

GARIMANE MICHA -V- SAMUEL THAO AND OTHERS AND GABRIEL PARA AND OTHERS AND ATTORNEY-GENERAL

High Court of Solomon Islands
(Palmer ACJ)

Civil Case No. 18 of 2002

Hearing: 28th February 2002

Judgment: 8th April 2002

G. Suri for the Plaintiff

A & A Legal Services for the First Defendants

Second Defendants in person

J.A. Keniapisia for the third Defendant (Commissioner of Forests)

PALMER ACJ: There are two summons for determination by the court. One is a summons to strike out under Order 27 rule 4 of the High Court (Civil Procedure) Rules, 1964 ("the Rules") by the first Defendant ("Aola Timbers"), the other is an application by the Plaintiff by Re-Amended Notice of Motion filed 28th February 2002, for orders inter alia, joinder of Earthmovers (Solomons) Limited ("Earthmovers") as second Plaintiff or defendant, and John Bartholomew Mara to be added as first plaintiff.

The claim of the Plaintiff

Plaintiff avers he is the chief of Nekama Clan, which owns Sobolonga Land in Ward 17 of Guadalcanal Province. He also claims his tribe owns the timber rights in the said land. This is not disputed. He further says at paragraph 1(c) of his Statement of Claim filed 31st January 2002, that ownership of timber rights over Sobolonga land had been determined in a *previous application* by Foxwood and Pacific Timber for timber licence. He did not give particulars of that previous application. What he claims is that whilst his rights were determined in that previous timber right hearing (a question of fact) **no timber rights agreement was entered into with Pacific Timbers**. In spite of this, Pacific Timbers appears to have acquired a timber licence (TIM 2/30) over Ward 17 way back in 1989. Sobolonga land is in Ward 17. The Plaintiff did not enter into a timber rights agreement with Pacific Timbers over Sobolonga land until **18th December 1996**.

Plaintiff relies on that timber right agreement as securing for Pacific Timbers an exclusive licence to enter, fell and remove logs from Sobolonga land. Plaintiff says that as the rightful landowner and representative of Sobolonga land, he is not aware of any other timber rights that he had granted to any other person apart from Pacific Timbers. Any other timber rights therefore that may have been granted by any other person would be null and void.

The dispute between the Plaintiff and the Defendants stem from the existence of another timber licence **TIM 2/45** obtained by the first Defendants in respect of Sobolonga land as well. It appears the first Defendants rely on a timber rights agreement dated **6th March 1996** entered into by the second Defendants with the first Defendants. Following the signing of this timber rights agreement, the first Defendant's timber licence (TIM 2/45) was extended by the Commissioner of Forest Resources by **letter dated 18th September 1996** to cover Sobolonga land.

The Plaintiff challenges the validity of that timber rights agreement and the extension of felling licence TIM 2/45 on the basis that it had been obtained **illegally** and by **fraud**. Plaintiff inter alia avers:

- (a) That no valid timber rights hearing was held in accordance with the requirements of the Forest Resources and Timber Utilisation Act 1996 [Cap. 40] ("the Forest Act").
- (b) That the Area Council Meeting held on 6th March 1996 (relied on by Aola Timbers) did not make any determination regarding timber rights over Sobolonga land. Any purported determination of timber rights over Sobolonga land therefore was false, illegal and fraudulent.
- (c) That even if a timber rights agreement may have been entered into by the second Defendants, they do not have authority in custom to grant timber rights. Whilst he concedes the second Defendants belong to the same Nekama tribe, he says they had no right in custom to enter into separate negotiations with the first Defendant without his authority or consent or to grant timber rights on behalf of their tribe. In so doing the second Defendants had acted outside any customary powers they might have and that such action in any event was null and void, and or fraudulent.

As a consequence he seeks orders to have Aola Timber's licence declared invalid. He seeks consequential orders, including an order for the judgment obtained by the first Defendants against Earthmovers (Solomons) Limited in Civil Case No.184 of 1998 set aside.

Lack of jurisdiction on customary matters

I will deal first with the Summons of first Defendant on whether this court has jurisdiction to determine issues in custom raised in the Statement of Claim of the Plaintiff. Are there any issues in custom raised, which are beyond the jurisdiction of this court?

It is not in dispute Plaintiff claims ownership over Sobolonga land as the lawful representative of Nekama tribe. It is also not disputed that the second Defendants are members of Nekama tribe. The crucial issue in custom however, regarding Sobolonga land is the question as to who are the persons and represent all the persons lawfully entitled to grant timber rights.

The determination of this question in the peculiar circumstances of this case is no longer a question in custom for determination. According to the pleadings of the Plaintiff this had already been determined in a *previous timber hearing*. The proof of this issue respectfully is a question of fact. Does such *previous timber right hearing* exist? When did it take place and where?

In contrast the case for the Defendants is based on a timber rights hearing purportedly made on 6th March 1996 and the subsequent extension of its timber licence to include Sobolonga land by letter dated 18th September 1996. The validity of the timber rights and licence are not questions of custom but of law and fact.

The submission that this court does not have jurisdiction to deal with issues of custom raised in the Statement of Claim of the Plaintiff is misconceived. The matters raised are not so much issues of custom as issues of law and fact.

No Cause of Action

Has Plaintiff disclosed a cause of action in its Statement of Claim filed 31st January 2002? In my respectful view this must be answered in the affirmative. Plaintiff has demonstrated in the pleadings the basis of his claim in law; that it is premised on the fact that his rights had been determined in an earlier timber rights hearing.

Particulars of illegality and fraud

Plaintiff's claim of illegality and fraud is premised on a number of facts. First that the timber rights hearing sought to be convened on 6th March 1996 was for purposes of negotiating timber rights over Telau customary land, not Sobolonga land. Secondly, Aola Timbers knew that Pacific Timbers had been issued with a licence over the whole of Paripao Ward (though in respect of Sobolonga land it was a mere bare licence – Pacific Timbers could not rely on it until it had obtained timber rights). To convince the President (Joeni Vakalea) of Bolomona Area Council to convene a timber rights hearing, Aola Timbers falsely represented to Joeni Vakalea ("Vakalea") that they had obtained the consent of Pacific Timbers. Thirdly, no timber rights hearing was ever held in respect of Sobolonga land. Any timber rights agreement therefore purportedly entered into over Sobolonga land was fraudulently obtained.

Statutory notice

In subparagraph 7(e) Plaintiff pleads illegality, to wit that the requirement for a statutory notice under the Forest Resources and Timber Utilisation Act 1990 ("the Forest Act") was not complied with. Further particulars are referred to in the affidavit of Joeni Vakalea filed 19th February 2002 at subparagraphs 5(8), (9) and (10).

Non-attendance at public meeting

At subparagraph 7(f) Plaintiff avers that neither he nor the second Defendants attended the public hearing purportedly convened on 6th March 1996. He also says that no mention either of Sobolonga land was ever made in that meeting (see 7(g)) or any determination made in respect of Sobolonga land (see paragraph 7(h)). If what is said here are true, then these raise very serious issues to be determined at trial.

The Timber Rights Agreement of 6th March 1996

At subparagraph 7(i) Plaintiff avers that the second Defendant acted fraudulently by entering into a timber rights agreement with the first Defendant when they knew very well they had no right in custom or law to do so. He seems to be saying that as members of the same tribe, the second Defendants ought to have known the identity of the chiefs and elders of the Nekama tribe and in particular if there had been *an earlier timber rights hearing* in which such rights had been determined.

I am satisfied Plaintiff has raised triable issues. To that extent paragraph 1 of the Summons of the first Defendant filed 26th February 2002 must be denied.

Frivolous and vexatious

In paragraph 2 of its Summons, Aola Timbers claim that the issues now raised by the Plaintiff in this case are frivolous and vexatious in that they had already been finally determined in an earlier case, between Aola Timbers as Plaintiff and Earthmovers (Solomons) Limited ("Earthmovers") as Defendant in Civil Case 184 of 1998.

In Civil Case 184 of 1998, Aola Timbers relied on the same timber licence no. TIM 2/45, extended by letter dated 18th September 1996 pursuant to the timber rights agreement, dated 6th March 1996. In

contrast Earthmovers relied inter alia, on the same licence TIM 2/30 issued in respect of Paripao Ward but not utilized until a timber rights agreement was entered into with the landowners (including the Plaintiff in this case, CC 18/02) on 18th December 1996. That same timber rights agreement is the same one relied on by the Plaintiff ("Micha") in this case. The defence relied on therefore by Earthmovers against the claim of Aola Timbers in CC 184 of 1998 apart from the claim of fraud now raised by Micha in CC 18 of 2002, was the same.

In CC 184 of 1998 Earthmovers claimed it already had a licence over Sobolonga land. Unfortunately, that was only partly correct. Up till 18th December 1996, it only had a bare licence (see *Mark Qurusu & Another v. Attorney-General & Others* CC 4/93, 4 June 1993). It did not acquire timber rights and therefore authority to enter Sobolonga land pursuant to that licence (TIM 2/30) until 18th December 1996. It must be borne in mind though that the validity of that right (that is, the validity of the timber rights agreement entered into on 18th December 1996) to enter Sobolonga land is dependent upon Micha proving on the balance of probability that his rights had been previously determined in an *earlier timber rights hearing*, the particulars of which have not been disclosed.

In contrast, we have the claims of Aola Timbers that it too had a valid licence (TIM 2/45) issued on 18th September 1996 over Sobolonga land based on a timber rights agreement dated 6th March 1996. Now in terms of the relative strength of each party's case based on priority, Aola Timbers would have prior claim to an exclusive licence, not Earthmovers.

The question whether these matters are frivolous or vexatious, would depend on the answer to the question whether the doctrine of *res judicata* applies.

Res Judicata

Does the doctrine of *res judicata* apply to Micha's case? In my respectful view, the answer is both yes and no. But for the allegation of fraud, the doctrine of *res judicata* would have applied to Micha's case. The ground of fraud was never raised in Earthmover's case. It is always open therefore according to clear case authorities (*Wyatt v. Palmer* [1889] 2 QB 106, *Jonesco v. Beard* [1930] AC 298, *Charles Bright & Co. Ltd v. Sellar* [1904] 1 KB 6) for Earthmovers to take up a fresh action even if that would entail impeaching a completed judgment obtained by Aola Timbers in CC 184 of 1998. This is not a case of seeking to rehear the matters raised in CC 184 of 1998. Fraud was not raised in CC 184 of 1998. It is a fresh action and it has been said that fraud if successful unravels everything.

But even if Earthmovers may have been prohibited somehow by the doctrine of *res judicata* the same cannot be said of Micha. He was not a party to CC 184 of 1998. There can be no legal impediment therefore for him to take up the action on fraud in this case (CC 18 of 2002).

To that extent, the order sought in paragraph 2 of the first Defendant's summons filed 26th February 2002 can only be granted in part with the exception of the claim on fraud. If Micha and Earthmovers are successful in their claim of fraud, that would destroy Aola Timber's licence and timber agreement with the second Defendants.

Application for joinder

I am satisfied in the circumstances Earthmovers should be joined as second Plaintiff and John Bartholomew Mara as one of the first Plaintiffs. I am also satisfied in the circumstances the order for execution in CC no. 184 of 1998 should also be stayed pending determination of this case. Costs should be in the cause.

Orders of the Court:

1. Dismiss paragraph 1 of the Summons of the first Defendant filed 26th February 2002.
2. Strike out all other grounds except the ground of fraud.
3. Grant leave to have Earthmovers (Solomons) Limited joined as Second Plaintiff.
4. Grant leave to have John Bartholomew Mara joined as a first Plaintiff.
5. Grant order to have the Writ of Fieri Facias issued for execution in Civil Case 184 of 1998 stayed pending determination of this case.
6. Plaintiff to file amended Writ of Summons and Statement of Claim within 7 days.
7. Costs in the cause.

THE COURT.