonstrate in my respectful view that the Plaintiffs cannot be regarded as mere busybodies but are persons with genuine interest and concern over West Barora Land. They go to show that they have sufficient interest and are entitled to come to court seek orders to challenge the validity of the timber rights agreement and the timber licence issued in favour of the First Defendant.

Gandly Simbe's Case can be distinguished to the extent that whilst the Plaintiffs did not exercise any rights under the Forest Resources and Timber Utilisation Act to appeal against any decision regarding identification of the persons entitled to grant timber rights, they had not sat back but had pursued rights under the Local Courts Act. If at the end of the day the Plaintiffs should win their case or demonstrate that they have rights of ownership in conjunction with that of the Third Defendants, then that could overturn the approved agreement and in turn the timber licence issued in favour of the First Defendant. The contentious issues on whether the Plaintiffs have rights of ownership or are members or descendants of the Paikei Clan are matters for determination in the appropriate land tribunals and courts. It is sufficient that the Plaintiffs have shown that they have sufficient interest. That entitles them to come to court for interlocutory injunction.

I am satisfied in such circumstances, this court also does have jurisdiction to take such steps as are necessary for purposes of assisting the Chiefs and land courts in making determinations on questions of ownership (see *Osiramo v. Mesach Aeounia CC 20 of 2000, 17th May 2000*).

In *Nathan Kere v. Paul Karana CC 258 of 2000 judgment delivered 27th November 2000*, his Lordship Kabui J. declined to issue interim restraining orders for a claim for trespass to customary land on the basis that his Lordship considered it material that the Plaintiff had not commenced proceedings before the Chiefs. His Lordship took the view that it was important that the Plaintiff commence proceedings before the chiefs before taking up a claim for trespass in the High Court. That case can be distinguished from this case where a claim had been commenced with the Chiefs.

This case is similar to the case of *John Osiramo v. Mezach Aeounia CC 20 of 2000 judgment delivered 17th May 2000* where his Lordship Kabui J. granted interim orders to aid the Chiefs in the statutory performance of their functions to determine questions of ownership of customary land. *In Joe Rody Totorea and Others v. Taiarata Integrated Forest Development Company Limited and Another CC 204 of 2000 judgment 8th September 2000*, ("Taiarata's Case") his Lordship Kabui J. distinguished the claim of trespass to customary land per se as opposed to claims involving logging cases, where the issues pertain to questions of ownership of timber rights as opposed to ownership of land. His Lordship declined to grant interim orders based on the basis that there was no final decree of ownership over customary land.

The case here is consistent with those logging cases that his Lordship Kabui J. referred to in Taiarata's Case, in that it pertains to the determination of an approved agreement under the Forest Resources and Timber Utilisation Act and not trespass per se. In such cases, the test is whether the Applicant/Plaintiff has demonstrated that it has sufficient interest in the West Barora land that is capable of supporting their claim to impugn the timber rights agreement and that would attract an interlocutory restraining order. That is why in this case, the question of whether action has been commenced before the chiefs to support the Plaintiffs contention of ownership over West Barora land is relevant to the question of determining whether the Plaintiffs have sufficient interest or not and whether there are triable issues or not, whilst in Taiarata's Case a similar action was considered not sufficient by his Lordship.

The case of *MSL Import and Export Company Limited v. David Maure CC 66 of 2001 judgment delivered 31st October 2001*, relied on by Mr. Tegavota can also be distinguished in that the Applicant/Defendant in that case did not seek to apply to restrain the Respondent/Plaintiff from its logging activities. Instead he sought to have the proceeds of logs exported restrained and paid into a Solicitors Trust Account. The court therefore could not grant what it was not asked to give. The court nevertheless did allow part of the proceeds to be injuncted and thereby indirectly affirmed the Applicant/Defendant's position that it had shown to the satisfaction of the court that it had sufficient interest and that it was no mere busybody.

The final case cited was *Vaedalyn Tutua & Others v. Kongu Ngaloso Timber Company and Omex Limited CC 63 of 2001 judgement 5th June 2001*. In that case his Lordship Sir John Muria held that the fact that action had been commenced before the Chiefs was sufficient to demonstrate that the Plaintiffs had sufficient interest and had disclosed serious issues that was capable of grounding an interlocutory injunction in favour of them. Again that case supports the approach taken by the courts on this important question and is consistent with the conclusion reached in this case that the Plaintiffs have shown that they have sufficient interest and that there exist triable issues.

Are damages adequate?

It is obvious that damages would not be a sufficient remedy to compensate the Plaintiffs should they win their case at the end of the day, although the First Defendants had indicated that they would be able to pay substantial amounts of compensation to the Plaintiffs. The issue here however is not money or compensation alone, but the right to have the trees dealt with as they wish, including not having them felled. Any large scale logging operations entail massive upheaval of the land and forest eco-systems and inevitably irreparable damage is caused.

On the other hand, whilst damages would be an adequate remedy to compensate the Defendants, it is clear the Plaintiffs do not have the means to compensate the Defendants should they win their case at the end of the day.

Balance of convenience

On the question of where the balance of convenience lies, in my respectful view, it must lie with maintaining the status quo. There has been no delay in the filing of the Plaintiff's application. They have acted promptly and therefore the scale of justice must fall in their favour. I am satisfied the orders sought in the Summons of the Plaintiff filed 18th June 2002 should be granted.

ORDERS OF THE COURT:

1. **Order that the First Defendant, its servants and agents cease all logging and associated operations on West Barora Ite customary land, Isabel Province..**

2. **The First Defendant to provide an account within 14 days of all trees of commercial value felled on the land pay the FOB value thereof less reasonable expenses into an interest bearing account in the joint names of the Solicitor's for the Plaintiffs and the First and Third Defendants.**

3. **That the First Defendant, its servants and agents vacate the said land and remove all its logging equipment there-from within 7 days of the said account being taken.**

4. **Costs in the cause.**

THE COURT.