WUITLYN VIULU, RAEVYN REVO, BROWN LAMU, ISSAC NAPATA AND SETH PIRIKU (Representing the Veala tribe of Vangunu) **–v- TUI KAVUSU, MOLTON LUMA, SAMSON SAGA, PESETI KUITI, HAMI LAVI, GORDON YOUNG, PAUL KAVUSU, OPHIU VENDI, STEVEN VENO, ISSAC NONGA AND ABRAHAM KUMITI,** (Representing Nama Development Company and Others)

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

Civil Case No. 015 of 2002

Date of Hearing: 8th October 2002
Date of Ruling: 11th October 2002

Mr G. Suri for the Plaintiff
Mr A. Radcliffe for the 1st-6th Defendants
Mr J. Sullivan for the 7th Defendant
Mr J. Deve for the 8th Defendant

RULING

Kabui, J. This is an application by the 7th Defendant for the following orders-

1. **Orders 1 and 2 of the Orders made herein by Justice Kabui on the 6th day of February 2002 as amended on the 21st day of February 2002 be discharged.**

2. **The Plaintiffs pay the 7th Defendant's costs of and in connection with this application and the hearings before this Court on the 21st day of February, 2002.**

3. **Such further or other orders as this Honourable Court may seem meet.**

The brief Background

On 6th February 2002, I granted a restraining order exparte against the 3rd Respondents/Defendants, contractors, friends or associates restraining them from continuing with their felling of logs or carrying on of logging activities within Ojava Lavata, Ojana Kiki, Riviti, Susuvairana, Lalajiri and Kuvotu on Vangunu. I also ordered that the 1st to 3rd Respondent/Defendants remove all logging machines and equipment from the said lands within 14 days from the date of the order. I further ordered that the 1st to 3rd Respondents/Defendants provide an inventory by affidavit of logs already on the ground stating the species of logs, the land from which such logs were felled and the their f.o.b. value etc. Lastly, I ordered that the interparte hearing be fixed after 14 days from the date of the order. I subsequently amended this order on 26th February 2002 having granted it on 21st December 2002. The first amendment was the deletion of the word "Riviti" wherever it appeared in orders 1 and 2 of the previous order. The second

amendment was the insertion of a proviso in order 2 of the same previous order to allow the 7th Defendant to remove any logs already on the ground on the said lands including logs on "Raviti" land. The third amendment was to allow the 7th Defendant to separately identify all logs removed from the said lands excluding "Raviti" land and to sell and export them for gain? The proceeds of such sale or export was to be paid into a joint interest bearing trust account in the names of the Solicitors for the 7th Defendant and the Plaintiff after deducting export duty and reasonable operating costs of the 7th Defendant. This position was to exist until further orders of the Curt. There were also minor consequential amendments. The 7th Defendant now seeks to discharge orders 1 and 2 as amended on 21st February 2002 and perfected on 26th February 2002. The other Defendants 1st to 6 and 8 are in support of this application.

The case for the 7th Defendant

Counsel, Mr. Sullivan, argued that the facts of this case were on all fours with **Gandly Simbe v. East Choiseul Area Council, Eagon Resources Dev. Company, Steven Taki and Peter Madada,** Civil Appeal No. 8 of 1997. He said, in that case, like in this case, the appeal to the Customary Appeal Court challenging the determination of the East Choiseul Area Council was out of time. He said, in that case, like in this case, the aggrieved party never took the dispute to the Local Court for determination. He also said, in that case, like in this case, the complaint by the aggrieved party was an alleged non-compliance with the provisions of the Forest and Timber Utilization Act (Cap. 40). He said, in that case, like in this case, the aggrieved party had no locus standi because the claim was a mere assertion of rights of ownership of customary land. He said that those facts were on all fours with the facts of this case. The next point that Mr Sullivan took up was the delay in fixing a date for the interparte hearing. He pointed out that the Plaintiff filed a Notice of Motion on 29th April 2002 pursuant to Order 27, rules 2, 3 and 4 of the High Court (Civil Procedure) Rules "the High Court Rules". He argued that the Plaintiff, having obtained exparte orders in his favour, sat on his case and did nothing to prosecute his case. That is, he said, the Plaintiff never bothered about getting the interparte hearing in place so that the Defendants would have the opportunity to remove the exparte orders in Court. The other point Mr. Sullivan took up was the lack of an undertaking by the Plaintiff to cover damages if the 7th Defendant should win its case at the end of the day after suffering the effect of the exparte orders against it. Mr. Sullivan concluded by saying that on the whole, there was no basis for the exparte orders to continue and therefore must be discharged. Counsel for the 1st to 6th Defendants, Mr. Radclyffe, also supported the call by Mr. Sullivan for the discharge of the same exparte orders. Counsel for the 8th Defendant, Mr. Deve, also agreed that the same exparte orders should go.

The case for the Plaintiff

Counsel, Mr. Suri, opposed the application. He distinguished the Simbe's case from this case as that case was concerned with Form 4 whereas this case was concerned with Form 2 with an allegation of fraud. He said, in this case, the appeal to the CLAC

was still pending before the Western Province CLAC although that appeal did not arise from the determination of the Western Province Government in this case. He said that the Plaintiff 's ownership interest remained the same nevertheless for the land areas in both cases were the same. He also said that, in this case, an element of fraud was alleged and so it was important that the matter went to trial. He did not agree that there was any delay of interparte hearing as there had been previous hearings but there had been adjournments also. He said although the Plaintiff could not provide cash undertaking, there was a Milling Licence in place of value. He concluded by saying that the ownership interest that the Plaintiff had in the land in issue greatly outweighed the monetary interest of the Defendants in the logs on that land. He urged me to maintain the exparte orders to protect the Plaintiff's interest in that land.

Court's assessment of the arguments on both sides

The first point I wish to make is that the exparte orders that I made on 6th February 2002 and varied on 21st February 2002 were made in the absence of the Defendants. I did not have the benefit of hearing them. That was why I ordered that interparte hearing should be fixed after 14 days. I did not want the exparte orders to last for longer than was necessary. The exparte orders were really a "holding charge" as if it was a criminal matter. That was how I viewed the exparte orders that I made. The first interparte hearing was on 21st February 2002 but that hearing was for the purpose of seeking variation of the orders I made on 6th February 2002. The next interparte hearing was on 9th May 2002. That hearing was for me to consider the Plaintiff's Notice of Motion filed on 29th April 2002 pursuant to Order 27 of the High Court Rules. Counsel for the 7th Defendant, Mr. Kama, protested against Mr. Suri for having said that he had come prepared to proceed that day but for Mr. Katahanas' objection. Mr. Katahanas had told Mr. Suri prior to that hearing that he needed time to take instructions on the Plaintiff's Notice of Motion and would prefer the interparte hearing and the Notice of Motion hearing to be at the same time. Mr. Suri's proposals for directions were that the interparte hearing was to be stayed until the determination of the Notice of Motion and witnesses were to be limited to the Provincial members named in Form 2. Mr. Kama then said that he had come for the interparte hearing but since the Notice of Motion had intervened, he would need time to take instructions. He pointed out that some of the affidavits filed in support of the Notice of Motion made allegations of breach of the Court orders by the 7th Defendants and he would need time to take instructions on the allegations and other matters raised in those affidavits. I adjourned the hearing at the request of Mr. Kama to a date to be fixed with costs reserved. The case came again for interparte hearing on 15th July 2002. At this hearing, Mr Radclyffe who was the Solicitor for the 1st to 6th Defendants sought an adjournment to enable him to take instructions from his clients. He straightaway attacked the Notice of Motion as being objectionable on points of law and facts and asked for it to be dismissed. He pointed out that deciding the points of law raised in the Notice of Motion would not end the litigation at all because the issue of ownership of customary land would still be there to be decided by the appropriate forum. I again granted an adjournment with costs to be in the cause. In the meantime, Mr. Suri decided to file an

Amended Notice of Motion in which he combined an application under Order 27 and an application under Order 61 of the High Court Rules as alternative relief to each other. He did so on 19th July 2002. Mr. Suri explained his intention at the interparte hearing on 1st August 2002. He said he was postponing the application under Order 27 but would proceed with the application under Order 61 of the High Court Rules. Mr. Sullivan opposed the move by Mr. Suri on the ground that the Western Provincial Government would have to be served with the Notice of Motion because of the allegation of fraud against it. He pointed out that there had been almost 5 months delay in getting the interparte hearing underway as soon as possible. He said the 7th Defendant had been under the exparte orders since February, 2002 without an undertaking by the Plaintiff to insure it against any damages that could arise form the effect of the exparte orders upon them should his client win at the end of the day. Mr. Suri said that he would serve the Western Provincial Government as soon as possible. He said he could proceed with the application under Order 61 of the High Court Rules or he could adjourn it. He said that in any case, if he applied for leave under Order 61, the interparte hearing would not be necessary. I made certain orders and adjourned the hearing to date to be fixed. The Plaintiff again re amended his Notice of Motion on 24th July 2002. He filed it on that date. The next interparte hearing was on 24th September 2002. I adjourned the hearing because Mr. Suri was ill and could not attend Court. I have recounted these facts so that an accurate picture of the conduct of each party in this case can be recognized and appreciated.

I will now deal with the legal arguments presented by the parties. The first point is the issue of standing of the Plaintiffs in this case. In this regard, Mr. Suri said that there was a Marovo Local Court decision referred to as No. 4/76 in favour of one of the Plaintiffs. Mr. Suri also said that an appeal to the CLAC Western Province was still pending regarding an application to log by Golden Springs International over the same areas of land over which the Plaintiffs claimed ownership in custom. Exhibit "WV3" attached to Mr. Viulu's affidavit filed on 31st January 2002 is the copy of the CLAC judgment. The appellants there are the Plaintiffs in this case. Bearing in mind the fact that in this case, there was no appeal by the Plaintiffs against the determination by the Western Provincial Government and the pending appeal (Case No. 6/97) in the CLAC Western Province in the case of Golden Springs International, the position of the Plaintiffs in terms of standing cannot be assured. I say this because of the effect of what the Court of Appeal said in **Aquila Talasasa, Jacob Zinghite and Nathan Maisasa Losa v. Rex Biku, John Kevisi and CLAC(W)** Civil Appal No. 2 of 1987 which I cited in my judgment in **John Sina v. John Mark Matupiko** Civil Case No. 082 of 2001. At page 2 of my judgment, I said, **"...The Court of Appeal judgment clearly puts beyond doubt that the Customary Land Appeal Court's jurisdiction in section 5D (2) (now 10(2) of the Forest and Timber Utilization Act is not to do with the determination of the ownership of customary land. It says the CLAC's jurisdiction is confined only to appeals arising from the determinations made by the Area Councils..."** Again at page 3, I said, **"...The Customary Land Appeal Court exercising its powers under section 5D (2) (now section 10(2) of the Forest and Timber Utilization Act**

would be an exception because its jurisdiction excludes the determination of the ownership of customary land..."

Any hope by the Plaintiffs in this case that the appeal pending in the CLAC Western Province referred to above would somehow help their cause therefore lacks any legal basis. The fact that the Plaintiffs have yet to refer the dispute to the Local Court through the Chiefs for determination of ownership in custom makes the position of the Plaintiff even weaker in terms of his standing. What the Plaintiffs have been saying so far in evidence is therefore no more than a mere assertion of ownership of the areas of land in issue other than Kuvotu Land. I will say more about Kuvotu Land later. This is why Mr. Sullivan insisted that the facts this case were on all fours with Simbe's case cited above. Simbe's case is a well-known authority in this jurisdiction on the ruling that the High Court has no jurisdiction to decide ownership of customary land because it is the exclusive preserve of the Local Courts. I need not go into further details on this. What it means in this case is that the exparte orders I made on 6th February 2002 and amended on 21st February 2002 were not valid orders for I had no jurisdiction to make those orders. The reason is that ownership of customary land or establishing customary boundaries being the triable issues now are not triable issues for the High Court to determine. They are triable issues for the appropriate Local Court through the appropriate Chiefs forum to determine. If the Plaintiffs should need injunctive orders, they must apply to the High Court for such orders after having referred the dispute to the Local Court through the Chiefs. The High Court in deciding whether or not to grant such orders will be exercising its jurisdiction in aid of the Chiefs and the Local Court. (See Simbe's case cited above). This is not the case here for the Plaintiffs have not gone to the Chiefs as yet for a determination of the dispute. The Statement of Claim filed by the Plaintiff on 30th January 2002 suggests that the Plaintiff on behalf of his tribe were the owners of Kovutu Land situated between Chochole and Sambunu rivers. Exhibit "WV2" attached to Mr. Viulu's affidvit filed on 31st January 2002 in support of his exparte application is the copy of the Marovo Local Court decision. The Local Court found that the Plaintiff was the owner in custom of Kovutu Land. The boundaries were said to be between Chochole and Sambunu rivers. In the map Exhibt "WV1" attached to Mr. Viulu's affidavit referred to above, Kuvotu Land the subject-matter of the Marovo Local Court in 1976 is outside the areas of land called Ojana Lavata, Ojana Kiki, Rihiti, Susuvirana and Lala Jiri. Form 2, being Exhibit "WV10," attached to Mr. Viulu's affidavit above, lists the areas of land to be logged as being Olana Kiki, Hihiovo, Kolobangara, Gulagulasa and Malemale. The demarcation of the boundaries of the areas of land covered by the Timber Rights Agreement signed on 7th December 2001 is described in that Agreement. The Licence No. A10108 issued on 24th December 2001 simply repeats the areas of land listed in Forms 1 (Exhibit "WV7") and 2 attached to Mr. Viulu's affidavit referred to above. The Logging and Marketing Agreement signed on 26th December 2001 between the 7th Defendant and the 1st Defendant simply follows the terms of the Timber Rights Agreement above. If there is any confusion at all in this case, it arises from the Timber Rights Agreement than from Forms 1, 2 and Licence No. 10108. The confusion is clearly about the true boundaries on the ground of Kuvotu Land relative to the boundaries of the areas of land listed in Forms 1, 2 and the Licence NO.10108. The

matter is further complicated by the existence of the Plaintiffs' Licence to operate a Sawmill issued on 23rd October 1995 renewed up to 23rd October 2002. That Licence covers an area of land between Sagivi and Chochole rivers. The boundaries of the area covered by that Licence in map 3 attached to Mr. Revo's affidavit filed on 22nd March 2002 appear to be quite extensive. The areas of land listed in Forms 1, 2 and the Lilence No.10108 may well be within the area for which the Plaintiffs hold a Sawmill Licence. That possibility may well raise issues of ownership in custom as well. The ownership of Kuvotu Land by the Plaintiffs in custom confirmed by the Marovo Local Court in 1976 is obviously not conclusive in terms of its true boundaries as against those of the surrounding areas of land. The High Court cannot determine customary boundaries of customary land. The jurisdiction to do so lies in the hands of the relevant Chiefs and the Local Court serving Vangunu Island. Ownership and boundaries issues are inter-linked in this case because respective ownership will follow the extent of the boundaries as determined by the relevant Chiefs and the Local Court. The fact that the Plaintiffs are yet to submit the dispute to the Chiefs in the first place and to the Local Court if necessary will disentitle them to maintain the exparte orders beyond today. The exparte orders are accordingly discharged. I do not need now to consider the issues of delay in the interparte hearing and the issue of the need for an undertaking by the Plaintiffs as the other issues. This case clearly shows the danger inherent in granting exparte orders and the interparte hearing is not forthcoming in good time. Each party will meet their own costs. This is not an easy case. Clearly, the Plaintiffs own Kuvotu Land in custom but its boundaries are so uncertain that the extent of their ownership is not clear to anyone. The Chiefs and the Local Court will have to deal with the issues of ownership and boundaries undoubtedly mixed together in this case. Upon application by the 7th Defendants supported by the 1st-6th Defendants, I ordered that the monies being held in the joint trust account of the Solicitors for the parties be released forthwith to the 7th Defendant or to Sol-Law's account for payment to the 7th Defendant.

F. O. Kabui
Judge