JOE RODY TOTOREA, ROE ROE AND GEORGE AHUKENI –v- TAIARATA INTEGRATED FOREST DEVELOPMENT COMPANY LIMITED AND BULECAN INTEGRATED WOOD INTERNATIONAL PTY. LTD.

HIGH COURT OF SOLOMON ISLANDS
(F. O. KABUI, J.)

Civil Case No. 204 of 2000

Date of Hearing: 26th June 2002
Date of Ruling: 28th June 2002

Mrs. M. Samuel for the Plaintiffs
Mr A. Nori for the Defendants

JUDGMENT

Kabui, J. The Plaintiffs by Notice of Motion filed on 22nd May 2002, seek the following orders-

1. **That all the Defendants/Respondents be barred from taking part in the proceedings as they had failed to file their list of documents as per the Order for Directions dated 28th March 2001.**
2. **That the court do grant leave to issue contempt of court proceedings against the Second and Third Defendants/Respondents for non compliance of court order that all rental money of the Po'otori log pond be deposited into a joint Solicitors account.**
3. **That the Malaita Customary Land Appeal Court be directed to sit and hear the appeal on the Po'otori land between the Plaintiffs/Applicants and the First Defendants/Respondents.**
4. **Costs against all the Defendants.**
5. **Any further orders that this Court deems fit to make.**

The Defendants did likewise and filed a Notice of Motion on 24th June 2002, seeking the following orders-

1. **The Plaintiffs' Notice of Motion filed herein be struck out on the ground that it is irregular.**
2. **The Consent Orders for Direction dated 28th March, 2002 be stayed for the reasons that-**

   (a) **the Plaintiffs' claim for damages for trespass is not prosecutable unless they fully establish their right of ownership over the disputed land; and.**
   (b) **Dispute over the ownership of the land in question between the Plaintiffs and the First Defendants is yet to be fully determined as the appeal is still pending before the Malaita Customary Land Appeal Court.**

3. **Further proceedings in this action be stayed for the same reasons enumerated in paragraph 2 of this Notice of Motion.**
4. **The Plaintiffs' application for leave to issue contempt proceedings against the Second and Third Defendants be dismissed; and**
5. **Costs to be paid by the Plaintiffs.**

I heard these two applications together for the sake of convenience in Chambers.

The Plaintiffs' Notice of Motion

Counsel for the Defendants, Mr. Nori, attacked the Notice of Motion as being in the wrong form. He said the appropriate form should have been a Summons. Mr. Nori did not press the point further. However, he said the Plaintiffs' Notice of Motion was irregular in that order 1 being sought in the Motion was in effect an order for variation of the consent order for directions dated 7th March 2001. As to order 2 in the Motion, Mr. Nori, said it was unnecessary because the matter could be sorted out as explained in Exhibit "AN" attached to his affidavit filed on 25th June 2002. That is, there was no need for any action for leave to issue a writ of attachment. It is not disputed that the Defendants had failed to file their list of documents within 14 days as agreed by the parties in the consent order for directions. No reasons were given by the Defendants for failing to comply with the relevant order for direction. If there were good reasons for an inevitable delay on their part, the Defendants should have applied for variation under Order 33, rule 28 of the High Court (Civil Procedure) Rules 1964, "**the High Court Rules**". This, the Defendants, did not do. There is also no evidence to show that the Plaintiffs had brought to the notice of the Defendants this omission and threatened them with the penalties under Order 33, rule 21 above. Communication between Solicitors on client matters would go a long way in avoiding firing final shots on discovery of omissions and defaults. The delay in this case had been a little over 12 months up to the date the Plaintiffs filed their Notice of Motion. The Plaintiffs, on their part, should have invoked Order 33, rule 21 of the High Court Rules after giving warning to the Defendants. This, the Plaintiffs, did not do. The first penalty under rule 21 above is attachment against the defaulter under Order 47 of the High Court Rules. This is perhaps what order 2 in the Motion is seeking in terms of leave being granted to issue a writ of attachment. The second penalty is an application for the Defendants' defence to be struck out. The Plaintiffs have not specifically asked for this relief although Mr. Nori said this was the case (See **Husband's of Marchwood Ltd. v. Drummond Walker Developments Ltd.** [1975] 1 W. L. R. 603). Mr. Nori could well be correct but I do take the view that Counsel for the Plaintiffs knew what she wanted. She did not make herself clear on this point that she was asking for the Defendants' defence to be struck out. Even if this were not the case, the facts do present a problem. If the parties had foreseen this problem, they would not have signed the consent order they signed and these two applications before me would have been unnecessary. The Plaintiffs' claim is for damages to customary land and for destruction of trees on that customary land. The ownership of that customary land is yet to be determined by the Customary Land Appeal Court (Malaita). If I strike out the defence, the result will be that the Plaintiffs can move for judgment in default of pleading a defence. This will not be

the result in this case because the dispute between the parties is currently before the Customary Land Appeal Court (Malaita) being the Court that has jurisdiction to determine the ownership of customary land. The High Court does not. I think the consent order for directions was premature in the sense that an order for directions should await the final determination of ownership of the customary land in dispute. At that time, the landholding group of the customary land in dispute would be known and their claim for damages for trespass will then be heard by the High Court. The High Court then assumes jurisdiction under the Writ of Summons to determine the Plaintiffs' claim for damages for trespass. The practical inconvenience of this suggestion will be that there would be months before summons for directions can be taken out by the Plaintiffs. This, in turn, will be contrary to Order 32, rules 1 and 8 of the High Court Rules in that if the Plaintiffs did not take out a summons for directions within 14 days, the Defendants would be at liberty to apply for an order to dismiss the action. This sort of practical problem peculiar to Solomon Islands underpins the remark I made in this same case in the ruling I made on 8th September 2000 where I said that the party who claimed damages for trespass on customary land in the High Court should not come to the High Court until customary ownership has been determined in the Local Court. I repeated this in **Nathan Kere v. Paul Karana** (Civil Case No. 258 of 2000). It undoubtedly would be frustrating for the Plaintiff to rush into the High Court only to be told to await the determination by the Chiefs or the Local Court or the Customary Land Appeal Court or even the High Court on appeal before the claim in the High Court can be heard. This is exactly the problem with this case. The consent order for directions dated 7th March 2001 was made too early. Mr. Nori must have realized this for the orders he seeks in his Notice of Motion are orders to stay the consent order for directions and further proceedings until the Plaintiffs establish their ownership rights in the land in dispute. I will come back to this point when I consider the Defendants' Notice of Motion. I will now say something about the Plaintiffs' wish to obtain leave to issue a writ of attachment against the Defendants. The undertaking filed by Mr. Nori on 6th September 2000 was not a Court Order. It was a personal undertaking to himself to cause an interest bearing deposit account to be opened in the joint names of the parties' Solicitors into which SBD1.50 per cubic metre would be paid. The written undertaking was filed simply as evidence of his seriousness of doing what he told the Court he would do. It was an open undertaking in that there is no time limit within which he must do what he promised to do. Now that he explained his position in his letter being Exhibit "AN' attached to his affidavit referred to above, the matter should be taken up from there by the Plaintiffs with the view to attaining their wish. That is, Mr. Totorea should see Mr. Nori to cause an account to be opened in one of the banks here for the receipt of rental payment as promised by Mr. Nori by his undertaking on 6th September 2000. There is therefore no ground for me to consider granting leave to issue a writ of attachment against the Defendants in this case. The Notice of Motion also asks for an order to direct the Customary Land Appeal Court (Malaita) to sit and hear the appeal about Po'otori land. I do not think that this can be done. Only a writ of mandamus can do that in an appropriate case. The practice is that the clerk to the Court arranges the sittings of the Court during the course of the year. This however cannot be done if there are no funds to do this. It is undoubtedly the case that the said Court cannot sit due to lack of

funds. I take judicial notice of this fact. The court order requested by the Plaintiffs cannot cure this financial problem of the Government. The Plaintiffs themselves do know about this for they too had requested this Court to sanction the withdrawal of $2000.00 from the fund payable for rental to meet the cost of the hearing of the initial dispute in the Malaita Local Court. (See my ruling on 7th November 2000). The current financial situation of the Government has not changed since then. I will also come back to this point later.

The Defendants' Notice of Motion

The Defendants' Notice of Motion was really a counter to the Plaintiffs' Notice of Motion above. In addition to claming the Plaintiffs' Notice of Motion as being irregular, the Defendants are seeking orders to stay the consent orders for directions pending the resolution of the ownership of the land in dispute and also the proceedings for the same reason. I think the reason for applying for staying orders is obvious. It is the same reason that I have pointed out above in this ruling. That is that, apart from causing inconvenience, it is often slow to obtain relief for trespass to customary land in the High Court until ownership has been determined by agreement or by the Chiefs, the Local Court, the Customary Land Appeal Court or the High Court whichever is the case. As I have said, the consent order for directions had come in too early and so it must be stayed until the question of ownership of the land in dispute is resolved between the parties. I do not think each party will be able to advance their case without first complying with the order for directions already made but in the meantime being stayed. I do not know how else any of the parties can revoke the consent order for directions already in place but being stayed in order to take further proceedings in this case. Such a possibility serves no useful purpose here because any further proceeding that is taken by either party prior to the resolution of ownership of the land in dispute will be met with the same problem of having to determine ownership first before taking any further proceeding. The need to make a further order to stay further proceedings for the same reason does not therefore arise. The Defendants have obviously been overcautious but as I have said the need for being overcautious does not arise here.

A side issue raised at the hearing

During the hearing, I commented on the futility of ordering the Customary Land Appeal Court (Malaita) to sit to hear the pending appeal before it. Counsel for the Plaintiffs, Mrs. Samuel, then suggested that the Court make an order that an amount of money be withdrawn from the proceeds of the sale of logs to meet the cost of a hearing by the Customary Land Appeal Court to be reimbursed by the Government. Counsel for the Defendants, Mr. Nori, did not oppose the suggestion but said the parties would discuss the matter and would come back to Court if necessary. Counsel for the Plaintiffs also asked that the members of the Customary Land Appeal Court (Malaita) be brought to Honiara to hear the appeal due to security reasons in Auki. Counsel for the Defendants, however, pointed out that for that to happen the relevant Court Warrant had to be varied. Counsel for the Plaintiffs did not however press the point further. I make no orders on these matters.

The orders of the Court

Clearly, there are good reasons for me to refuse to grant the orders sought by the Plaintiffs. The application by the Plaintiffs is therefore dismissed. The application by the Defendants is granted to the extent that the consent order for directions dated 7th March 2001 be stayed until the ownership of the land in dispute is finally resolved. I deliberately omit any reference to any resolution of the dispute by the Customary Land Appeal Court (Malaita) as being final because there may be an appeal to the High Court. Finality really depends upon what the High Court says if there is an appeal to it. If there is no appeal, determination by the Customary Land Appeal Court (Malaita) will be the final determination. There is of course the possibility that the dispute may be sent back by the Customary Land Appeal Court (Malaita) to the Local Court for re-hearing in which case finality will not be forthcoming for a long time. I am pointing out these scenarios to avoid any misunderstanding for the staying order may apply to more than one scenario depending on what happens after the determination by the Customary Land Appeal Court (Malaita). As to the question of costs, I feel each party should meet their own cost. Having said that, the orders of the Court are-

1. **The Plaintiffs' application is dismissed.**
2. **The Defendants' application is granted to the extent that the consent order for directions dated 7th March 2001 be stayed until ownership of the land in dispute is finally resolved.**
3. **Each party will meet their own cost.**

F.O. Kabui
Judge