

SAMSON SIAMAKANA -V- PIRIVOSORO & OTHERS

**HIGH COURT OF SOLOMON ISLANDS
(PALMER J.)**

CIVIL CASE NUMBER 253 OF 1991

**HEARING: 25TH OCTOBER 1999
JUDGEMENT: 31ST JANUARY 2000**

**A. NORI FOR THE APPLICANTS/DEFENDANTS
P. LAVERY FOR THE RESPONDENTS/PLAINTIFFS**

PALMER J.: This is an application by Notice of Motion filed 1st October 1999 to have the matter in this case (*Civil Case 253 of 1991*) re-instated for hearing. Authority relied on is found in Order 43 Rule 1 of the High Court (Civil Procedure) Rules 1964 (*hereinafter referred to as the "the High Court Rules"*).

The Court made final orders in respect of this case on 16 August 1994. These were made by consent of the parties after a hearing proper between the parties had been commenced (*see record of transcripts at page 14 and 15 and affidavit of Roy Patrick Lavery filed 26 October 1999 at paragraphs 2-4*). Those orders read as follows:

"1. The Defendants, by themselves or any of their line known as TOROMEJI, their relatives, servants or agents including in particular but without prejudice to the generality of this order the following:-

WONDING TAGOLO
KOLI TAGOLO
HILISON JOSHUA
RONALD VAIKESA
KEVI VAIKESA
ERIKI TAGOLO

be restrained from entering SASALO Land for any purpose whatsoever and in particular to cease collecting coconuts from any part of the Land, to cease planting coconuts, cutting down any tree, clearing land for gardening or building any houses. SASALO Land is for the purpose of this order as described in the judgment of the North Choiseul Local Court in Civil Case No. 1 of 1961 being all that Land between the KAO and PARANO rivers to MATASUSUPI and AEKE respectively.

2. The Defendants pay to the Plaintiff damages for trespass of \$30,000-00 and costs of \$1376 forthwith."

The Defendants now come to Court **five years later** seeking orders under Order 43 Rule 1 to have the matter restored for hearing with the view in turn to seek orders to

have the Order of 16 August 1994 (*hereinafter referred to as "the Order"*) varied. Applicant argues the Order was never perfected after it was made and therefore it is open to the Applicant to come back to Court to have that order varied. It would seem the view taken by the Applicant is that unless the procedure set out in Rule 1 is complied with, the Order can be varied on application to this Court at any time, even five years later. Order 43 Rule 1 reads:

"Every judgment shall be entered by the Registrar in the book kept for the purpose. The party entering judgment shall deliver to the Registrar a copy of the whole of the pleadings in the cause, other than any petition or summons; such copy shall be in print or typewritten, except such parts (if any) thereof as are by these rules permitted to be written: Provided that no copy need be delivered of any document a copy of which has been delivered on entering any previous judgment in such cause. The forms in Appendix F shall be used, with such variations as circumstances may require."

In the affidavit of Andrew Nori filed 25th October 1999, it is deposed no entry was made on said book kept for that purpose by the Registrar and therefore judgment had not been perfected. To that extent it is open to the Defendants in this case to apply to have that order varied.

The case authority in this jurisdiction, Liliau -v- Trading Company (Solomons) Limited (No. 2) 1983 SILR, 40, (*hereinafter referred to as "Liliau's Case"*) relied on by Mr Nori for the Defendants, adopted the approach taken by Jenkins L.J. in Re Harrison's Settlement (1955) 1 All E. R. 185, in which Jenkins L.J. held that a judgment was ". . . not perfected until drawn up, passed and entered, and anyone who acts on it before hand must take such risk as there is that it will not be drawn in the form in which it was heard to be pronounced." This issue had been settled in the English jurisdiction by earlier cases dating back to the 1800's. In Preston Banking Co. v. William Allsup & Sons [1895] 1 Ch. 141, 144-145, it was held ". . . that so long as the order has not been perfected, the judge has a power of reviewing the matter, but when once the order has been completed the jurisdiction of the judge over it has come to an end" (see also In re Suffield and Watts 20 Q.B.D 693; Mellinsted v. Grosvenor house (Park Lane) Ld. [1937] 1 K.B. 717 and In re Harrison's Share Under A Settlement [1954] 3 W.L.R 156.).

The law as set out in Order 43 Rule 1 and as established by the English Courts and adopted by this Court in Liliau's Case (*ibid*) is that so long as the jurisdiction of a Judge over the matter has not come to an end by perfection of an order, a Judge retains jurisdiction to review the matter. The issue before this Court, in the peculiar circumstances of this case, is whether the same can be said of it. It is not in dispute the judgment had not been entered in the book kept for that purpose by the Registrar. Unfortunately it seems, and I do not think for one moment Counsel for the Defendants would deny, that the failure to enter judgment, in the book kept for that purpose, by the Registrar can be said to be anything other than inadvertent. The order was clearly intended to be a final order by the Court, as well as the parties; especially after a trial proper had been commenced, with the Defendants represented at the trial by able Counsel, Mrs Samuels. The Defendants were given, and had all the opportunity they

needed, at that hearing, to raise what they are now trying to raise by this application. It is like trying to having a second go when they knew they had already had opportunity to raise these matters in 1994. That with respect cannot be allowed. The application to that extent as rightly described by learned Counsel for the Plaintiffs, is frivolous and vexatious and amounts to an abuse of process. All that needed to be said had been said, and all that needed to be done had been done. There was nothing more left to be done, and for the Court to consider, or to review in this matter. The only omission was the failure by the Registrar to enter judgment in the book kept for that purpose; a mere administrative bungle. It had been completely overlooked and forgotten by the parties for the past five years until fresh contempt actions were commenced against the Defendants in Civil Case 219 of 1997 by the same Plaintiff when through the vigilance of learned Counsel Mr Nori, it was picked up that the judgment had not been entered. It would be an injustice to the Plaintiff if the fruits of his judgment which had survived that long without any interference whatsoever from the Defendants, to now allow it to be opened up for re-litigation.

The scope of Order 43 Rule 1 in my respectful view gave jurisdiction to the Court to review a matter on its own motion, or on application, under circumstances that would be considered to be appropriate and justifiable, when the judgment or order had not yet been perfected. Where there is no reason or cause for the order or judgment to be reviewed, one would expect the order or judgment to be entered in the book kept for that purpose by the Registrar in the normal way and within a day or a week, at the latest. In this instance, the only reason why the order had not been entered in the book kept for that purpose by the Registrar was nothing more than mere oversight. In my respectful view, it would be an injustice to the Plaintiffs to be penalised by a mere administrative oversight by the Registrar. **The Registrar should have that order entered on the book kept for that purpose with immediate effect.** In Liliau's Case, the case was restored to the list after judgement had been pronounced, but before it had been perfected, on grounds that the question of interest was not dealt with by the Court, though parties had made submissions on it. The application to have the matter re-listed before the Judge was filed on the same day. If the Defendants were genuine and serious about their case, they would have either instructed their Solicitor to appeal or to make similar application that they are now making with immediate effect. To wait for five years and then come to Court and try and open this case up again for re-litigation in my respectful view amounts to delay that can only be described as excessive and inordinate, and an abuse of process. It over-rides any merits that might be found in the arguments presented by Counsel for re-instatement of this case on the list and ought to be dismissed. The Defendants have little excuse to offer concerning knowledge of the order made on 16 August 1994. They are deemed by law to have knowledge of the order with effect from that date. They had representatives in Court at said time and were represented by legal Counsel.

The second part to this Notice of Motion pertains to the application of Order 64 Rule 9 of the High Court Rules. I quote:

"In any cause or matter in which there has been no proceeding for one year from the last proceeding had, the party who desires to proceed shall give a month's notice to the other party of his intention to proceed. A summons on which no

order has been made shall not, but notice of trial although countermanded shall be deemed a proceeding within this Rule."

The application of the Defendants assume that the Notice of Motion is a *proceeding* within Order 64 Rule 9 and therefore a months notice is required to be given. Where that is not given application will have to be made to have time abridged. Unfortunately, the word *proceeding* refers to interlocutory proceedings before final judgment (see *The Annual Practice Volume 1 at page 1818 and 1819 which deals with Order 64 Rule 13 of the Rules of the Supreme Court; the English equivalent to our Rule 9*). In my respectful view, Rule 9 does not apply to this case as the proceeding sought to be commenced in this instance is not an interlocutory proceeding. Final judgment had already been given by this Court on 16 August 1994. Nothing further is to be done. Order sought therefore under that Rule is inappropriate and should not be granted.

The Notice of Motion accordingly must be dismissed with costs. This leaves the action for contempt against the Defendants in Civil Case 219 of 1997 to be re-listed for sentence.

ORDERS OF THE COURT.

- 1. DISMISS NOTICE OF MOTION OF THE DEFENDANTS FILED 1ST OCTOBER 1999.**
- 2. AWARD COSTS IN FAVOUR OF THE PLAINTIFF.**
- 3. DIRECT THAT ACTION IN CIVIL CASE 219 OF 1997 BE RE-LISTED FOR SENTENCE FOR 24 FEBRUARY 2000 AT 9.30 AM.**

THE COURT