

PAPUA NEW GUINEA
[IN THE NATIONAL COURT OF JUSTICE]

CIA NO. 86 OF 2018

BETWEEN:
KINMAS INVESTMENT LIMITED
Appellant

AND:
**PETER TENG IN HIS CAPACITY AS GENERAL MANAGER FOR AND
ON BEHALF OF TZEN RESOURCES LIMITED**
First Respondent

AND:
TZEN RESOURCES LIMITED
Second Respondent

AND:
**PAUL KAUNIE & PAUL KAUNIE JUNIOR AS LANDOWNERS OF
KOLONG LOGPOND, WEWAK EAST SEPIK PROVINCE**
Third Respondent

AND:
WIANDUO LOGGING LIMITED
Fourth Respondent

Waigani: Miviri J
2021: 02nd June

PRACTICE & PROCEDURE – Judicial Review & appeals – Appeal – Ex parte Preservation Status Quo Orders – No opportunity Accorded in defence – Decision effecting Rights Liberty – Error of Law – Section 59 Constitution – Apparent & Identifiable error – Orders at first Instance set aside & discharged – Appeal Upheld – cost in the cause.

Cases Cited:

International Finance Company v K K Kingston Limited [2019] SC1872
Mupang v Independent State of Papua New Guinea [2014] PGSC 43; SC1397
Parakas v The State [1985] PNGLR 224
Munarewe v Kowingere [2003] PGNC 106; N2389

Counsel:

L. Painap, for Appellant
A. Furigi, for Respondents

RULING

17th June, 2021

1. **MIVIRI, J:** This is the ruling on the appeal filed against the decision of the Wewak District Court in proceedings DC 112 of 2018 on the 03rd August 2018 and 17th August 2018.

2. It stems from a complaint and summons that was filed in 24th July 2018. An appeal book has been filed of the 17th June 2020. It is now the 17th June 2021. The matter has orders issued for warrants of arrests for persons who have allegedly breached orders of the Court. Including orders that relate to moneys accruing for storage of machinery and equipment at a logpond. Primarily it is a matter that originates from a logging operation, a LFA at Hawain. It is three years since those orders, and whether or not there is utility in the appeal remains. Particularly in the light of all set out above and the lapse in time since.

3. But the law is clear that it is upon the appellant to show that there are apparent and identifiable errors on the face of the Judgement or decision at first instance to vitiate it succeeding the appeal: *International Finance Company v K K Kingston Limited* [2019] SC1872 (13 November 2019) and *Mupang v Independent State of Papua New Guinea* [2014] PGSC 43; SC1397 (30 October 2014).

4. The contention by the notice of appeal filed 21st August 2018 is that the District Court Magistrate erred in fact and law in denying the Appellant/Defendant Natural Justice pursuant to the Principle of Natural Justice under section 59 of the *Constitution* of the Independent State of Papua New Guinea (Constitution) in that:

- (a) *The District Court Magistrate did not ensure that the defendant was given sufficient time to provide proper instructions to a lawyer of its choice and be adequately represented by its Lawyer; and*
- (b) *The appellant/Defendant was not given enough time to present evidence in support of a defence for itself and never given the chance to properly defend itself;*
- (c) *The entirety of the proceedings were rushed through from filing and commencement of proceedings to granting of substantive orders within*

thirteen (13) days, as depicted in the table of chronology of events below; 24th July 2018 to 03rd August 2018.

- (d) The District Court Magistrate erred in fact and Law in that the decision of the district Court was so unreasonable as per the Wednesbury Principle that no reasonable constituted tribunal of law or fact would have made the decision it made.*
- (e) That the district Court magistrate erred in fact and in law in that the Magistrate on 1st August 2018 ordered that the matter be set down for trial to hear the substantive hearing of the complaint first;*
 - (1) First dealing with and allowing the Court to properly hear the interparty hearing of the interim restraining orders granted by the District Court Magistrate on the 24th July 2018; and*
 - (2) First ensuring that at the commencement of the civil hearing, the Magistrate reviewed the substance of the Complaint with the defendant and asked the defendant why an order should not be made against him or her as required by section 139 of the District Courts Act. This essentially step if taken would in effect, allowed the appellant/defendant to either deny the facts alleged in the Complaint or raise a defence to meet the allegations.*
 - (3) Allowing the Defendant to provide the Court with a concise Statement of his Defence to the complaint and of the points on which the Appellants/Defendant would have relied, as required by section 140 of the District Courts Act.*
- (f) The District Court Magistrate erred in fact and Law in ordering, amongst others in that the Appellant/Defendant shall not;*
 - (1) Interfere in any shape or form with the logging projects or operations at the Kolang logpond area and /or the Hawain LFA Project;*
 - (2) Support any landowner including Adrian Kum, his servants or agents or associates for whatever reason;*
 - (3) Cause any such form of interference that shall adversely affect the logging operations under the First and second Respondent/complainant; or*
 - (4) Have any interest or anything to do with the Hawain LFA Project including signing of any logging and Marketing Agreement or other agreement whatsoever with the Permit holder and/or landowner as there exists no agreement between the appellant/Defendant and Respondent/Complainants, specifically in regard to a restraint of trade agreement nor does their exist a clause in any Agreement for that matter, to say that the appellant/ Defendant*

should not deal with anyone else except the Respondent/Complainants.

- (g) *The District Court Magistrate erred in fact in that there are currently proceedings before the National Court of Papua New Guinea challenging the deed of Assignment assigning rights of the Timber Permit Holder and rights under the Timber Permit 11-02 of the Local Forest Area (LFA) known as Hawain Project area. The National Court Proceedings are, WS 763 of 2016 between Wianduo Logging Limited and another and Adrian Kum and Wiruho Holdings Limited. In this regards the Deed of Assignment still operates and the Appellant/Defendant is still the Permit holder of Timber Permit 11-02, which subsequently questions the Standing of Wianduo Logging Limited in making a complaint against the Appellant/Defendant.*
- (h) *On 17th August 2018, that*
- (1) *The four persons are to leave Wewak within 3 working days by 22nd August 2018;*
 - (2) *The machinery and equipment at Kolang Logpond are to be impounded and placed in the custody of the court pending their removal;*
 - (3) *After 21st August 2018, the machinery and equipment at Kolang Logpond shall be subjected to storage fees, which if disputed can be dealt with in the higher court given the jurisdiction of the District Court;*
 - (4) *The Defendant shall pay all storage costs before removing the machinery and equipment;*
 - (5) *The defendant shall pay costs of the enforcement proceedings;*
- (i) *And take notice that the grounds of appeal are;*
- (j) *The District Court Magistrate erred in fact and Law in that the Decision to order the four persons named in the Warrant of arrest to leave Wewak within three (3) working days by 22nd August 2018 was so unreasonable as per the Wednesbury Principle that no reasonably constituted tribunal of law or fact would have made the decision it made. There existed no jurisdictional basis for the Court to make such an Order.*

Dated the 21st August 2018.

5. There is no written Judgement in the matter except for handwritten notes in

a worksheet of the magistrate that is filled out. These are supposedly the transcript of the proceedings for our purposes at pages 17 to 24 of the appeal book filed 17th June 2020 of the Magistrate at first instance. It depicts no record that the appellant was in court and did voice their defence in the matter. On the 24th July 2018 Mr Andrew Furigi appeared for the Complainants, but there is no appearance by the appellants. The court determines that it is a project of national importance and that the balance of convenience is in favour of grant of the orders and makes the orders, pending determination of the substantive matter. This ruling is without the benefit of hearing the other side in this case the appellants as defendants then. There is no evidence on the transcript of what material was presented to advance, and the cause of the complainant from which the court drew the orders emanating.

6. On the 30th July 2018 there is no appearance by all parties' and the matter is further adjourned to 1st August 2018 for hearing and a notice of hearing to be prepared and given to the parties.

7. On the 1st August 2018 there is appearance by Mr S Kati for the complainants on behalf of Mr A Furigi counsel on record. Counsel on the other side is Mr V Jim for the defendants standing in for counsel on record Mr C. Raurela. He is based here in Port Moresby and has to travel there to Wewak. There is mention of breach of the interim orders by counsel for the plaintiff without any formal material on record. Application for variation is granted without any material noted on the record of the transcript, and of the defendants now appellants being given opportunity to respond. Again, there is no analysis of material before it applied to the law leading to the orders that emanate.

8. There is no record of any process and procedure in the transcript as to the warrants of arrests that come out on pages 26, 27, 28, 29, 30,31,32,33, except on page 34 where the notation is breach of court order warrant of arrest issued. There is no record of appearance by counsel, nor is there record of a conduct of hearing before the warrants are issued. What material has led to the issue of the warrants is not on the record. It is not based in law.

9. At Page 35 to 39 is the complaint and summons in DC 112 of 2018 Parties are Tzen Resources Limited v Paul Kaunie and another with two others. There is no record of the formal hearing of that matter on the appeal book filed depicting that there was conduct of the proceedings with representation from either side and the court making determination after consideration of all the materials that were presented with the application of the law, and the judgment with the orders

emanating. And from that proceedings eventually on the 03rd August 2018 the following orders were made, appeal book page 75:

- (1) *The defendant's application to vacate the substantive hearing is refused and hearing shall proceed.*
- (2) *The Defendant, its servants, agents, and associates residing and occupying the Kolang Logpond area and /or the Hawain LFA Project shall vacate the Complainants log-pond and Hawain LFA Project Area forthwith.*
- (3) *The Defendant is ordered to remove and ship out all its machineries and equipment from the Kolang Log-Pond within 5 days from the date of service of these orders.*
- (4) *A warrant of arrest shall be issued to members of the Police Force to affect the eviction of the Defendant, its servants, agents, and associates residing and occupying the Kolang Logpond Base Camp area and/or the Hawain LFA Project area together with the removal of its machineries and equipment forthwith.*
- (5) *That pursuant to section 22 of the District Courts Act 1963 orders are given that the Defendant, its servants, agents and/or associates shall not;*
 - (a) *Interfere in any shape or form with the First, Second, and Third Complainants logging project or operations at the Kolang Logpond area and/or Hawain LFA project;*
 - (b) *Support any landowner including Adrian Kum, his servants, agents, or associates for whatever reason;*
 - (c) *Instigate any landowner factions within or outside the Hawain LFA Project;*
 - (d) *Cause any such form of interference that shall adversely affect the logging operations under the First Defendant;*
 - (e) *Have any interest or have anything to do with the Hawain LFA Project including signing of any logging and Marketing Agreement or other agreements whatsoever with the Permit Holder and/or with landowners whatsoever.*
- (6) *Each Party bears their own costs.*
- (7) *Time is abridged.*

10. And from the proceedings of the 17th day of August 2018 the following orders were made:

(1) *The defendants by its named servants, agents and/or associates namely; Law Sie Chai, Peter Anak Lagon, Empati Anak Tindin and one Lawrence are to leave Wewak, East Sepik Province within three (3) working days commencing on Monday 20th August 2018.*

(2) *The defendant's machineries, plant, and equipment currently at the Kolang logpond shall be impounded there forthwith and now placed under the custody of the Court.*

(3) *The defendant shall pay storage fees on the machineries, plant and equipment currently stored at Kolang Logpond to Tzen Resources limited at such rates each and severely as follows:*

(a) *Bulldozers per item at K 3, 500 per day.*

(b) *Excavators per item at K 3, 500 per day; log loaders per item at K 3, 500.00 per day.*

(c) *Motor Graders per item at K 3, 500.00 per day.*

(d) *Logging trucks per item at K 3, 500 per day.*

(e) *Dump trucks per item at K 3, 500 per day.*

(f) *Toyota Land cruisers per item at K 2, 500 per day.*

(g) *Containers per item at K 3000 per day.*

(h) *All general items at K 5000 per day.....”*

11. These are extensive orders and the records obtained complied in the appeal book set out above do not depict that the appellants were heard or given an opportunity to be heard. Or at the minimum real opportunity was accorded to the defendants and now appellants. Adjournment applied to secure Counsel from Port Moresby into Wewak was refused and matter proceeded primarily with counsel on record for the complainant only. That in itself is a breach of right to defend oneself. Because justice is not served when the other side is not heard in defence. It is also in itself a breach of section 59 of the *Constitution*. There is no observation in that no opportunity is accorded to the other side to the dispute to be heard in their defence on the matter. Justice is not done and seen to be done by that fact. It is primarily that real opportunity is given to the other side to the dispute to air its defence in the cause of action: *Parakas v The State* [1985] PNGLR 224.

12. The transcript of the Court is the record of the court that leads to the Judgement at the end including the orders. If the records are not in order to justify the basis for the orders that follow, there cannot be orders at the end against the

parties, let alone parties who are not heard in their defence as is the case here. It means for all intent and purposes the matter has not been properly dispensed in law, and ought to be reheard, or set aside as the case maybe: *Munarewe v Kowingere* [2003] PGNC 106; N2389 (15 May 2003). Here orders have emanated out of a proceeding that is clear on the records that there was no appearance by counsel on the defendant's side. He was not heard or he was not afforded real opportunity to air the case for the defendant. It is primary and preliminary to the Constitution and leaves no other cause other than to uphold the appeal in the material terms pleaded by the Notice of Appeal. That is section 59 of the *Constitution* has not been heeded and therefore the defendants/Appellants have not been heard. The records are self-explained.

13. Accordingly, the appeal is upheld on the grounds pleaded. The orders at first instance of the 03rd August 2018 and the 17th day of August 2018 are all set aside forthwith.

14. The orders of the court are therefore:

- (i) The appeal is upheld.
- (ii) The seven (7) Orders issued by the Wewak District dated the 03rd day of August 2018 are set aside and discharged forthwith.
- (iii) Further the nine (9) Orders of the Wewak District Court issued dated the 17th day of August 2018 are set aside and discharged forthwith.
- (iv) Cost will follow the event forthwith.

Orders Accordingly.

Young & William Lawyers: *Lawyer for the Appellant*

Furigi Lawyers: *Lawyer for the Respondent*