HYUNDAI TIMBER CO. & OTHERS -v- THE ATTORNEY GENERAL & OTHERS

High Court of Solomon Islands
(Palmer J.)
Civil Case No. 79 of 1993
Hearing: 1 September 1993
Judgment: 11 November 1993

T. Kama for Appellant
D.J. Mcquire for the Premier of Western Province
C. Ashley for the Attorney General
P. Lavery for 3rd and 4th Defendants

PALMER J: By writ of summons filed on the 18th of March 1993 the Plaintiffs seek orders of Certiorari to quash the determination made by the Vella La Vella Area Council dated the 14th day of September 1992 and an order of mandamus that the Vella La Vella Area Council or a differently constituted Vella La Vella Area Council to re-hear and re-determine the questions of timber rights over the customary land of Kaneporo and Naqei Sorezaru.

The grounds for the relief are contained in paragraph 3 of the statement filed under Order 61 Rule 2 on the 1st of April 1993. They read as follows:

"(a) *The Vella La Vella Area Council had conducted the hearing unfairly when they failed to properly inquire into the ownership of Naqei Sorezaru and Kaneporo Customary Land.*

(b) *The Area Council had erred in their findings, that the Third and Fourth Defendants and Respondents were customary landowners without proof of ownership of the said customary land.*

(c) *The Area Council has no power to determine customary land ownership.*

(d) *The rejection of the application by the Area Council erroneously made and therefore it is invalid*".

The facts of this application related to a timber rights hearing conducted before the Vella La Vella Area Council at Supato village, Vella La Vella on the 14th of August 1992.

An application had been lodged by the First Plaintiff for extension of its licence to include four customary land areas, namely, Sarapaito, Naiqaio, Kaneporo or Miga, and Naqei Sorezaru. The two areas of land that are the subject of this application are Kaneporo and Naqei Sorezaru.

In the affidavit of John Mae filed on the 1st of April 1993 the persons described in the form 1 application as entitled to grant timber rights inrespect of those two customary lands were:

> Jonathan Korabangara, Rimu Baizovaki, Casper Bazupala, Jacob Hatakera and Kaaki inrespest of Kaneporo; and Vivian Maeke, Zedekiah Tulavaka, Johnly Korapala, Boaz Lipa and Nery Balese for Naqei Sorezaru.

At page 3 of the minutes of the Vella La Vella Area Council meeting, a (copy has been filed as exhibit 1), Rimu Baizovaki and Viviani Maeke were identified as spokespersons inrespect of the tribes claiming the rights to grant timber rights inrespect of those two customary lands. At paragraph 3.1 of the minutes under the objectors list, John Nenete was described as the spokesperson for the Kaneporo tribe and Silas Viripitu of the Belo Belo tribe. Of the Naqei tribe, Mark Elizama and Kevin Zoro were the objectors, Mark Elizama being the spokesperson.

After hearing all the submissions from the various persons present at the meeting the Area Council retired to make its determination. A copy of that determination is attached to Exhibit 3 filed in this court and marked Exhibit 3(b).

The Vella La Vella Area Council felt that it could not make a proper determination as there was a clear dispute as to land ownership. It therefore determined that no agreement could be concluded between the applicant and the disputing customary landowners. Subsequently it recommended that the Commissioner of Forests reject the application under section 5D(1) of the Forest Resources and Timber Utilisation (Amendment) Act 1990.

The Commissioner of Forest however responded by letter dated 1/9/92 and stated as follows:

> *"I have studied the submissions and come to the conclusion that the Area Council had not fulfilled the statutory requirements under 5C(3) and 5C(4). Therefore it would not have been possible for the Area Council to have made the determinations as alluded to under 5D of the Forest Resources and Timber Utilisations Act.*

As a matter of procedure, the requirements of 5C has to be complied with, for which only the Area Council has legal authority to determine". *(see exhibit 4).*

Section 5C (3) and 5C (4) read as follows"

"At the time and place referred to in subsection (1), the area council shall in consultation with the appropriate Government discuss and determine with the customary landowners and the applicant matters relating to-

(a) whether or not the landowners are willing to negotiate for the disposal of their timber right to the applicant;

(b) whether the persons proposing to grant the timber rights in question are the persons, and represent all the persons, lawfully entitled to grant such rights, and if not who such persons are;

(c) the nature and extent of the timber rights, if any, to be granted to the applicant.

(d) the sharing of the profits in the venture with the landowners; and

(e) the participation of the appropriate Government in the venture of the application.

(4) Any agreement reached pursuant to discussions held under subsection (3) shall be reduced to writing and be forwarded to the Commissioner with the recommendation of the area council with particular reference to -

(a) the quantum of profit sharing, is any, agreed upon; and

(b) the extent of participation, if any, of the appropriate Government, in the applicants venture".

It is not exactly clear what is meant by the Commissioner of Forest in his letter, but I presume he meant that the Area Council had not done what was required of it under S.5C(3) and 5C(4).

As a result, the Area Council reconvened and made a second determination to replace the first one.

In the minutes of its meeting in which the determination was made it read:

"A3 Kaneporo land: The Vella La Vella Area Council has determined that the Hyundai Timber Co. Ltd Form 1 application on A3 land area has rejected".

Inrespect of A4 Land Areas Naqei Sorezaru it read:

"The Vella La Vella Area Council has determined that the Hyundai Timber Co. Ltd Form 1 application on A4 land area has rejected".

In the Form II Certificate of Customary Ownership submitted to the Commissioner of Forest (a copy of which is annexed to exhibit 5) there is a note which reads"

"Section 5C(3)(a)

(i) Area edged Red on map No. II affected by Form I have been determined by the Vella La Vella Area Council as area refused for grant of Timber Rights by persons lawfully able and entitled to grant any timber rights.

(ii) Persons lawfully able and entitled to grant timber rights in the area edged red in map II attached being land held by the landholding group specified here in as affected by Form I but have refused grant of any timber rights are:-

(1) John Nenete of Kaneporo tribe
(2) Silas Vizipitu of Belo Belo tribe

(1) Mark Elizama of Naqei Sorezaru
(2) Kevin Zoro of Naqei Sorezaru".

The first legal question I will address is whether the appeal rights of the Plaintiffs were denied, by the rejection of the Vella La Vella Area Council of the First Plaintiff's application. This submission is important because it was this belief that resulted in no appeals being filed under section 5E(1) and instead an application was filed in this court for writs of certiorari and mandamus.

Section 5E(1) reads:

"Any person who is aggrieved by the determination of the council made under section 5C (3)(b) or (c) may, within one month from the date public notice was given in the matter set out in section 5D(2)(b), appeal to the customary land appeal court having jurisdiction for the area in which the customary land concerned is situated and such court shall hear and determine the appeal".

The rights of appeal refer specifically to the determination of the Area Council inrespect of section 5C(3)(b) and 5C(3)(c).

The Defendants submit that there was a determination under sections 5C(3)(b) and 5C(3)(c). The Plaintiffs argue there was none. There was instead they say, a determination under section 5C(3) (a) only.

Section 5C(3)(a) required that the area council shall discuss and determine with the customary landowners and the applicant matters relating to whether or not the landowners are willing to negotiate for the disposal of their timber rights to the applicant.

This section is an interesting section in itself because contained within it are certain basic assumptions which form the foundation within which the Area Council is to perform its statutory function.

One possible assumption is that the customary land owners of the land over which the applicant wishes to acquire timber rights have been identified or known. For how can the Area Council discuss and determine with those customary landowners the question asked in sub-paragraph (a) if it could not identify or does not know who those customary landowners are!

The other possible assumption is that it refers generally to all customary landowners claiming an interest in that customary land.

S.5C(3)(a) then asks the question, "whether or not the landowners are willing to negotiate for the disposal of their timber rights to the applicant".

Again there are two possible constructions of the meaning of the word 'landowners'here. On one hand it refers to the true or correct land owners of the customary land and on the other, landowners in general.

If it refers to the former, then it is a fairly simple matter for the Area Council to discuss and determine with those landowners whether they are willing to dispose of their timber rights or not. There would not be any dispute as to the question of ownership of land. The only issue, is that of their willingness to negotiate. If that is answered in the affirmative, then they can go straight on to consider the next questions under S.5C(3)(b).

If it however refers to landowners generally, then this is where some complications arise and I dare say raises issues which seems not to have been addressed correctly.

Let me set a typical scene. When an applicant (the logging company) wishes to set up business in Solomon Islands as a timber exporter or sawmillers and therefore wishes to

acquire timber rights over customary land, usually such company would have already identified a group of landowners who are willing to grant their timber rights to that company. When the meeting is called however, amongst those groups of landowners proposing to grant their timber rights would be other landowners who would also be claiming an interest in the ownership of those timber rights by virtue of the fact that they also are owners of the said land. So what we usually have is two groups or more of landowners all asserting ownership of their timber rights by virtue of their separate claims of ownership over the said land. On one hand you have the landowners who are willing to negotiate for the disposal of their timber rights, whilst on the other hand, you have those landowners (usually known as the objectors) who are not willing to enter into negotiations for the disposal of their timber rights.

Faced with such conflicting claims, what should the Area Council do? Should it go on to consider the questions in s.5C(3)(b)? In this case, this is what the Vella La Vella Area Council did. Is this the correct approach? I would venture to say no. Section 5C(3)(b) in my view can only be considered after s.5C(3)(a) had been answered in the affirmative. If s.5C(3)(a) cannot be answered in the affirmative, then it is my humble opinion that a rejection must be recommended to the Commissioner of Forest under s.5D(1). I would also venture to add that this would include the situation where there has been a number of landowners claiming ownership over the same land. To go on to consider s.5C(3)(b) when the question in s.5C(3)(a) had not been answered in my view is a wrong application of those provisions.

The first determination therefore of the Vella la Vella Area Council in which it rejected the application of the applicant on the basis that it felt that it was not the competent body to deal with the question of landownership in my view was perfectly valid and proper. And with respects to the letter of the Commissioner of Forest dated 1 September 1992, he had no legal basis with which to write it. Such a rejection would mean that the applicant would not have any right of appeal. However, that is not the end of the matter, because the second and third plaintiffs would still be entitled to bring a case under the Local Court (Amendment) Act 1985, commencing with the chiefs, for a land dispute against the defendants.

As a result of the letter of the Commissioner of Forest, the Vella la Vella Area Council made a second determination. But this time it did the determination by considering the questions in s.5C(3)(b) first.

Although I am of the view that the Vella la Vella Area Council erred in law in considering s.5C(3)(b) without first dealing with the questions raised in s.5C(3)(a), I will nevertheless go ahead to analyse the approach taken by the Vella la Vella Area Council as accepted by the parties.

The first question raised under s.5C(3)(b) is: "whether the persons proposing to grant the timber rights in question are the persons, and represent all the persons, lawfully entitled to grant such rights?" There are two parts to this question. The first part deals with the question of whether the persons proposing to grant the timber rights are the persons lawfully entitled to grant such rights. In answering this question the Vella la Vella Area Council heard the submissions of all interested parties i.e. the 2nd and 3rd plaintiffs group and from the objectors group (the 3rd and 4th defendants group). It must be noted that there is no evidence before me to show that the Vella la Vella Area Council acted unfairly in this. After hearing all the submissions that need to be made, it made the determination that the persons proposing to grant the timber rights in question, ie. the 2nd and 3rd plaintiffs group, were not the persons lawfully entitled to grant those timber rights.

The second question which it needed to consider then was who were lawfully entitled to grant those timber rights? The determination of the Vella la Vella Area Council was, inrespect of Kaneporo land: John Nanete and his group of the Kaneporo tribe, and Silas Vizipitu and his group of the BeloBelo tribe; inrespect of Naqei Sorezaru tribe: Mark Elizama and Kevin Zoro of the Naqei Sorezaru tribe. This determination is to be found in the Form II notice issued by the Vella la Vella Area Council dated the 14th of September 1992, at the bottom of page one under subheading "Note". A copy of this form II notice can be seen in annexure "JM4" attached to the affidavit of John Mae filed on the 1st of April 1993.

Having answered the question in s.5C(3)(b), the Vella la Vella Area Council then re-traced its steps to s.5C(3)(a) and answered the question posed in that sub-paragraph in the negative. It is my view that this approach as I have stated is wrong. And this is the reason why I think it has confused the Plaintiffs into believing that they have no rights of appeal or to say that they have been denied their rights to prove that they are the true landowners and have not been given that opportunity and thereby alleging that the Vella la Vella Area Council have acted unfairly. This is the reason too why I think it was alleged in the affidavit of John Mae filed on the 1st of April 1993 at para. 7 that:

> *".............there was no determination of the persons entitled to grant timber rights so that those persons can decide to grant timber rights or not before any rejection can be validly made".*

There was with due respects, a determination made, albeit, wrongly made. The plaintiffs therefore were not denied their rights of appeal under s.5E(1) of the Forest Resources and Timber Utilisation (Amendment) Act of 1990. That was a mistaken belief on their part.

The finding therefore on the part of the Vella la Vella Area Council under s.5C(3)(a) that the landowning group were not willing to dispose of their timber rights does not necessarily mean that those landowning groups are indeed the true customary land owners. In the case of *Fugui & Another -v- Solmac Construction Company Limited & Others 1982 SILR 100 at page 107* Commissioner Crome made some pertinent comments as to the question of ownership of timber rights, although the context in which he made those comments were slightly different. I quote:

> *"The essence of the procedure leading to the granting of a licence is to ensure that those persons who in custom are entitled to the timber rights, as defined in the Act, are traced and their consent given to the operation proposed by an Applicant for a licence. The consent must be evidenced by an agreement which not only, in the nature of things, must have the approval of those customary owners ....*
>
> *In order to trace the customary owners who are entitled to enter into any agreement relating to the granting of timber rights an elaborate procedure must be followed, all clearly laid down in the Act, ...*
>
> *A "Sit down" is arranged at least two months ahead of the day the application is received and, following what was obviously meant by the draftsmen of the Act to have been a public inquiry conducted by the Area Committee, a Certificate is issued by the Area Committee in which the Committee states whether the persons proposing to grant the timber rights, are entitled to do so".*

At page 106 and 107 he continued:

> *"All a licence amounts to, it seems is a defence to a prosecution under s.4(1) and the possibility that the true customary owners of timber rights and any persons by whose consent the exploitation of those rights can be sold or dealt in, have been traced as a result of the lengthy procedures under the Act. No guarantee is given that the contracting customary owners are the true owners".*

The last sentence is of significance in that, although there was a finding of land ownership by the Vella la Vella Area Council this was deduced from the finding made under s.5C(3)(b). Having failed to exercise its appeal rights under s.5E(1), it is not open in my view to the Plaintiffs to now seek to review a valid determination of the Vella la Vella Area Council.

If it is dissatisfied with the finding of ownership of the two customary lands, then it is still open to the Plaintiffs to open a land dispute case with the chiefs of the area under the Local Courts (Amendment) Act 1985.

It is very important to bear in mind that the Area Council is not empowered to deal with the situation where there is a land dispute between two or more landowners as to the question of land ownership. If it is clear to the Area Council that there is a dispute as to the question of ownership over the customary land or even a dispute as to the boundaries, then the Area Council in my view must reject the application and ask the parties (i.e. the landowners) to sort out their disputes in the appropriate courts specifically provided. For it is my view, that the Area Council would not be able to perform its specialised functions under s.5C. And if it does go ahead as in this case, then it will be acting ultra vires its powers. Although this is what has happened in this case, this has not been specifically pleaded, and on that basis, I have put it aside in this application, and proceeded on to deal with the issues actually pleaded.

Part IIA of the Forest Resources and Timber Utilisation (Amendment) Act 1990 is a fast track legislation for the acquisition of timber rights over customary land where there is no dispute as to land ownership or other related matters. It is however not a shortcut from the normal processes available for the settlement of customary land disputes.

I now turn to the grounds raised for relief in this application.

First, the question of unfairness on the basis of a failure to properly inquire into the ownership of the Kaneporo and Naqei Sorezaru customary land.

I have already indirectly covered this point. First, the Vella la Vella Area Council is not required to make a determination as to the question of customary ownership of those lands. If it did make a finding as to the question of ownership, then as Commissioner Crome has correctly stated, that finding is no guarantee that the contracting owners are the true owners. Secondly, had the Plaintiffs exercised their rights of appeal, then they could have raised this question of ownership before the Customary Land Appeal Court, which court had the power to inquire into questions of land ownership.

Thirdly, it is still open to the 2nd and 3rd Plaintiffs to open a land dispute case with the defendants under the Local Court (Amendment) Act 1985.

The first ground raised therefore in my view must fail. The Vella la Vella Area Council was not required to make a determination as to ownership.

On the other hand, it did make a finding as to the question of ownership of timber rights. As succinctly submitted by Mr. D.J. Macquire, counsel for the second defendant, there is hardly any evidence of any unfairness at all. The parties were all given equal opportunities to make submissions to the Council for its consideration. And afterwards, the Council made its findings. The impropriety of that determination is not open to review.

The second ground relied on must in my view be also dismissed. The finding of ownership made by the Vella la Vella Area Council was deduced from the findings of the Vella la Vella Area Council under s.5C(3)(b). The findings as to ownership as I have stated is not a guarantee of true ownership. It was made on the best possible evidence before the Area Council. It is still open to the 2nd and 3rd plaintiffs to use the Local Court (Amendment) Act 1985. A judgment obtained from the courts would be binding on the parties then.

Ground three must also be dismissed as it raises no new ground. I have already dealt with this point fully in this judgment.

Ground four likewise must also be dismissed. This point has already been fully canvassed in this judgment. Suffice it to point out that the rejection was made after it was deduced from the findings made under s.5C(3)(b) that the persons lawfully entitled to grant the timber rights over Kaneporo and Naqei Sorezaru land were not willing to dispose of their timber rights to the applicants. The Vella la Vella Area Council could not have ruled in any other way. If it was an error then it is an error within jurisdiction and not subject to review before this court.

The mistaken belief is that because the rejection was purportedly made under s.5C(3)(a), that accordingly there was no right of appeal. Unfortunately, what was overlooked was that, that rejection had come about only after a determination had been made under s.5C(3)(b). That determination therefore under s.5C(3)(b) could have been subject to the appeal powers of the CLAC. As to the rejection under s.5D(1), it is open to the 2nd and 3rd Plaintiffs to pursue a land dispute case in the appropriate courts.

I am satisfied that the various orders sought in the Notice of Motion filed on the 6th of April 1993 must be dismissed with cost.

(A.R. Palmer)
JUDGE