JOHN KILATU & 6 OTHERS -v- NATHAN KERA & 7 OTHERS

High Court of Solomon Islands
(Muria, CJ.)
Civil case No. 241 of 1991
Hearing: 1st May 1995
Judgment: 5 May 1995

P. Tegavota for the Plaintiffs
T. Kama for the Defendants

MURIA CJ: There are two applications in this case, one by the defendants and the other by the plaintiffs. It was agreed that the two applications should be heard together an so the Court proceeded to hear the two applications together.

The Defendants' Application

In this application, the defendants seek to have the action brought by the plaintiffs struck out for want of prosecution. To this the plaintiffs by their counsel objected.

Mr. Kama of Counsel for the Defendants argued that the plaintiffs had brought the action on 7th November 1991 and served on the defendants on 11th December 1991. The defendants defaulted in filing a defence and so on 18th February 1992 a Judgement in Default of Defence was signed against the defendants. That Judgement was however set aside on 2nd April 1992 and the defendants were allowed to defend the action. Consequently the Defence was filed on 1st May 1992.

According to Mr. Kama, the last action taken in this case was the filing of Defence by the defendants. Counsel added that the plaintiffs have not taken any further action in the matter since 1 May 1992 and so the defendants took out this summons on 3rd December 1993 asking the Court to strike out the plaintiff's claim for want of prosecution.

Mr. Tegavota of Counsel for the plaintiffs argued that it is not true that the plaintiffs did nothing since March 1992 because on 28th August 992 the plaintiffs filed *Ex parte Summons* seeking interim injunction against the defendants. On the record, it is clear that the plaintiffs filed an *ex parte Summons* seeking restraining order against the defendants. That Summons was listed for 3rd September 1992 on which date the matter was adjourned to 17 September 1992. The application was further adjourned to 6 November 1992 and it was then that the Court granted an interim restraining order against the defendants.

Mr. Tegavota again submitted that on 11 December 1992 the then solicitor for the plaintiffs wrote to the solicitor for the defendants regarding the plaintiff's offer of settlement. The plaintiffs' offer was contained

in a letter dated 11 December 1992. It is not clear whether the defendants responded to that offer or not. Again another letter of 29 January 1993 was sent to the defendants' solicitor regarding directions as to the conduct of the case.

Thus, Counsel for the plaintiffs' argued, it is not correct to say that the plaintiffs had done nothing about the case since 1 May 1992. He conceded that the case has been dragging on for some time and the delay was partly due to the plaintiffs awaiting for the defendants' response to their offer of settlement. Also Counsel urged that the plaintiffs did not have the service of a solicitor since their former solicitor stopped acting for them until he took carriage of the case at the end of 1994. As soon as he took carriage of the case, he took immediately action and filed an application (The Plaintiffs' Application).

I can very well understand the effect of the delay in resolving this case would have on the defendants, particularly in view of the existing Order of 6 November 1992 of this Court against them. But having heard Counsel and having regard to the affidavit evidence before the Court, I am inclined to accept the argument by Counsel for the plaintiffs that it would not be correct to say that the plaintiffs had done nothing between 1 May 1992 and 3 December 1993. There is undoubtedly delay in the progress of this case as rightly conceded by counsel for the plaintiffs but it cannot be said that the plaintiffs had been guilty of want of prosecution of their case here.

On the question of delay, the Court has discretion to decide whether such delay is fatal to a litigant's case but the exercise of that discretion cannot avail a litigant where there is absence of excuse. In the present case, I find that there has been no want of prosecution on the plaintiffs part and there is excuse for the delay which is admitted in this case.

I refuse the defendants applications.

The Plaintiffs' Application

I turn to the plaintiffs application. The plaintiffs seek a determination of a question of law in this case. That question has been amended and now reads:

> *"Whether or not those who are signatories to the timber rights agreement signed on 29 March 1984 and annexed to John Kilatu's affidavit as "JK" are entitled to receive royalty payments"*

It has been argued by Counsel for the plaintiffs that as the plaintiffs had signed the timber rights agreement, they are entitled also to receive payments of royalty for logs extracted from the land in question. Annexure "JK" contains the description of the said land as:

"Kalena Land in Lots 9 and 12 of LR 529 and Land immediately west of Lots 13 of LR 529 in Viru and including Land west of Lots 9 and 12 up to Rorosi River in Saikile."

In support of this argument, Counsel relied on the affidavit filed by the first plaintiff and the timber rights agreement ("JK") annexed to that affidavit. The first plaintiff deposed that he and the other plaintiffs together with the defendants had all signed the agreement and had agreed that royalty payments on logs be distributed equally to each of the tribes through their representatives in the Saikile Chiefs' Committee and then the representatives to distribute equally to their family units. He further deposed that despite the agreed form of distribution, of royalty payments, only the defendants had been paid royalty but not the plaintiffs.

Counsel for the defendants on the other hand argued that what the plaintiffs are doing is really seeking a judgement as prayed in the main action. He further argued that there is no dispute that the plaintiffs belong to the tribes mentioned in paragraphs 1 and 2 of the Statement of Claim and that they are entitled to the royalty payments. The question, Counsel suggested, is that whether the plaintiffs should be paid the royalty payments since the Chiefs' Committee had refused to pay them.

The suggestion by Counsel for the defendants is that since the plaintiffs withdrew from the Saikile community project, they have forfeited their right to be paid royalty payments. They have refused, said counsel, to accept royalty payments.

When one looks at the evidence of the 1st defendant and Nelson Huti contained in their respective affidavits filed on 15 April 1992, it is obvious that there has been a rift between the plaintiffs and the 1st defendant which led to the plaintiffs resigning from the Chief's Committee in April 1986. There appears to be no resolution to that rift as yet despite attempts to find settlement had been made by both sides. The action brought by the plaintiffs is clearly a consequence of that rift.

I feel it is worth noting the plaintiffs' claim here in the main action. The plaintiffs claim as follows:

1. *An injunction restraining each and everyone of the defendants from dealing in any accounts in the name of Saikile Chief's Committee;*
2. *An account to be produced by the defendants showing all funds received from Kalena Timber Company Limited by way of royalties and how such funds have been distributed.*
3. *Damages for breach of contract.*

It seems that the plaintiff's claim of entitlement to the royalty payments as envisaged by the question sought to be answered, stems from the contract (and I take that to mean the timber rights agreement signed on 29 March 1984) which they and the defendants signed with the company. Counsel for the plaintiffs

clearly relied on the timber rights agreement arguing that the defendants had been in breach of the provisions of that agreement when they refused to give royalty payments to the plaintiffs.

In support of his argument, Counsel for plaintiffs also relied on the case of *TOVUA & Ors -v- Meki & Ors* [1988-89] SILR 74 where the Court held that Earthmovers Solomons Ltd, a company extracting timber in Machevona Land, was bound to pay royalties to persons with whom it signed an agreement to acquire timber rights in the said land. When one considers the circumstances in that case and those in the present case, there is an obvious distinction to be observed.

Whereas in *Tovua & Ors -v- Meki* the timber rights agreement was signed between the company and representatives of those entitled to grant timber rights in the land in question, in the present case the agreement had been signed between the company and the Chief's Committee who in turn distribute royalties to the representatives of those entitled to be paid royalties. As such when the rule in *Tovua & Ors -v- Meki & Ors* is applied to the present case, the company was bound to pay royalties to the Chief's Committee who signed the agreement with the company. In fact that had been done in the present case. The rights of the plaintiffs to be given shares of the royalties, to be distributed to them by the Chiefs Committee is outside the principle enunciated in *Tovua & Ors -v- Meki & Ors* case.

Having said that the question of whether the plaintiffs are entitled to the royalty payments still remains to be answered. Counsel for the defendants stated that the defendants do not dispute that the plaintiffs are entitled to the royalties but said that since the plaintiffs had withdrawn from the Chief's Committee and had refused to accept royalty payments, they should not be paid. Counsel argued that the plaintiffs are asking for something which they had already refused to accept.

I feel the plaintiffs' right to a share of the royalty payments in this case can be better discovered when their claim in paragraph 3, as mentioned above, has been dealt with. This application is not the time in which that can be done. If it were so, I agree with Counsel for the defendants, that the Court would be giving judgement on the very issue raised by plaintiffs in their main action.

In those circumstances, I feel I must exercise the Court's discretion and refuse the application.

The result of both applications is that they are both refused and in the circumstances, each party should bear their own costs.

(Mr. Justice GJB Muria)
CHIEF JUSTICE