

HITUKERA -v- HYUNDAI TIMBER COMPANY LIMITED & MAEPEAZA

High Court of Solomon Islands

(Muria ACJ)

Civil Case No. 132 of 1992

Hearing: 23 July 1992

Judgment: 24 August 1992

P. Lavery for the Plaintiff

A. Nori for the Defendants

MURIA ACJ: The plaintiff in this case seeks a continuation of the *ex parte* injunction granted by this Court on 13 May 1992 and for an order of ejection of the first defendant from the plaintiff's land. The first and second defendants, by their summons, seek to set aside or vary the Order of 13 May 1992. By consent these two applications were heard together.

The plaintiff claims that he is a member of the Buro Tribe, the members of which are the owners of Buro Land in the Malasova area. The first defendant is a logging company which has been issued with a Licence to fell trees and remove timber from the following lands, namely, Makavore, Naiqao, Sarapaito and Vaululu. The second defendant is a member of the Buro Tribe and residing at Pazaju Village within Malasova.

The plaintiff alleges that the first defendant has since 13 November 1991 trespassed and continues to trespass on the plaintiff's land. No Timber Right agreement has ever been made between the first defendant and the Buro Tribe over Buro Land within Malasova. It is further alleged that as a result of the trespass, severe economic and environmental damage has been caused contrary to common law and in breach of the provisions of the Forest Resources and Timber

Utilisation (Amendment) Act 1990. As against the second defendant, the plaintiff alleges that she has urged encouraged and facilitated the trespass.

The brief particulars of the alleged trespass and damage are that on or about 13 November 1991 a barge loaded with the first defendant's employee and equipment went ashore at Malasova. On the same day the first defendant's employees started clearing the area cutting down the plaintiff's coconut plantation. They also cut down trees other coconut plantations and destroyed garden areas. After the clearing, houses were constructed for the company employees and managers. Workshops were also built. Roads were constructed in and around the logging camp area as well as into the bush. The plaintiff complained but he was ignored.

Despite threats of destruction of his properties, the plaintiff refused to vacate his village. Then on or about 16 December 1991 while the plaintiff and his family were in their kitchen having breakfast a large number of men from the logging camp together with other people from other villages entered the plaintiff's village with bush knives, big sticks and chain-saws. As they entered the plaintiff's village, a bulldozer followed and entered the plaintiff's village destroying coconuts, bananas, cut-nut trees and a garden. The plaintiff again attempted to stop what the bulldozer was doing but he could not. Himself, his wife and children were terrified. This was a planned attempt to evict the plaintiff and his family from his village and to demolish the village. Among those who came with the company employees and equipment were Reuben Evala, Oliver Zapo and Ole Maepeza. On instruction from Ole Maepeza, the men and the bulldozer moved further into the village smashing down more trees. The men were shouting at the plaintiff to leave the place. The people from Supato came to plaintiff's assistance. Consequently the bulldozer and the men returned to the company's camp.

Damage was assessed by an Agriculture Officer on 17 January 1992 and he stated that the damage done to the Plaintiff's properties was very serious. He estimated that about 90 - 100% of the

plaintiff's newly planted coconuts were destroyed as well as 4 hectares of the land had been destroyed by bulldozers.

On 13 May 1992 the plaintiff sought and was granted an ex parte injunction restraining the first defendant, its servants or agents from further clearing timber, plantation, garden or other areas or from commencing or continuing the construction of any building, structure or road or in any way extending the logging camp in the plaintiff's land. On 23 July 1992 the Camp Manager Mr Kim Yong Sung was found guilty of Contempt of Court for breaches of the ex parte injunction order. The breaches involved the continuation of construction of a new gasoline store. In the Contempt application, the Court found that there was a clear disobedience of the Court Order by the Camp Manager.

The plaintiff now asks that in view of circumstances of the case particularly the conduct of the first and second defendants before and after the ex parte injunction order of 13 May 1992, the Court should order that an interlocutory mandatory injunction be granted even at this interlocutory stage. The defendants objected to the continuation of the injunction. The defendants further sought that should the injunction be continued, then it should be varied to allow first defendant to continue working since it would be a while before the action is heard by the Court.

It is also part of the defence case that the first defendant entered the land in question under the authority of the lease which was entered into between itself and the second defendant on 9 November 1991. The second defendant claimed ownership of the land. That being so the ex parte order should be revoked.

Generally the Court is slow to grant a mandatory injunction at an interlocutory stage than to grant prohibitory injunction. Where a mandatory injunction is sought at an interlocutory stage the case for the applicant has to be "*unusually strong and clear*" before the Court can grant a mandatory injunction. *Shepherd Homes Ltd -v- Sandham* [1970] 1 All ER 402.

The Court is bound to take into account the benefit the order will confer on the plaintiff and the detriment which it will cause the defendants. This is necessary in order for the Court to achieve a fair result between the parties.

The affidavit evidence so far disclosed shows that a number of disputes exist between the parties particularly on the question of ownership of Malasova where the first defendant now has its logging camp. There is apparent in the submission by counsel for the plaintiff the suggestion that the land over which agreement to log had been entered into between the first defendant and Niqao Tribe is a land called Niqao which is situated between Malasova Bay and Oula River in the north. The second defendant while deposing in her affidavit as a member of the Euro line, signed the agreement as one of the representatives of the Niqao Tribe. It will be noted that there is no logging agreement over Euro Land which is in Malasova. The only agreement covering Malasova is the Lease Agreement for the logging camp.

The basis of the plaintiff's claim in the action is that of trespass and this application is to restrain the defendants from further trespassing into Euro Land in Malasova. The second defendant claims ownership over the land in question. By virtue of her claim of ownership of the land in question, she leased the land to the first defendant for logging camp. The plaintiff also claims ownership over the same land.

The question of ownership of the land in question is therefore a central issue here. The Court will only grant a mandatory injunction if the test as set out in *Shepherd Homes Ltd -v- Sandham* is satisfied. That test was set out by Meggery J. at page 412 where he said:-

"..... on a motion as contrasted. with the trial. the court is far more reluctant to grant a mandatory injunction than it would be to grant a comparable prohibitory injunction. In a normal case the court must. inter alia. feel a high degree of assurance that at the trial it will appear that the

injunction was rightly granted; and this is a higher standard than is required for a prohibitory injunction."

The test of "*high degree of assurance*" requires that the court must be assured that the case for the applicant is exceptionally strong and clear. Any lesser degree of conviction on the strength of the applicant's case will result in a refusal of mandatory injunction. See *Locabail Finance Ltd -v- Agroexport* [1986] 1 WLR 657 where the Court of Appeal allowed the appeal on the basis, inter alia, that the trial judge granted a mandatory injunction with a lesser degree of conviction than was appropriate.

In the present case the competing claims of ownership of the plaintiff and second defendant having been put in issue, the court must also have a high degree of assurance that if a mandatory injunction is granted that at the trial it will appear to be rightly granted against the second defendant and as well as the first defendant. Applying the test set out in *Shepherd Homes Ltd -v- Sandham* to the evidence as disclosed, I am left with a lesser degree of conviction that a mandatory order is appropriate here.

The issue of ownership, however, remains a serious issue to be resolved between the plaintiff and second defendant, bringing in the consideration of the principles laid down in the case of *American Cyanamid Co. -v- Ethicon Ltd* [1975] AC 598. The question therefore is whether an interlocutory injunction should be ordered in a prohibitory nature.

Accepting that there is a serious issue to be tried, the Court must now consider where the balance of convenience lies. I set out the steps to be taken when considering the balance of convenience in *Beti and Others -v- Allardyce and Others Civil Case 45 of 1992* and I need not repeat them here. Suffice it to say that on the evidence the balance of convenience would favour an order which would have the effect of maintaining the "status quo" between the parties until the rights of the parties can be finally determined.

I feel that the proper order would be to grant an interlocutory injunction restraining the first defendant, its servants or agents from entering or carrying on any operations whatsoever on the land in question namely Buro Land in Malasova which land is particularly shown edged red on the sketch map annexed to the ex parte application.

The injunction issued against the second defendant on 13 May 1992 is discharged.

However in view of the evidence of threats of violence as shown, I order that the second defendant, her servants or agents be restrained from interfering with, assaulting or threatening to assault the plaintiff and members of his family and all persons they represent in this action.

I further order that the plaintiff, his servants or agents be restrained from interfering with or causing damage to the property of the first defendant that are already on the land in question.

The above orders are effective until the trial of the action at the next sitting of the Court in Gizo.

The plaintiff is legally aided by the Public Solicitor and part of his means of obtaining money had already been destroyed by the first defendant. I therefore dispense the need for him to give the usual undertaking as to damages.

The ex parte injunction is varied only to the extent as set out in this judgment.

Costs in the cause.

(G.J.B. Muria)
ACTING CHIEF JUSTICE