

**IN THE HIGH COURT OF THE COOK ISLANDS
HELD AT RAROTONGA
(CIVIL DIVISION)**

PLAINT NO. 20/03

**BETWEEN TUAO MESSINE of Aitutaki, Planter
Plaintiff**

**AND TERRY MITCHELL of New Zealand,
Planter
First Defendant**

**AND DANIEL MITCHELL of New Zealand,
Occupation Unknown
Second Defendant**

**RULING OF DAVID WILLIAMS J UNDER SECTION 42
JUDICATURE ACT 1980-81**

[1] When this case was called Mr Joseph Ka standing with the second defendant, Mr Daniel Mitchell, at counsel's table, applied to represent Mr Mitchell as his agent in these proceedings. Mr Ka had previously lodged documents on behalf of the second defendant and, in particular, a Statement of Defence dated Wednesday 25 June 2003 to the second amended Statement of Claim. That document was signed by Mr Ka as agent for the second defendant. It recorded that the Statement of Defence had been filed by Mr Ka as agent for agent for the second defendant.

[2] I was aware of the ruling of the Chief Justice of 13 February 2002 in *CIDB v Mitchell*, Plaint 64/01. There the question of Mr Ka's role in filing Court documents as agent was considered. The Chief Justice ruled that:

“5. Mr Mitchell has purported to grant a power of attorney to Mr Ka. The copy document such to Mr Ka's letter is dated 17 January 2002. It is not witnessed but may nevertheless take effect of the deed if the documents in Court are signed by Mr Ka as agent or on behalf of Mr Mitchell. The signature appears to be pursuant to the power of attorney.

6. In the circumstances the Registrar is entitled if not obliged to accept the documents and to act on them. Equally the plaintiff and its counsel may not safely ignore them.

7. Whether and to what extent Mr Ka is acting or continuing to act as a barrister or solicitor in this matter is not for me to decide at this time or in these proceedings. That does not however nullify the effect of the documents filed. The plaintiff should in the meantime treat the case as if the plaintiff is proceeding in person through his attorney.”

[3] No person may act as a barrister or solicitor in the Cook Islands if not duly enrolled under Part I of the Law Practitioners Act 1993-94. No person may act in any other country as a barrister or solicitor appearing before the High Court or Court of Appeal of the Cook Islands unless that barrister or solicitor has been instructed by the holder of a current practising certificate in the Cook Islands (section 8(1) and (2)). The maximum penalty for any person practicing, wilfully pretending to practice, or implying that he or she is qualified to practice, while not enrolled, is a fine not exceeding \$5,000 (section 61(1)). That section does not apply to an agent acting in the Land Division of the High Court with the approval of a Judge or a Justice of the Peace.

[4] Section 42 of the Judicature Act 1980-81 provides as follows:

“42. Right of audience in the High Court – in any proceeding in the High Court, whether civil or criminal, any party thereto may be represented either by a barrister or a solicitor or with a leave of the Court, by any other agent, but any such leave may be at any time withdrawn.”

[5] In deciding whether to grant leave I considered it appropriate first to ascertain the educational qualifications and occupation of Mr Mitchell. Mr Mitchell said that he was 42 years of age and his education went up to sixth form level. He was presently employed as a distribution manager for Monark Performance in New Zealand. He was also a part-time army officer. For 6½ years he has been a Police officer in New Zealand. For 1½ of those 6 years he had duties as a Police prosecutor in the Courts. He has been 20 years in the New Zealand Army.

[6] When asked why he wished to have Mr Ka represent him in these proceedings as agent he said that Mr Ka had looked after Mitchell family affairs, including land affairs, for some time and he had confidence in him. He acknowledged that it would have been possible for him to retain a lawyer but he preferred to have Mr Ka. From all of this I deduced that Mr Mitchell, especially in view of his experience as a Police prosecutor, would be familiar with Court procedures and able to fully and fairly present his own case as second defendant.

[7] I next raised with Mr Ka the content of the Statement of Defence which he had certified and filed as agent for the second defendant. I had noted that there were serious allegations made against the plaintiff and his counsel. I drew attention in particular to paragraph 11 which states:

“In response to paragraph 21 of the Claim he states that the plaintiff, with his Counsel driving, fabricated the truth to mislead the Court.”

[8] There were allegations of a similar kind elsewhere in the Statement of Defence. For example, paragraph 17 stated, inter alia as follows:

“He denies the details in paragraph 25 of the Claim as, like the majority of the paragraphs of the Claim, are a fabrication of evidence by the Plaintiff at the leading of his Counsel...”

[9] Mr Ka sought to distance himself from these serious, and, unsupported allegations, by saying that these were not his allegations but those of Mr Mitchell. But he accepted that they carried his endorsement by virtue of the fact that he had signed the Statement of Defence as agent for the second defendant. The reading of the whole document lead to the irresistible inference that Mr Ka had been a party to the

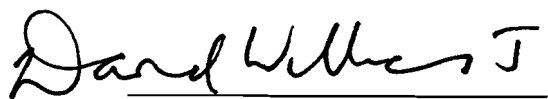
inclusion of the allegations and that he was fully aware of their nature, character and seriousness. This particular factor led me to conclude that Mr Ka was not a person who should be allowed the privilege of appearing as an agent.

[10] There was another reason for my concern about granting leave. A perusal of the papers, including those relating to an application made at an earlier stage by the plaintiff for an interim injunction, showed that Mr Ka had himself become deeply personally involved in the dispute. To give but one example, it was Mr Ka and his female partner who had ended up buying from Mr Daniel Mitchell the Massey Ferguson D165 tractor which is the subject of these proceedings. This transaction occurred after the purported sale of the same tractor by the first defendant to the plaintiff had been negated at the instance of Mr Mitchell. The unwisdom of counsel appearing for a party where that counsel has been personally involved has often been pointed out. See for example the comments of Thomas J in *Kooky Garments Ltd v Charlton* [1994] 1 NZLR 587. I did not enquire as to whether Mr Ka would plan to give evidence but I had a reasonable apprehension that this might well turn out to be the case. My concerns proved to be well-founded because after leave had been refused to Mr Ka, he was subsequently called by Mr Daniel Mitchell as a witness.

[11] The foregoing were the reasons why I refused the application of Mr Ka. I have thought it appropriate to leave a record of my ruling.

[12] I direct that the Registrar make available to the parties this ruling and that it be kept on file by the Registrar and a copy also sent to the secretary of the Cook Islands Law Society. The matters recorded in this minute may be relevant if on any future occasion Mr Ka again seeks to appear as agent.

NOTE: The first draft of this ruling was dictated on the night of 13 November. By the time it was transcribed the case had concluded. I should record that, as was predicted, Mr Daniel Mitchell was able to represent himself most competently and efficiently not only in leading witnesses but also in making opening and closing submissions on his own behalf.



David Williams J

18 December
2003