

**RICHARD BOSO -v- COMMISSIONER OF FOREST, JETTY NIVAH AND OTHERS AND PACIFIC CREST ENTERPRISES LIMITED**

Civil Case No. 391 of 2005.

Date of Hearing: 23<sup>rd</sup> November 2005.

Date of Ruling: 25<sup>th</sup> November 2005.

*A. Radcliffe for the Plaintiff.*

*N. Moshinsky, QC with M. Ipo for the 1st Defendant.*

*A. Nori for the 2<sup>nd</sup> Defendant.*

**RULING**

**Kabui, J.** Rule 2 of Order 27 of the High Court (Civil Procedure) Rules, 1964, "the High Court Rules" provides a procedure in civil litigation where points of law may be raised by the parties by consent or on application by one of the parties if consent is not forthcoming from the other party. Where an application is made, it is done by a summons. The purpose of this procedure is to save costs of litigation but the points of law to be raised must be such that their resolution as points of law will dispose of the Plaintiff's action without the need for a trial. This is the attractiveness of this procedure if it can be invoked.

This case is about logging in the Western Province where the licence holder is the 2<sup>nd</sup> Defendant. It had invoked the procedure under rule 2, Order 27 of the High Court Rules above by motion and asked the Court to agree to the points of law it put forward for determination. If the Court agrees, a time will be fixed for the hearing of the arguments on the points of law followed by the Court's determination of them.

**The alleged points of law.**

The alleged points of law are two-fold. The first is whether the Western Provincial Executive had acted lawfully when it considered, accepted and adopted the timber rights determination of the then Roviana Area Council dated 25 April 1989 without carrying out any hearing or inquiries of its own. The second is whether or not Form 2 determination issued by the Western Provincial Executive dated 10<sup>th</sup> February, 2003 is valid. These points of law are framed in a way as though they are matters to be determined under Order 58 of the High Court Rules.

The usual form of words in practice is that-

**"The defendant will object that the statement of claim is bad in law and discloses no cause of action on the ground that" or "The defendant will object that"**

(See page 362 of Practice of the Supreme Court of Victoria In Its Civil Jurisdiction, by Neil J. Williams, 1964).

**The accepted facts in the pleading.**

The facts are said to be those set out in paragraphs 4-9 in the Statement of Claim. These facts are as follow.

The then Roviana Area Council held a timber rights hearing on 25<sup>th</sup> April 1989 to determine the persons lawfully entitled to grant timber rights over Central Parara Land. It determined a number of persons as being the lawful persons entitled to grant timber rights over Central Parara Land. No Form 2 was ever issued due to a mistake.

By 2000, Parliament replaced the Area Councils with Provincial Executives of Provincial Governments by legislation, creating them as the new body to determine the persons lawfully entitled to grant timber rights on customary land. In 2003, the descendants of the persons lawfully entitled to grant timber rights in 1989, applied in Form 1, to the Commissioner of Forests for a logging licence to cover Momou customary land, Parara Island, Western Province. The Western Provincial Executive simply endorsed the minutes of the then Area Council in 1989 and made a determination and then issued Form 2.

A number of the descendants of the persons lawfully entitled to grant timber rights by the then Roviana Area Council in 1989 were determined by the Western Provincial Executive as the lawful persons entitled to grant timber rights over Momou customary land. Those persons do appear in Form 2.

### **Deciding whether the points of law should be set down for hearing.**

In *Clara Rebitai v. Francis Chow, R.E.G.S. Limited, Onaga Corporation Limited and F.C. Limited*, Civil Case No. 108 of 1998, I repeated the general warning often expressed by the courts in this sort of case about the danger of jumping to conclusions in the absence of all the relevant evidence being made available to the Court, particularly, in cases where the facts are in dispute or facts and the law are mixed up together and not easy to sort out in advance of the trial. This is a general statement and it assumes that there is a point of law to be determined. The court however does have the discretion to rule on any point of law under rule 2 of Order 27 of the High Court Rules.

The Practice Books however seem to be saying that for a point of law to arise, it must be stated as an objection in the pleading. That is, the party making the objection will say that there is no legal basis for the action to proceed or to sustain a defence as the case may be. A point of law is often raised on that basis and its determination will inevitably dispose of the case unless the point is cured by an amendment of the pleading. (See Practice of the Supreme Court of Victoria In Its Civil Jurisdiction, by Neil J. Williams, 1964). Pleading a point of law must be specific and is not the same thing as pleading matters of law as material facts. (See page 165 of Australian Civil Procedure, by Bernard C. Cairns, 1961).

In this case, the defence filed by the 2<sup>nd</sup> Defendant on 10<sup>th</sup> October 2005 does not disclose any objection on any point of law against the action brought by the Plaintiff. The matters pleaded in the defence as touching on the law are matters of law as material facts which may be objectionable in pleading facts.

The fact is that paragraph 16(a) in the statement of claim is a claim for damages and (b), (c) and (d) are declaratory orders being sought from the Court. Nowhere in the pleading does the 2<sup>nd</sup> Defendant object to the Plaintiff's action on the basis of the heads of claim by the Plaintiff being without legal basis to justify raising any point of law under rule 2 of Order 27 of the High Court Rules.

Rule 2 of Order 27 of the High Court Rules is not an alternative procedure to originating summons under Order 58 of the High Court Rules where common questions affecting the parties can be determined by the Court or a short cut procedure to avoid delay of sorts.

Here, the Plaintiff is claiming damages as well as declarations. I can see no possibilities of applying rule 2 of Order 27 of the High Court Rules in this sort of action by any stretch of imagination. The points of law raised by the 2<sup>nd</sup> Defendant are really a combination of the declarations sought by the Plaintiff in paragraph 16(b)(c) and (d) in the statement of claim. The 2<sup>nd</sup> Defendant's application is more akin to seeking declarations under Order 58 of the High Court Rules than proceeding under rule 2 of Order 27 of the High Court Rules.

The result is that the claim for damages in paragraph 16(a) in the statement of claim is left out of the proceeding. That clearly is not the function of the procedure under rule 2 of Order 27 of the High Court Rules. The application has been misconceived and is therefore dismissed with costs. I order accordingly.

**Frank O. Kabui**  
**Puisne Judge**