KONGGUKOLO FOREST RESOURCES DEVELOPMENT COMPANY –v- DENNIS LOKETE AND OTHERS

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

Civil Case No. 159 of 2002

Date of Hearing: 29th July 2002
Date of Ruling: 31st July 2002

Mr J. Apaniai for the Applicants/Defendants
Mr P. Tegavota for the Respondents/Plaintiffs

RULING

(Kabui, J.): The Defendants by Summons filed on 24th July 2002, seek the following orders-

1. **That the time for hearing this application be abridged under Order 57 Rule 7 of the High Court (Civil Procedure) Rules 1964.**
2. **That the exparte orders of this court dated 10th July 2002 be discharged forthwith.**
3. **An order restraining the First and Second Plaintiffs, by themselves, their servants or agents, from entering and/or remaining on Nonoulu land.**
4. **Subject to order 5 hereunder, an order restraining the First and Second Plaintiffs, by themselves, their servants or agents, from felling, extracting and removing any trees, logs or timber from Nonoulu land.**
5. **Notwithstanding order 4, any logs now felled and lying in the bush within Nonoulu land may be removed by the Plaintiffs and sold, but that the proceeds of such sale to be paid into an interest bearing trust account to be opened in the joint names of the parties solicitors or their nominees and to remain there until trial or until further order of the court.**
6. **An order that the First and Second Plaintiffs, within 14 days from the date of the order to be made in respect of this application, account to the Court for all marketable trees felled on Nonoulu land during the period commencing January 2002 up to the date of the order to be made in respect of this application and providing details of:-**
   (a) **species, quantity and fob price of the logs extracted from Nonoulu land;**
   (b) **the quantity of logs already sold and/or exported and the amount not yet sold and/or exported as at the date of the order to be made in respect of this application;.**
   (c) **in the case of logs already exported, to produce to the court the Bills of Lading and Commercial invoices relating to such exports.**
7. **In respect of logs already exported and/or sold as mentioned in paragraph 6 [b] above, that the First and Second Plaintiffs, within 14 days from the date of the order to be made in respect of this application, pay the balance, after deduction of statutory expenses, of any monies received in respect of such export and/or sale into the interest bearing trust account mentioned in paragraph 5 above and to remain there until trial or until further order of the court.**
8. **In respect of logs not yet exported and/or sold as mentioned in paragraph 6 [b] above, that the First and Second Plaintiffs, within 14 days from the date of the export and/or sale of such logs, pay the balance, after deduction of statutory**

expenses, of any monies received in respect of such export and/or sale into the interest bearing trust account mentioned in paragraph 5 above and to remain there until trial or until further order of the court.

9. **That a penal notice be attached to orders 3, 4, 5, 6, 7 and 8 above.**
10. **Should there be any dispute between the First Plaintiff and the Defendants as to the ownership of Nonoulu land or the boundaries between the said Nonoulu land and Konggukolo land, that the Defendants, within thirty days from the date of the order to be made in respect of this application, refer (sic)**
11. **Such further or other orders as the Court thinks fit.**
12. **Costs in the cause.**

Order 10 above was subsequently dropped by the Defendants on the ground that the dispute was already before the Marovo Chiefs as on 29th July, 2002.

THE BACKGROUND

On 10th July 2002, I made interim restraining orders against the Defendants upon the application of the Plaintiffs. The hearing was done ex parte and so the Defendants were not present at that hearing. They have now come back to Court to request the Court to discharge the said interim orders and to request fresh restraining orders against the Plaintiffs. They relied on two affidavits. One was sworn and filed on 24th July 2002 by Dennis Lokete, the 1st Defendant. The other was sworn and filed on 29th July 2002 by Burnley Kimitora a member of the Nonoulu tribe. Their case was that Nonoulu land was not Konggukolo land and therefore the Plaintiffs had no right to enter and log on Nonoulu land without the permission of the owners of Nonoulu land.

THE EVIDENCE

When the Form 1 application was forwarded to the Marovo Area Council in 1997, Nonoulu land was included in that application. At the Timber Rights Hearing by the Marovo Area Council, the inclusion of Nonoulu land was objected to and so it was excluded from the Certificate of Determination. A Timber Rights Agreement was signed on 29th April 1999 between the 1st Plaintiff and the customary owners of Konggukolo land. A Logging and Marketing Agreement was also signed on 5th June 1999 between the 1st Plaintiff and 2nd Plaintiff. Based on these agreements, a licence was issued to the 1st Plaintiff on 23rd August 1999. It is referred to as TIM2/126. In none of these documents was Nonoulu land included. The Defendants did not sign the Timber Rights Agreement and so are not parties to that Agreement. It is not binding on the Defendants. These new facts were not before me on 9th July 2002 when I heard the Plaintiffs' application for interim orders against the Defendants. They had not been disclosed to me by the Plaintiffs. **(Alfred Uiga & Alick Sarere –v- Wilson Habo)** (Civil Case No. 136 of 1998). The Plaintiffs produced no evidence to counter these new facts. Counsel for the Plaintiffs, Mr. Tegavota, however said that he believed that the suspension of the 2nd Plaintiff's operation by the Commissioner of Forest Resources as per letter of 27th May 2002 had been lifted following a meeting with the Commissioner. He however said he could not produce any documentary evidence of that fact. The letter lifting the suspension was given to me in Chambers by Mr Pou, our Office Manager yesterday at 1:00 pm. He said it was given to him by Mr Sangatu for onward transmission to me. This is most irregular and I do not accept this letter as evidence. Evidence must be produced in Court in the proper manner and openly in Court. I reject this letter on that basis. Be that as it may, such evidence does not help the Plaintiffs much because even if the suspension had been lifted, it would not alter the position that the suspension would only apply to Konggukolo land. Clearly, it would not apply to Nonoulu land. These new facts have completely altered the triable issues I determined in my ruling on 10th July 2002. The issues have become issues of ownership of Nonoulu land in custom and its correct boundary between itself and Konggukolo land. If the 1st Plaintiff accepts that the Defendants are the owners of Nonoulu land then only the common boundary between the two

needs to be determined. If not, the issues of ownership and the correct common boundary need to be determined. The validity of the 1st Plaintiff's licence is neither being questioned nor the 2nd Plaintiff's right to enter into contract with the 1st Plaintiff. These are no longer triable issues. As such, they form no basis for the continuance of the interim orders I made earlier in my ruling on 10th July 2002. The restraining orders I made referred to above must therefore go as well. Those orders are hereby discharged. I order accordingly.

THE DEFENDANTS' REQUEST FOR RESTRAINING ORDERS AGAINST THE 1ST AND 2ND PLAINTIFFS

The Defendants filed their defence on 24th July 2002 to the Plaintiffs' Writ of Summons and Statement of Claim filed on 27th June 2002. In the defence was a counterclaim against the Plaintiffs in which the Defendants, amongst other things, alleged trespass against the Plaintiffs, claiming damages etc. The Defendants/Plaintiff s alleged that they were the owners in custom of Nonoulu land and not the members of the 1st Plaintiff. The allegation clearly raises the issue of ownership of the Nonoulu land. Counsel on each side agreed that this Court had no jurisdiction to decide ownership of customary land as laid down by the Court of Appeal in Gandley Simbe's case and applied in many cases in this jurisdiction. What was in dispute was in what circumstance would this Court assume jurisdiction in aid of the Chiefs or the Local Courts? Counsel for the Plaintiffs, Mr. Tegavota, argued that the party claiming aid of the High Court must show that it was entitled to ownership of the customary land in dispute. He cited the case of **Vaedalyn Tutua & Others v. KonguNgaloso Timber Company, Omex Limited,** Civil Case No. 063 of 2001 (unreported) as authority for his argument. The brief facts of that case were that the Plaintiffs had in their favour a determination by the Marovo Chiefs' forum when they claimed damages for trespass to their land and for conversion of trees on their land. That case can be distinguished from this case in that the Plaintiffs were entitled to ownership of Seko land before they came to the High Court for relief quite unlike the case in **Nathan Kere v. Paul Karana,** Civil Case No. 258 of 2000 where I said the Plaintiff had to turn to the Chiefs first for determination of ownership. I think what Muria, C. J. meant was that the aiding jurisdiction of the High Court was not restricted only to cases where no first determination had been made by the Chiefs but also to where Chiefs had made a determination. His Lordship however gave no examples of the circumstances His Lordship had in mind in cases where a party comes to the High Court seeking its aid when that party is already the owner of the customary land in question. However, I do not think that such a case would be unimaginable in customary land litigation. One would not be surprised to discover as a reality that the party who loses in the Chiefs' forum, or in the Local or Customary Appeal Court attempts to enter the land by force whilst an appeal is pending in the upper Court. In such situation, a restraining order may prove to be useful pending the determination of the appeal. In this case however, the dispute over ownership of Nonoulu land has been referred to the Marovo Chiefs for determination. The affidavit filed by Burnley Kimitora confirms this fact. The triable issues in this case are currently pending before the Marovo Chiefs for determination. The orders being requested by the Defendants are intended to maintain the status quo until the triable issues are resolved by the Chiefs. The High Court clearly has the jurisdiction in that situation to aid the Chiefs in the exercise of their jurisdiction. (See **John Osiramo v Mesach Aeounia** Civil Case No. 020 of 2000 (unreported).

SHOULD RESTRAINING ORDERS BE GRANTED?

The Court clearly has the discretion to make restraining orders where it is necessary to do so. The exercise of its discretion however is influenced by a number of factors. Those factors were identified and recognized in American Cyanamid Co. v. Ehican Ltd. [1975] 1 A. E.R.504 cited in this jurisdiction in **Nelson Meke v. Slomac Construction Company Limited,** Civil Case No. 44 & 45 of 1982 (unreported). Those factors have been considered and applied in this jurisdiction on numerous occasions and I need not cite them. Basically, the factors are applied so as to point to where the balance of convenience lies in the case before the Court. This exercise involves weighing the factors

against each other and seeing on which side the balance of convenience tilts. In practice it means asking the question, would the plaintiff be adequately compensated if an injunction is granted and he or she wins his or her case? If the answer is yes, no injunction should be granted. If the answer is no, but the plaintiff undertakes to abide by any order of the Court for damages, would that satisfy the Defendant in terms of adequate damages for his or her loss? If the answer is yes, an injunction should be granted. If, however, doubt still remains, then all the factors in the case should be considered bearing in mind the important thing being maintaining the status quo at the time the defendant commenced the activity complained of by the plaintiff. If, after these steps have been taken there is still doubt, then the relative strength of each party's case should be the basis on which a decision is made. Bearing these factors in mind, the answer to the first question is that the Defendants/Plaintiffs in the counterclaim would not be adequately compensated if no injunction is granted and they win their case at the end of the day. The reason is that by the time their case is decided, the trees will have gone and their land damaged. The loss incurred may prove to be irrepairable in terms of adequate damages being paid. I accept the fact that the Defendants as Plaintiffs in the counterclaim are unable to provide an undertaking for damages but that fact should not be held against them. (See **Steward Tatalu & B. Wanefaekwa v. Elliosn Lifuasi & Alban Leaga,** Civil Case No. 146 of 1996 **and Rolland Masa and Others v. Kololeana Development Company Limited and Others,** Civil Case No. 361 of 1995). In my view, the balance of convenience lies in favour of the Defendants in the counterclaim. In fact, they are the Plaintiffs in the counterclaim. I would therefore grant the orders except 10 sought by the Defendants as Plaintiffs in the counterclaim. I order accordingly. The 1st and 2nd Plaintiffs will pay the Defendants' costs.

F. O. Kabui
Judge