

**GARIMANE MICHA (representing the NEKAMA Tribe) -V- EARTHMOVERS AND OTHERS**

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

Civil Case No. 018 of 2002

Date of Hearing: 4<sup>th</sup> November 2002.

Date of Ruling: 7<sup>th</sup> November 2002

*Mr G. Suri for the 1<sup>st</sup> and 2<sup>nd</sup> Plaintiffs*

*Mr C. Ashley for the 1<sup>st</sup> Defendant*

*Mr M. Ipana for the 2<sup>nd</sup> Defendant*

*No appearance for the 3<sup>rd</sup> Defendant*

**RULING**

**Kabui, J.** The 1<sup>st</sup> and 2<sup>nd</sup> Plaintiffs (the Plaintiffs) by a Notice of Motion filed on 15<sup>th</sup> October 2002 seek the following orders-

1. An order that judgment be given and entered against the First Defendants, in default of defence, in the terms contained in the Amended Statement of Claim filed on 15<sup>th</sup> April 2002.
2. Further or other orders as the Court deems fit.
3. Costs of this application be paid by the First Defendant.

The 1<sup>st</sup> Defendant by contrast seek the following orders by Summons filed on 31<sup>st</sup> October 2002-

1. That the 1<sup>st</sup> and 2<sup>nd</sup> Plaintiffs file and serve further and better particulars as requested by the 1<sup>st</sup> Defendants in their request dated 20<sup>th</sup> and filed 21<sup>st</sup> June 2002.
2. In the event that the Plaintiffs fail to file their answers within 7 days of the order sought in paragraph 1 (if granted), the Plaintiffs' Amended Writ and Statement of Claim be struck out.
3. Any further or order the Court deems fit.
4. The Plaintiffs to pay the costs of all the Defendants.

**The brief Background**

The 1<sup>st</sup> Plaintiff filed a Writ of Summons together with a Statement of Claim on 31<sup>st</sup> January 2002, claiming relief in the form of a declaration and certain orders. The 1<sup>st</sup> Defendant entered a Memorandum of Appearance on 12<sup>th</sup> February 2002. The 3<sup>rd</sup> Defendant did likewise on 14<sup>th</sup> February 2002. By order of the Court, Earthmovers (Solomons) Ltd. was joined as 2<sup>nd</sup> Plaintiff and John Bartholomew Mara as a 1<sup>st</sup> Plaintiff. The Writ of Fieri Facias issued for execution in Civil Case No. 184 of 1998 was also stayed pending the determination of this case. An amended Writ of Summons and a Statement of Claim were to be filed within 7 days. The Amended Writ of Summons and Statement of Claim were filed on 15<sup>th</sup> April 2002. The 2<sup>nd</sup> Defendant entered a Memorandum and a defence on 27<sup>th</sup> June 2002.

## The Dispute

By a document titled "Request for further and better particulars of amended Statement of Claim," filed on 21<sup>st</sup> June 2002, the 1<sup>st</sup> Defendant sought answers to the requests for further and better particulars stated therein. By letter dated 26<sup>th</sup> June 2002, the Solicitor for the Plaintiffs wrote to the Solicitor for the 1<sup>st</sup> Defendant. In that letter, the Solicitor for the Plaintiffs told the Solicitor for the 1<sup>st</sup> Defendant that the further and better particulars being sought were addressing non-issues. The Solicitor for the 1<sup>st</sup> Defendant by letter dated 1<sup>st</sup> July 2002 disagreed with the Solicitor for the Plaintiffs and threatened to apply for Court orders. By letter dated 3<sup>rd</sup> July 2002, the Solicitor for the Plaintiffs told the Solicitor for the 1<sup>st</sup> Defendant that he stood his ground. The Plaintiffs eventually filed the answers on 5<sup>th</sup> September 2002. The purported answers were peculiar in nature in that they were not answers but a refusal by the Plaintiffs to give any answers on the basis that any answers would be irrelevant and oppressive. The Plaintiffs then decided to move for judgment in default of defence under Order 29, rule 8 of the High Court (Civil Procedure) Rules 1964 "the High Court Rules". The 1<sup>st</sup> Defendant responded by applying for Court orders under Order 21, rule 7 of the High Court Rules.

## The steps taken by each party

Although the Plaintiffs filed an Amended Writ of Summons and Statement of Claim on 15<sup>th</sup> April 2002, there is no evidence to show that these documents had been served on the Defendants. They might well have been served but there is no proof of service. The Amended Writ of Summons had not been indorsed under Order 9, rule 12 of the High Court Rules to show that Writ of Summons had been served. (See **Francis Saemala v. Gordon Kiko Zinehite**<sup>1</sup>) None of the other Defendants except the 2<sup>nd</sup> Defendant had entered appearance to the Amended Writ of Summons and Statement of Claim. I think the 1<sup>st</sup> Defendant should have entered appearance first to the Amended Writ of Summons and Statement of Claim. The Plaintiffs have not taken issue on this point but the omission does raise the point whether or not they should have moved for judgment in default of defence under Order 29, rule 8 of the High Court Rules. Did they not act prematurely by coming to Court under Order 29, rule 8 above and forgetting about acting by reason of default of appearance under Order 13 of the High Court Rules. There is of course the argument that the 1<sup>st</sup> Defendant had already entered appearance on 12<sup>th</sup> February 2002 to the earlier Writ of Summons and Statement of Claim filed on 31<sup>st</sup> January 2002. Clearly, the Amended Writ of Summons and Statement of Claim had replaced that Writ of Summons and Statement of Claim. There ought to have been fresh appearances and defences filed in response to that amended cause of action. Both parties had jumped over one step into the second step and then acted on that basis. That is, the Plaintiffs filed their Notice of Motion for judgment in default of defence when no defence was due to be filed. No defence would be due until an appearance had been entered. The 1<sup>st</sup> Defendant, on the other hand, sought further and better particulars when the Plaintiffs were awaiting an appearance from them. I do not think defence can be a substitute for appearance. These are two separate steps in pleading. (See **Francis Saemala v. Gordon Kiko Zinehite** cited above). I think the mistake in jumping over the first step into the second step in this case was a mutual one.

## The solution to this dispute

Putting aside the procedural error mentioned above, the main issue to be decided is whether or not the 1<sup>st</sup> Defendant's request for further and better particulars are oppressive in that the answers being sought are irrelevant. I think the starting point is Order 21, rule 6 of the High Court Rules. Rule 6(1) states-

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<sup>1</sup> Civil Case No. 162 of 2000

"In all cases in which the party pleading on any misstatement, fraud, breach of trust, wilful default, or undue influence, and all other cases in which particulars may be necessary beyond such as are exemplified in the forms aforesaid (with dates and items if necessary) shall be stated in the pleading"...

At page 113, Bernard C. Cairns<sup>2</sup> says,

"...Generally a party pleading a contract, misrepresentation, fraud, breach of trust, wilful default, or undue influence must do so with particulars. In addition, in all other cases where particulars are required they must be stated, either in the body of the pleading or separately. These requirements apply to all actions"...

The Amended Statement of Claim filed on 15<sup>th</sup> April 2002 is based on fraud allegedly committed by the 1<sup>st</sup> and 2<sup>nd</sup> Defendants. The particulars of the fraud alleged are set out in paragraphs 21-23 of the Amended Statement of Claim. The request for further and better particulars is set out in two paragraphs. Paragraph 1(a) requests the 1<sup>st</sup> Plaintiff to state the basis upon which he says he is the rightful and recognized Chief and Head of the Nekama clan. This is calling for evidence of the acquisition of that Chiefly status in custom. Paragraph 1(b) requests the Plaintiff to state the basis upon which he says he owns Sobolonga land. This is again calling for evidence of ownership of land in custom. Palmer, J. in His Lordship's ruling on 8<sup>th</sup> April 2002, said that the issue of the Plaintiff's status as Chief of Nemaka clan was not disputed. In that same ruling, Palmer, J. also said that ownership of timber rights by the Plaintiff on Sobolonga land was not disputed. In any case, issues of custom affecting customary land are not issues for the High Court to decide. (See **Simbe's case**). I do not think the answers to those issues will better enable the 1<sup>st</sup> Defendant to deliver a better defence. It is oppressive as much as it is irrelevant to insist upon answers from the Plaintiff on those two issues. Paragraph 1(c) seeks to establish the date and place of the application by Foxwood and Pacific Timbers. This is calling for evidence of proof of the existence of such application, if any. The 1<sup>st</sup> Defendant may simply deny existence of that fact in the defence. It is oppressive and irrelevant to demand any further facts on that issue from the Plaintiff. Paragraph 2(a) and (b) are in the same way, calling for evidence of the facts set out in paragraphs 2 and 9 in the Statement of Claim. I do not think the Plaintiff can be forced to give answers to particulars in paragraph 2(a) and (b) above which are oppressive and irrelevant. The purpose of providing particulars is to cure defective pleading. (See **Roderick Terry Kera v. Attorney-General**<sup>3</sup>). The application by the 1<sup>st</sup> Defendant is refused. The application is also refused. This reverts the case to the basics of pleading. The Amended Writ of Summons and Statement of Claim must be served and indorsed, if not already done. The 1<sup>st</sup> Defendant must then enter an appearance, followed by the delivery of defence as usual. I make the following orders as follows-

1. I direct that the Amended Writ of Summons be served and indorsed, within 7 days if not already done;
2. I direct that the 1<sup>st</sup> Defendant enter appearance within 10 days thereafter;
3. I direct that the 1<sup>st</sup> Defendant deliver defence within 14 days thereafter;
4. Costs will be cost in the cause.

F. O. Kabui  
Judge

<sup>2</sup> in *Australian Civil Procedure*, 1981

<sup>3</sup> Civil Case No. 15 of 1998