

HIGH COURT OF SOLOMON ISLANDS

JOSEPH AMA (Representing himself and members of the Vihuvunagi Tribe of Bugotu, Isabel Province) -v- JAMES BAKO (1st Defendant), BEN BAKO, JACOB MERIDI, FRANCIS SESI (Trading as Bugotu Lumber Enterprise (2nd Defendant) and SUCCESS COMPANY LIMITED (3rd Defendant)

Civil Case No. 305 of 2002

Honiara: Brown PJ

Summons Summons to strike out claim for it discloses no reasonable cause of action – standard logging agreement – not in evidence – claim of customary ownership.

Issue Estoppel Local Court order over customary land – designation of owner – Forest Resources and Timber Utilisation Act (Cap 40) – statutory time limiting appeals – claim in nature of appeal out of time.

The defendants filed a summons to strike out a statement of claim of the plaintiffs as showing no sufficient cause of action, or in the alternative, being frivolous or vexatious. The plaintiff, by an amended statement of claim, says he represents members of the Vihuvunagi tribe of Bugotu, Isabel Province, owners of Loguhutu and Iageba customary land which is affected by a logging agreement entered into by James Bako with a group trading as Bugotu Lumber Enterprises, and with Success Company Limited, a company carrying out the logging. James Bako is described as not a member of the Vihuvunagi tribe but one who purportedly granted timber rights over the land of the plaintiff. The plaintiff further pleaded that the agreement was entered into without the knowledge or approval of the plaintiff, nor with adherence to proper procedures for obtaining a felling licence. The defendants, on the other hand, say that the plaintiff is estopped by the fact of a customary land court order given by the Local Court on the 17th June 1997, confirming ownership of the subject land in the 1st defendant's line, and further that time limited for appeal by parties aggrieved by acts done under the Forest Resources and Timber Utilisation Act (cap 40) has expired. The Act does not permit of this court's interference in matters of custom for the Local Court and the fact of the judgment is an issue estoppel.

The defendant's evidence was read on affidavit, and the plaintiff's evidence was also read on affidavit. The "standard Logging Agreement" was not in evidence and no evidence was adduced by the plaintiff about any procedural irregularities during the course of the Forestry Agreement process. The plea of ignorance by the plaintiff of the fact of the logging agreement was not supported by the evidence of the plaintiff's own witness, who was a signatory to the agreement.

- Held:*
1. *Where under the Forest Resources and Timber Utilisation Act (Cap 40) no appeal has been made within time to an act of an authority, this Court cannot reopen the process as an administrative review of the act without compelling reasons.*
 2. *The allegation of ownership of customary land, of itself is not a sufficient reason to review the process of the grant of a timber right agreement.*
 3. *Issue estoppel arises where a subsisting order of the Local Court has determined ownership in a holistic scene, over the land the subject of a timber right agreement. The plaintiff cannot assert to the contrary.*
 4. *Where the agreement is not in evidence, it is open to the Court to make findings, on the presumption, acted upon by the parties, of its existence, especially since the agreement is pleaded by plaintiff as part of its case.*
 5. *While the timber right agreement was not in evidence, the fact of its existence in statutory form, can be accepted from extrinsic evidence.*
 6. *The court cannot entertain a claim for relief arising out of a timber right agreement where the aggrieved plaintiff has failed to establish special circumstances which excuse his omission to appeal within the time limited by the Act.*

Cases cited: G. Simbe -v- East Choiseul Area Council anors; Court of Appeal Case 2/97
J. P. Haununumanie -v- Moffet Pehowa anor; Civil Case 122/92

Date of Hearing: 19th February 2003

Date of Judgment: 20th February 2003

Mr. Suri for the applicant/1st and 2nd defendants
Mr. Tigulu for the respondent/plaintiff

Summons to Strike Out pursuant to 0.27 r.4 of the High Court Rules

Reasons for Decision

By amended Writ of Summons of the 18th February 2003 the plaintiff claimed a declaration that the 3rd defendants felling licence is unlawful, invalid and ineffective in that it did not comply with the Forest Resources and Timber Utilization Act (Cap 40). He also claimed a permanent injunction against the 3rd defendant, preventing further logging, and damages for trespass. No claims were made against the 1st and 2nd defendants, although in the recitals in the Statement of Claim, it was alleged they all, without the knowledge and approval of the plaintiff entered into a timber right agreement in relation to logging of timber from Joguhutu and Lageba customary land. There were no particulars pleaded in the Statement about the procedures alleged to have been breached when obtaining the licence.

The plaintiff, as to be expected, also sought in his associated summons for injunctive relief, restraining orders against the two logging companies, the 2nd and 3rd defendants, from carrying out any further logging, and orders securing moneys from the sale of logs.

On the same day, the defendants filed a Summons under 027 r4 of the High Court rules, seeking to strike out the plaintiffs original claim filed in December last, on the basis that it disclosed no reasonable cause of action or, in the alternative was vexatious. That summons asserted that ownership of the customary land had been settled by a decision of the Gao/Bugotu Local Court in Civil Case 7/77 Kikolo Thavinago –v- Isaiah Malu.

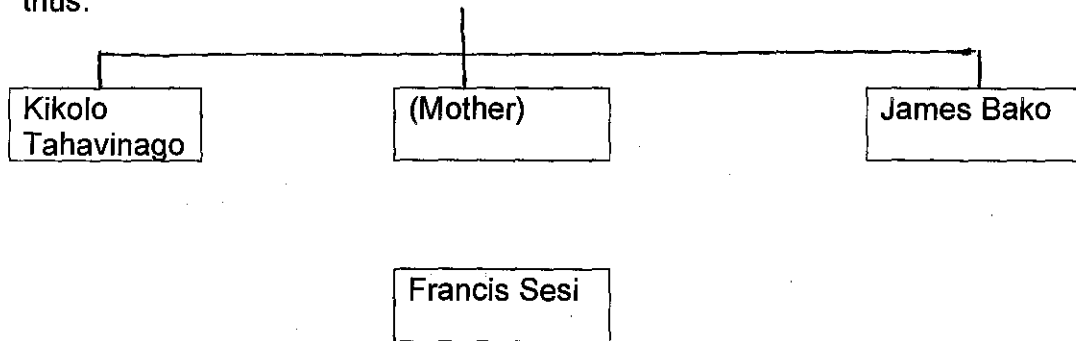
Mr. Suri, for the applicants/defendants when faced with the fact that a later claim had been substituted, agreed to proceed with the defendants summons to strike out, for the claim was in similar form.

In support of his clients case Mr. Suri read an affidavit of Drummond Roroi filed on the 18th February and of Francis Sesi filed on the same day.

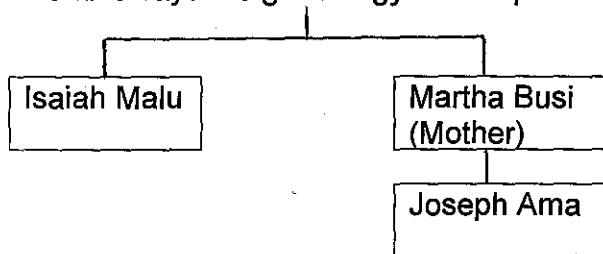
Drummond Roroi deposed to the fact that he was a former Clerk of Gao/Bugotu Local Court, and that he was the Court Clerk at the time of a land dispute on the 17th June 1977 between Kikolo Thavinago of Sepi Village and Isaiah Malu of Nagolau over a tract of land known as Lageba/Garama. Annexed to this affidavit was a copy of his handwritten record and the typed judgment. The Decision recorded was:

“Ordered K. Thavinago and his original clan to own the land being disputed. I. Malu the defendant to ask K. Thavinago for a development if he wish to. Also ordered I. Malu to appeal within 3 months from the date of the Court proceedings.”

Francis Sesi says that he is a nephew of Kikolo Thavinago. His geneology is thus:



He also says the geneology of Joseph Ama, the plaintiff is thus:-



Isaiah Malu was invited to sign the timber right agreement because of advice Sesi had from Joseph Hiro, a former provincial minister.

Francis Sesi also confirmed that the map, produced by Drummond and Rorori, correctly delineated the land boundaries of Lageba and Loguhutu land mentioned in the Local Court judgment.

Mr. Tigulu for the respondent/plaintiff read Isaiah Malu's affidavit of the 19th February 2003 in answer to the applicants claim to strike.

Isaiah Malu's affidavit was the subject of objection and I struck out paragraphs and parts, which I found, were objectionable for various reasons noted in the margin of the document. He did say that he signed the standard logging agreement. Further, he disputed the boundaries of the land in the Local Court decision of the 17th June 1977 (the 1977 Local Court decision) saying the court had regard to a small track of land known as Garanga. He further said that the 1st and 2nd defendants knew very well that he was the key spokesman for the plaintiff's tribe and that is why they required his signature to the logging agreement.

Annexed was a decision of the Maringe House of Chiefs dated 1st February 1999 relating to the Tagathaga Land. Also forming part of this bundle of documents was a 2 page document head "Tagathaga Land" and signed by Chief Isaiah Malu, Loguhutu Village. It recited that a custom feast was held on the 9th July 1990 by the named people of particular lands, Lolokuhi, Tagathaga, Malapiga Haguria Island.

It would seem this 2 page document formed part of the material considered in the "written judgment" of a disputed land case 12.12.98 by the Maringe House of Chiefs, Maringe District, Isabel Province evidenced by the Chairman, Cecil Togamae on the 10th February 1999 and also annexed to Isaiah Malu's affidavit. That disputed land case related to Tagathaga Land.

There seemed, from looking at the various plans to be Tagathaga land abutting Loguhutu.

Isaiah Malu also disputed Francis Sesi's affidavit, denying that Francis Sesi is any way related to Kikolo Thavinago in custom.

Mr. Tigulu then read second affidavit of Isaiah Malu filed on the 24th January 2003, made in support of the plaintiff's application for interim injunctions against, who were then 4th and 5th defendants, Bugotu Lumber Enterprises and Success Co. Ltd. On the 29th January, the plaintiff discontinued proceedings against Isaiah Malu, (then named as the 1st defendant) and Drummond Ama Tango, (named as a 2nd defendant).

Despite argument by Mr. Suri, I was satisfied the plaintiff could discontinue as against these two defendants for no defence had been filed, and by the Rules, no Court consideration of the discontinuance and question of costs, was necessary.

In Isaiah Malu's earlier affidavit, he recounted that he was taken by Ben Bako, to Honiara to sign the standard logging agreement on the 7th July 2002. He further said "our tribe had land disputes with Ben Bako before so he came and asked me to consider "working together" on the logging operation to generate royalty income for landowners. We are distant relatives under Vihavunagi Tribe but the land from Loguhutu to Lageba only belongs to those of us from the plaintiff's side."

He said he signed the standard logging on the 11th July 2002, at the office of the Success Company, Burns Creek. The Success Company had met his accommodation, meals and allowances. When he sought a "landing fee" from Billy Tapalia, the Administrative Manager at Success Company office he was refused since "no logging commenced yet". He went on to say that "the actual amount intended as landing fee was never made clear to me but from how (Bugotu Enterprise) and Success Company responded to my request I soon realized that I was being tricked into signing documents relating to the logging operation". He went home on the 14th July, some seven days in Honiara.

Isaiah Malu says, "*the present logging operation has harvested logs in our tribes land. Other tribe lands are yet to be entered by the logging operation.*"

Since the injunction granted by the High Court in Civil Case 287/2002, logs are lying idle in the bush of Jouhuta and Lageba land to this day. I doubt the validity of the (Bugotu Lumber Enterprise) felling licence. No proper meetings were held by customary landowners prior to the issue of felling licence. At first discussions to develop the land in question at home were aimed at acquiring a milling licence for sustainable harvesting of our resources. This was where we landowners are prepared to go for the idea of "working together" with the other tribes.

In the end and very much to our disagreement, a felling licence was issued. Most members of Vihuvunagi tribe of which I am a member prefer to see a licence issued under my name as senior member of the tribe. Many members regard Ben Bako and Francis Sesi as crooks from experience in land disputes they had been causing in other parts of Bugotu District."

He described the boundaries of Joguhutu to Jageba land as "commence at Lagebarup to Nahuthobio bush down to Tagathaga land to Tabugnagui down to Malapigha and Haghuria island". The map annexed was coloured to show the extent of the land in question and describes parcels of land abutting, including Tagathaga land.

I should say that the map of the former clerk of the Gao/Bugotu Local Court, Drummon Roroi, forming part of his affidavit, included the Ole/Tabagnaguo portion and the Tagathaga part, excised on Isaiah Malu's map.

Isaiah then deposed to land rights of those named, trading as Bugotu Lumber Enterprises.

This contested evidence does not need resolution, for my reasons for decision are based on other issues.

The Timber Right Agreement

Mr. Suri has charge of satisfying the court that the plaintiff's claim should be struck out. The evidentiary weight rests with his clients. He says that the plaintiff's case fails for a) it concerns the "procedures" for the grant of a Timber Rights Agreements and b) it also concerns customary rights of ownership to Lagebae Loguhutu land.

He says, on (b) that the plaintiffs do not have locus standi for they are they are effectively estopped from asserting customary ownership by virtue of the Bugotu Local Court judgment of the 17th June 1977 over Lageba Land. Rights over land must be established before any argument over rights to log timber. The Local Court decision binds the plaintiff because Isaiah Malu is the uncle of the plaintiff, and it was the plaintiff's mother, Martha Busi who was a key witness in the Local Court case which found for K. Thavinago and his original clan. He relied on the geneology set out in Francis Sesi's affidavit. Consequently the plaintiff cannot claim rights to land dealt with in the court decision. I should say, here, that I cannot accept his locus standi argument, for ownership under the Act is not the determining factor when approving a forestry agreement.

Res judicata applies or there is an issue estoppel, the plaintiff is prevented from raising the ownership issue in this court for it has been decided in the proper forum.

So far as (a) is concerned Mr. Suri says that this matter is on all fours with the facts in Gandy Simbe's case.

(Gandy Simbe -v- East Choiseul Area Council anors, Court of Appeal 2/1997).
To impugn the Timber Rights agreement, you must show a substantial interest, recognizable in law.

Mr. Tigulu, for the plaintiff, says the plaintiff can show a substantial interest in the Timber Rights agreement, for Isaiah Malu signed the document, which impliedly recognizes this right, a claim of ownership. The plaintiff also asserts ownership rights through this tribe. The delineation of the land the subject of the Timber Rights agreement, the Local Court order and the parties themselves is at variance, consequently the Court should not accept that the 17th June 1977 order relates to the land in question. There was nothing in the judgment in 1977 to delineate boundaries, and the plan of the clerk, Drummon Roro, is today's plan, not that of the earlier court.

Mr. Tigulu says there is reasonable cause shown by the plaintiff to come to the court, based on land ownership in their own right and consequently the plaintiff's case should be allowed to proceed to a full hearing on all issues. If this court is concerned about boundaries, then it can refer the issue back to the Local Court for definition. He referred to the civil case no. 122/92 (John Palm Haununumania -v- Moffat Pehowa'anor) decision of the Chief Justice as supportive of this step.

The Law

Since Mr. Suri says Gandy Simbe's case is pertinent, that is a good starting point. Gandy Simbe appealed against an order of the Deputy Chief Justice discharging his earlier order granting an interlocutory injunction, obtained ex parte, restraining parties from logging on customary land (Choiseul Island) that the plaintiff claimed as a member of Dali Tribe. The respondents to the appeal were respectively the timber logging company and other tribal representatives including one claiming as land owner. The East Choiseul area council took no part in nor was represented on the appeal. The Court of Appeal dealt with the statutory provisions leading to a timber rights agreement, reciting the steps necessary leading up to the Area Council determination and subsequent certification by the Commissioner, under S.5F, to recommend to the appropriate (provincial) government, to grant approval. The Area Council is bound, where no agreement is reached between the applicant and the customary landowners, to recommend rejection of the application for a timber licence, and the Commissioner is required to reject it.

On the Commissioner's recommendation, the Provincial Government is authorized, by S.5G to complete a certificate in prescribed form approving the agreement. Without a certificate there is no power to grant a timber licence under S.5(IA).

In this case, I do not know whether there is a valid timber licence under S.5 (IA) for none has been produced nor referred. As previously seen, a Timber Rights Agreement has been referred to, but the document was not in evidence and whether it has the licence necessary under S.5(IA), or not, need not be the subject for conjecture for the plaintiff and the defendants proceeded on the basis of its existence.

What is clear, from the Court of Appeal is that an area council determination is *not a determination of ownership*.

"It has long been recognized that the determination gives rise to no guarantee that the contracting customary owners are the true owners. See Hyundai -v- A-G (1993) CC 79/93 at pp 8-10 (72-74), citing with approval the remarks in the High Court of Commissioner of Crome in Fugui -v- Solma Construction Co. Ltd (1982) SILR100, 107. If a binding determination is desired it must be obtained from a local court under S.8 of the Local Courts Act as amended by the Local Courts (amend) Act 1985 inserting SS.8C, 8D and 8F; or on an appeal instituted under S.5E(I) of the Forest Resources Timber Utilisation Act by a person who is aggrieved by a determination of the area council under S.5C(3)(b) of that Act, to a customary land appeal court having jurisdiction for the area in which the customary land is situated. In contrast to an area council determination, the order or decision of a customary land appeal court on an appeal pursuant to S.5(E(i) is "final and conclusive: See S.5E(2)." (Court of Appeal; G. Simbe -2/97)

The Plaintiff's allegation, then, of customary ownership, is not of itself, a sufficient reason to question the process of the grant of a logging agreement for the Act is a Code, for all intents and purposes, including the nature of notice to all interested in land or usefructury rights, and including the appointment of "representatives" of those claiming rights. The plaintiff has not sought to tender the standard logging agreement, but I am satisfied such an agreement, in statutory form, exists, since all parties have acted upon it and none deny its existence. The plaintiff pleads the existence of an agreement as part of his case. There is also extrinsic evidence of its existence. A. Malu for the plaintiff says he signed it.

Now in this case the defendant's point to an order of the Local Court dated 17th June 1977, saying that the plaintiff is estopped from denying the legitimacy of the 1st defendant's rights as owner of the land. Had, for instance, there been a Local Court finding clearly denying the 1st defendants claim to ownership, yet a Timber Rights Agreement had issued, in favour of the defendant, then that may be a compelling reason for a judicial review of the process. But that is not the case here.

The Act is a Code for the granting of timber logging rights and the time limited to appeal the decision of the area council by a person aggrieved, has expired.

I am satisfied on the evidence of the defendants, that the decision of the Local Court of 17th June 1977 should be given proper recognition. The decision recorded respecting ownership is quite clear. The boundaries of the land are not spelt out in the decision, but the plaintiff (who was successful) had a witness, Marshall Hiro who described the boundary "from Lageba and across Loguhutu". Parts of the land used by others was not delineated. The plaintiff, however, does not have to satisfy me in these proceedings to strike, that he also owns the land. He says he has an arguable case, based on the rights of Isaiah Malu, rights recognized in the Local Court judgment. But that does not help the plaintiff, for the judgment is against Isaiah Malu and consequently the plaintiff.

The Local Court has exclusive jurisdiction (Court of Appeal 8/97 at p.16) and in the face of the order of the 17th June 1977, there is no arguable case. The Local Court order has dealt with the very issue. Isaiah Malu "must ask K. Thaavinago for a development if he wishes to." It is K. Thavinago's right to decide, not I. Malu.

Mr. Tigulu's reference to the Chief Justice's decision in civil case 122/92 does not help here. The Chief Justice, obiter, said because of the obvious animosity, the parties should adhere to the advice given by the CLAC to consult with each other. He dismissed the plaintiff's claim for damages for trespass, to land. There was a pre-existing dispute over boundaries.

There is no allegation made about the manner of work for instance of the 2nd defendant. The plaintiff pleads that the 2nd defendant is the holder of a felling licence, and the 3rd defendant carries on the business of logging, both of whom benefit by virtue of a standard logging agreement entered into with James Bako, the 1st defendant.

He further pleads that all defendants without the knowledge or approval of the plaintiff, as a representative of customary owners of the Loguhutu and Lageba customary land, were parties to the agreement.

The plaintiff clearly relies on his claim as customary owner. This Court is not the forum. He is estopped by the Local Court order.

Since the Act is codification of the practice and procedure for logging in the Solomon Islands, the plaintiff's time in which to appeal a decision under the Act to the Customary Land Court has expired. He has come to this court, which is an inappropriate forum. His claim, on the evidence of his witness, Isaiah Malu, that the Agreement was without the "knowledge and approval of the plaintiff" cannot stand, for Isaiah Malu executed the document of his own free will. So far as the plea that the Agreement was obtained "without going through the proper procedures" is concerned, the plaintiff is out of time for an appeal under the Act.

I find that I do not have to consider the conflicting evidence which I have touched on earlier. There is the conflicting geneology, the assertion by A. Malu that all the land the subject of the agreement is not properly delineated, nor do I have to consider why A. Malu signed the agreement. The fact is the plaintiff is out of time to appeal under the Act and his assertion of ownership is irrelevant for the purposes of an administrative review of the procedures followed under the Act. There is an issue estoppel, by virtue of the Local Court Order, where he seeks to use this Court to make a finding about ownership of land.

Clearly these people have fallen out over the effects of logging. It is unlikely they will be able to settle their differences amongst themselves. The Local Court is invested with jurisdiction to deal with this dispute. It is a shame that felled timber should go to waste because of disputation but greater emphasis on resolution and fair distribution of money according to custom, instead of acrimonious litigation, would benefit all parties.

On the summons to strike under 027 r.4 for the reasons set out above, in that the plaintiff's claim discloses no reasonable cause of action, the amended originating summons and statement of claim is struck out. The application for injunctive orders is also struck out, since it has no basis.

J. R. Brown
JUDGE