

GANDLEY SIMBE AND NATHIEL MELA (representing the Dali tribe) -
v. HARRISON BENJAMIN AND PETER MADADA, (representing the
Volekana tribe) AND EAGON RESOURCES DEVELOPMENT
COMPANY (SI) LTD

HIGH COURT OF SOLOMON ISLANDS.
(KABUI, J.).

Civil Case No. 205 of 2004.

Date of Hearing: 30th July 2004
Date of Ruling: 5th August 2004

P. Tegavota for the Plaintiffs.
G. Suri for the 1st and 2nd Defendants.

RULING

Kabui, J. This is an application by summons filed by Messrs Simbe and Mela, of the Dali tribe on 17th June 2004 seeking the following orders-

1. That the *exparte* order by this Honourable Court on 2nd June 2004 be set aside forthwith.
2. Further or other order as the Court deems fit.
3. Costs of this application be paid by the Plaintiffs on indemnity basis.

The *exparte* order that they wish to set aside was made by this Court on 2nd June 2004. The order was a restraining order the terms of which are set out in that order. The ground upon which the application was being sought had not been stated in the summons but was canvassed in the affidavits filed and in the submissions made by Counsel for the Volekana tribe, Mr. Suri.

The Volekana tribe's case.

Their case was that the Chiefs' determination upon which this Court made the order it made on 2nd June 2004 was the second determination of the Chiefs. In other words, the Dali tribe simply picked the Chiefs' determination which was in their favour and failed to disclose the first one which was not in their favour. This position is set out in the affidavits filed by Messrs Heinz Vaekesa and Harrison Benjamin on 17th June 2004 in support of the Volekana tribe. Counsel for the Volekana tribe Mr. Suri, argued that the Chiefs did not have the power to vary their own determination. He argued that the first Chiefs' determination dated 16th February 1999 was binding on the parties to the dispute and so the second Chiefs' determination was simply irrelevant. He pointed out that the correct thing to do in this situation was for the Dali tribe to move the dispute into the Local Court, which they had not done. Having said that, he further argued that the Chiefs could not dislodge the determination of the East Choiseul Area Council made in favour of the Volekana tribe in 1995. By failing to appeal to the relevant CLAC against the determination of the East Choiseul Area Council, the Dali tribe had forfeited its right to challenge the rights of the Volekana tribe by waiver or by estoppel.

The Dali tribe's case.

Counsel for the Dali tribe, Mr. Tegavota, had conceded the non-disclosure of the first Chiefs' determination made on 16th February 1999 at the hearing of the *ex parte* summons filed by Messrs Simbe and Mela on 28th May 2004. He argued that the Chiefs' hearings were about ownership of customary land and not about timber rights and so the Dali tribe was not estopped from going to the Chiefs' forum for that purpose. He further argued that the second Chiefs' hearing was simply a continuation of the first hearing and so both determinations made by the Chiefs were valid.

The issue.

The issue here is the discharge of the interim injunctive order I made on 2nd June 2004.

Non-disclosure of material evidence.

One main requirement for *ex parte* application for an interim injunction is the disclosure by the applicant of all material evidence including any evidence that may well be against the applicant at the *ex parte* hearing. An equitable remedy is discretionary and so all relevant evidence must be shown to the court to enable it to exercise its discretion properly and correctly.

The *ex parte* order I made on 2nd June 2004 was an interlocutory one. I did not hear the other side of the case for the Volekana tribe before I made that order. The evidence was all one-sided in favour of the Dali tribe. That was alright provided the Dali tribe did not withhold any evidence that was against it in its application for *ex parte* interim orders. I made that same point in *Alfred Uiga & Jack Sarere v. Wilson Habo*, Civil Case No. 136 of 1998 and *Kongguloko Forest Resources Development Company v. Dennis Lokete and Others*, Civil Case No. 159 of 2002. (Also see *John Labere and Agnes Votaia v. Kalena Timber Company Limited*, Civil Case No. 211 of 2000). It is not disputed that the Chiefs' hearing on 30th September 1999 was an *ex parte* hearing in that the Volekana tribe was not represented at that hearing. Exhibit "HV3" attached to the affidavit of Mr. Heinz Vaekesa filed on 17th June 2004 shows that the area of land being under consideration by the Chiefs was between Kozo stream and Lalaguti stream. The Chiefs' determination was that the land between the Kozo stream and Lalaguti stream belonged to the Dali tribe, comprising Volekana 1 and Nola land areas represented on the map as blocks 1, 2 and 3. So Nola land is under the authority of the Dali tribe. However, according to the Volekana tribe, block 3 is Vure land or Volekana 1 and 2. The logging plan operation covers block 3 and part of block 2. Exhibit "HB1" (the first Chiefs' determination made on 16th February 1999) attached to Harrison Benjamin's affidavit filed on 17th June 2004 shows that Okolo land belongs to the Dali tribe. The boundary of Okolo land runs from Loanga stream upwards to a place called Oaka and thence to Kuduru stream. The Chiefs did confirm that the Volekana tribe did have the right to cultivate land given to Qilavas as her *bani* in custom which land runs from Kozo stream to Vure stream and thence to Quabangara. This acknowledgment of the rights of the Volekana tribe had subsequently been denied by the same Chiefs on 30th September 1999 in their second determination on the ground that the 1st Defendant had denied the gift by the Dali tribe and furthermore had given that land to the 2nd Defendant against the wish of the Dali tribe and therefore lost it (*itingi in custom term*). It is not disputed that the Volekana tribe did not attend both the first and second Chiefs' hearings on 16th February and 30th September, 1999. Messrs Benjamin and Vaekesa in their joint affidavit filed on 19th July 2004 explained that their absence was due to the death of Chief Taki and the delay in replacing Chief Taki. This would seem to suggest that the Volekana tribe had had notice of the two hearings but were unable to attend for the reasons stated by Messrs Benjamin and Vaekesa above. The Chiefs at the second hearing did say on the record that the Volekana tribe had in fact been served with the notice of hearing but chose not to attend. Nevertheless, I do think the two determinations made by the Chiefs following the above mentioned two hearings could well be binding on the Volekana tribe as they had been summoned to appear at each of the two hearings but chose not to do so. The determinations ought to be set aside if the Volekana tribe should wish to pursue

their claim of ownership further or else to argue that the second Chiefs' determination on 30th September 1999 is for some reason invalid. In any case, the Volekana tribe had moved the dispute into the Local Court, following the first Chiefs' hearing on 16th February 1999. The dispute appears to be over Oloko land, the boundaries of which had been stated. The Local Court has not sat to hear the dispute due to lack of funds from the Government. The referral to the Local Court is still pending. The fact that the Volekana tribe had moved the dispute into the Local Court was not told to the Court at the *ex parte* hearing. In fact, the Volekana tribe has challenged the first Chiefs' determination made on 16th February 1999. There is already a dispute pending in the Local Court as a matter of fact. However, there is no evidence to show that the Volekana tribe had referred the second Chiefs' determination made on 30th September 1999 to the Local Court. This second determination appears to be the most important because it denies the Volekana tribe's rights to own Volekana 1 and 2 or any parts of them for the Dali tribe now owns land from Kozo stream to Lalaguti stream including Volekana 1 and 2 claimed by the Volekana tribe. The second Chiefs' determination has in effect dissolved what the Volekana tribe is claiming as Volekana 1 and 2. The Chiefs' second determination therefore remains unchallenged. Whilst it is true that the East Choiseul Area Council's determination has remained intact as regards the grant of timber rights to the 2nd Defendant, the ownership of the land has been awarded to the Dali tribe of which Messrs Simbe and Mela are members. The Volekana tribe believing that Volekana 1 and 2 had been subsumed by the Dali tribe claim should have challenged the second Chiefs' determination to that extent. Obviously, the grant of timber rights had been overtaken by ownership rights in the land. Harvestable trees and the timber rights vested in them do not hang in the air. They do stand on the ground on land. Although the Volekana tribe does stand on the strength of the East Choiseul Area Council determination in 1995, it will now have to seek permission from the Dali tribe which owns the land between the Kozo steam and the Lalaguti steam. This does demonstrate the difficulty in the legal dichotomy created by statute affecting the customary land tenure system that one tribe can grant timber rights by agreement on customary land and another tribe may own that same land for the two, timber rights and ownership of that land, are not the one and the same thing. For in customary law, the one who owns the land owns the trees that stand on that customary land. It makes no sense in customary law like in this case that the Volekana tribe would have the timber rights vested in them but the Dali tribes owns the land who does not agree with logging. It would have been different if the trees are plantation trees planted by another party by agreement on customary land, in which case, the trees belongs to the planter and the land remaining the property of the owning tribe.

Why the Volekana tribe does not succeed in this case.

Whilst no criticism can be made of the way in which the Chiefs had dealt with the dispute between the parties (See *Eddie Muna and Smiley Muna v. Holland Billey and Toben Muna and Attorney-General*, Civil Case No.284 of 2001), the position is that the land from Kozo stream to Vure stream and thence to Quabangara had been reverted to the Dali tribe because the Volekana tribe had denied that the land had been given to them by the Dali tribe through the female Qilavisu of the Dali tribe and furthermore had given the land to the 2nd Defendant. Whether that is the correct position in custom or not is a matter for another forum. The non-disclosure of the first Chiefs' determination on 16th February 1999, in this respect, has not really changed the position borne out by the order I made on 2nd June 2004. That is, the second Chiefs' determination made on 30th September 1999 remains the position as regards ownership of land. It is the evidence of ownership of the land in question. The application is dismissed. The order is to continue until further order. The parties will pay their own costs.

F.O. Kabui
Puisne Judge