

DANIEL DAUTAHA AND OTHERS -v- SOLOMON
GARIMARAU AND OTHERS

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

Civil Case No. 327 of 2003.

Date of Hearing: 1st October 2004.

Date of Ruling: 6th October 2004.

D. Hou for the Plaintiffs.

P. Tegavota for the 1st-8th Defendants.

RULING

Kabui, J. By summons filed on 10th September 2004, the first to the eighth Defendants (the Defendants), applied for an order to stay the action commenced by the Plaintiffs filed on 5th December 2003, seeking relief against the Defendants for alleged trespass to customary lands allegedly owned by the Plaintiffs. The reason is that the Plaintiffs' action does raise issues of custom pertaining to the ownership of customary land over which the High Court has no jurisdiction as laid down by Simbe's case. The Defendants had lost their application for injunctive orders against the Plaintiffs in an earlier application filed on 18th April 2004. In my ruling on 28th July 2004, I rejected their application for such injunctive orders for the reasons stated in that ruling.

The brief background.

The Defendants are parties to a Timber Rights Agreement signed on the 12th September 2002. As a result of the Agreement, a licence was issued to the 7th Defendant to fell and carry away timber from a number of areas of customary land specified in the licence. There is also an Agreement between the 7th Defendant being the licence holder and the 8th Defendant being the contractor who undertook to harvest the timber, sell it and manage the whole extraction operation for gain. The Plaintiffs' action has the effect of interfering with the effective and efficient operation of the 8th Defendant and does affect the 7th Defendant's business plan to do business with the 8th Defendant. If this Court orders a stay of the Plaintiffs' action, the Defendants will be able to proceed with their operation until the issues of custom are determined by the Chiefs in the first place.

The law.

There is no doubt that this Court does have the jurisdiction to make staying orders where it is necessary in the interest of justice to do so. The jurisdiction is derived from Order 27, rule 4 of the High Court (Civil Procedure) Rules, 1964, "the High Court Rules" as well as being inherent in nature. This Court has a discretionary power to either grant a stay or not to grant one; it all depends upon the circumstances of the case bearing in mind that the Court should do justice in the case before it.

The nature of the Plaintiffs' action.

The 1st Plaintiffs on behalf of the Atawa tribe based their claim in the High Court on the basis that they had been adjudged the owners of blocks 7, being Bwauiaro land and 8 and 10 being Rumahui land, all lands being in Arosi 2, in the Makira/Ulawa Province. The 2nd Plaintiffs also did likewise with regards to the ownership of block 9 called Horobaewa land. In their defence filed on 31st December 2003, the Defendants said that block 7 was Maborae land and not Bwauiaro land. They said this land was owned by the Atawa and Mwara tribes. They said block 8 was Taraetete land, owned by the Aoba tribe. They said block 10 was Bwauiaro land, part of Heresau land, owned by Amaeo tribe. They said Bwauiaro land is outside of block 10. They also said Rumahui land was also outside blocks 7 and 8. The CLAC determined in 1982 that Atawa, Bora, Mwara, Amaea and Aoba tribes had land rights between Mwata and Tawaranga streams inside Bwauiaro land. The Atawa and Amaeo tribes seemed to be the dominant tribes in Bwauiaro land otherwise all the five tribes do have land rights inside Bwauiaro land. According to the Bauro Local Court decision, the Atawa, Amaeo, Aoba, Maraukenua and Maraharutaniu tribes do have equal land rights over Rumahui land. This decision is being appealed. An application by the Plaintiffs for interim restraining orders against the Defendants was refused by Brown, J. on 30th April 2004. The Plaintiffs have not re-listed their action for hearing since my ruling on 28th July 2004. The Plaintiffs' action is clearly based upon the premise that the Plaintiffs are the owners of the areas of land in dispute as determined by the CLAC and the Bauro Local Court. A permanent injunction is being sought on that basis against the Defendants. The 1st Plaintiffs represent the Atawa tribe. The Plaintiffs' tribe is one of the five tribes which have land rights over Bwauiaro land which lies between the Mwata and Tabrawanga streams. The CLAC decision does not single out which portion or portions of Bwauiaro land is or are owned by the Atawa tribe. However, the licence does cover the areas of land known as Otarobo, Ama' ama, Bwararaiu to Aitomu, Tawarao, Arounabwai to Tarahanea, Omaraha, Waiwedeia, Tarahanea to Waiama, Aroinabai to Haunarikarakara, Waiama to Wairata in Wards 5 and 6 in Arosi 2. Which areas are within Bwauiaro land and which are within Rumahui land are not stated and therefore are not known other than they are areas within wards 5 and 6. Which tribes own what

and how much land inside Bwauaiaro land is also not stated anywhere. The areas covered by the licence do not also tally with the areas of land covered by the Timber Rights Agreement signed by the 7th and 8th Defendants. There are a number of questions yet to be asked and answered before the extent of ownership by the Atawa tribe can be finally settled in this case. The parties have given different names to the areas in dispute. The locations of the areas are also in dispute. The boundaries of them have not been defined. The whole lot is a confusion of facts. The most I can make of the CLAC decision regarding Bwauaiaro land and the Bauro Local Court decision regarding Rumahui land is that in both cases the parties are the same people. These two decisions clearly reflect that position. The Atawa tribe clearly did not consent to logging taking place on its land. The location of its land and its boundaries will have to be established by itself in a Chiefs' hearing at some point in time. The other tribes that support logging do not seem to agree with its view regarding the areas of land covered by the 7th Defendant's licence.

The reasons for deciding against the Defendants.

The determination of its position in custom is obviously beyond the jurisdiction of this Court and so this Court cannot deal with its dispute with the Defendants regarding ownership and boundaries. The decisions of the CLAC and the Bauro Local Court are too general in nature that they do not give specific ownership rights to the Atawa tribe over Bwauaiaro land and Rumahui land. Would the Plaintiffs' action then be stayed on the basis that it cannot succeed as it is in this Court? If this Court lacks jurisdiction, then it should order that it be thrown out. But the Defendants are instead asking for a stay pending the resolution of the issues of custom by the appropriate forum. That request in effect seems to sound like an interim injunction in disguise under the umbrella of Gandle Simbe's case except that it hangs in the air for no dispute is currently before any Chiefs' forum. I do not think that such an order can be made with an injunctive objective in mind. Such an order by its nature is not in aid of the Chiefs at all because the Chiefs are not seized of any dispute pending before them. The Plaintiffs have not reported any dispute to any Chiefs as a matter of fact. Even if there is a dispute before the relevant Chiefs, a staying order would be unnecessary because the outcome of the Chiefs' determination may be different from expectation in that the Plaintiffs, for example in this case, may be the losing party and would fall away rendering the Plaintiffs' action in the High Court pointless. An order for the Plaintiffs' action to be struck out for being frivolous and vexatious is a better option on the basis that the action is not one for the High Court to entertain under Gandle Simbe's jurisdiction rule. But the Defendants are not asking for such an order to be granted by this Court. Granting a staying order without conditions against the Plaintiffs will of course prevent the Plaintiffs from proceeding further with their action and thus allowing the Defendants to continue with logging operation as before. The Defendants however have asked for a

staying order with the condition that the order remains in force until the issues of custom raised by the action are determined by the Chiefs forum. I will not grant the order in the terms being sought because to do so would assume that the High Court does have the jurisdiction to order a stay in order to allow the Plaintiffs to refer the issues of custom to the Chiefs. Doing that is an inappropriate extension of the High Court's aiding jurisdiction which is limited in application to the extent that the Gandley Simbe's rule only applies to granting an interim injunction to maintain the status quo pending the resolution of a dispute already referred to the Chiefs forum for determination. It does not apply to holding the action and maintaining the status quo by a staying order in order to allow time for the other party to refer the dispute to the Chiefs forum. Also, granting the order in the terms being sought would be a novel extension of the purpose of granting staying orders in that such an order allows the other party time to refer the dispute to the Chiefs forum and awaits a determination. That is not the purpose of a staying order in its ordinary sense. A staying order is possible only if the same action has been commenced in two parallel jurisdictions. The action in one of them has to be stayed to allow the action to be determined in the other jurisdiction. This application has arisen because interim relief had been denied to both parties. Only two options are open to both parties. One is for the Plaintiffs to re-list their action for hearing. The other is for the Defendants to apply to strike out the Plaintiffs' action. I am tempted very much to intervene, exercising the inherent jurisdiction of this Court, but I would rather give each side the opportunity to state their case at the next hearing date. For now, I dismiss the Defendants' application. . The order of the Court is that the application is dismissed. There will be no order as to costs. I order accordingly.

F.O. Kabui
Puisne Judge