

N10159

PAPUA NEW GUINEA
[IN THE NATIONAL COURT OF JUSTICE]

WS No. 991 OF 2017

BETWEEN:
VANIMO JAYA LIMITED
Plaintiff

AND:
EMO HOLDINGS LTD
First Defendant

AND:
MOILE RESOURCE OWNERS LTD
Second Defendant

Waigani: Linge AJ
2022: 22nd November

CUSTOMARY LAND -acquired under Special Agricultural & Business Lease (SABL) – subsequently divided into two (2) separate customary titles under Voluntary Customary Land Registration (VCLR) - for agro-forestry development.

Vanimo Jaya Limited the holder of a *Special Agricultural & Business Lease (SABL)* as portion 248C filed this proceeding to basically enforce its rights it claims is breached by the defendants. The first claim is against the first defendant for trespass and encroachment upon the said SABL. The second claim is against the second defendant for breach of *Mediation Agreement* as endorsed by Order of 5 October 2015 in *OS No.411 of 2013* and enforcement of the judgment in *OS No. 904 of 2016*.

Held:

1. The plaintiff's pleadings on trespass and breach of agreement are vague and

as a result the plaintiff has not established his cause of action and the claims are hereby dismissed.

2. The registration of two customary titles under Voluntary Customary Land Registration (VCLR) as portions 277C and 276C replaces and super cedes SABL 248C.

3. The entry by Emo Holdings Limited on to portion 277C was consented to and at the invitation of Moile Resource Owners Limited, the customary and registered owner of portion 277C under VCLR on a lease-lease arrangement.

4. Portion 277C on which Emo Holdings Limited operates is owned by Moile Resource Owners Limited, the second defendant, comprising of members of the One tribe and the claim by Vanimo Jaya Limited on it fails on the principle of *jus tertii*.

Cases Cited:

Papua New Guinean Cases

Malawa v Pidi [2019] PGNC 11; N7675

Sam Samoua v Access Venture Ltd [2013] N5325

Mudge –v- The Secretary of Lands [1985] PNGLR 387

Rimbunan Hijau v Ina Inai (2017) SC1605

Re Era Taora Land (1971) FC 18

Kanga Kawira & Ors v Kepaya Bone & Ors (2017) N6802

Overseas Cases

League Against Cruel Sports v Scott [1985] 2 All ER 489

Doe d Carter v Barnard, [1849] 13 QB 945

Counsel:

Ms. Emily Dauma, for the Plaintiff

Mr. A Donigi, for the First and Second Defendants

JUDGMENT

13th March, 2023

1. **LINGE AJ:** This is my ruling on liability. The plaintiff was a holder of a

Special Agricultural and Business Lease (hereinafter “SABL”) in the Aitape area in West Sepik sued the first defendant for trespass and encroachment upon the said SABL. The plaintiff also alleges that the second defendant breached the Wewak Heads of Agreement (hereinafter the “*Mediation Agreement*”).

2. The contested trial was conducted on the 18 November 2022. Counsels of parties made oral submissions.

Background

3. On 12 December 2005 Vanimo Jaya and One-Uni Development Corporation signed a Memorandum of Agreement (hereinafter “the MOA”) for the development of an Agro Forest project involving harvesting of all timber from the 40,000 hectares customary land and oil palm planting.

4. Thereafter on the 19 July 2006 the State entered into a lease agreement with customary owners purportedly represented by **One-Uni**. It was a form of *Lease Lease* back arrangement in which the landowners agreed with the State for them to lease their customary land to the State.

5. The *National Gazette* No. G143 of 20 July 2006 published a *Notice of Direct Grant* under Section 102 of the *Lands Act*, that shows Vanimo Jaya and One- Uni Development Corporation were granted a *Special Agricultural and Business Lease* (hereinafter “SABL”) containing an area of 47, 626 hectares of customary land described as Volume 13, Folio 177, Portion 248C, Milinch Tadj, Fourmil Aitape, West Sepik Province for 99 years from 20 July 2006 to 19 July 2105 as *tenants in common*.

6. On the 14 May 2007 Vanimo Jaya bought out **One-Uni** 50 % shares in the tenancy in common for consideration of K2, 000.00. The transferee in the transfer was one Ignas Aro of the **Uni** Tribe.

Facts

7. The plaintiff claims that on or about 20 December 2016, the first defendant encroached on the SABL when it landed a ship full of logging equipment on site and allegedly conducted logging operations by clear felling of trees for export.

8. The first defendant maintains that its entry into the area was agreed to and at

the invitation of the second defendant, who are customary owners of major parcel of the SABL.

9. On the 1 August 2013 Moile Resources Owners Ltd on behalf of 57 Incorporated Land Groups (ILG) and Julian Pawa, the Chairman filed *OS No. 411 of 2013* challenging the validity of the plaintiff's SABL. The case was resolved by Court annexed Mediation concluded on the 10 September 2015 by the signing of the *Mediation Agreement*. The customary landowners who signed the *Mediation Agreement* included Julian Pawa of the **One** Tribe and Ignas Aro from the **Uni** Tribe; the latter also signed for Vanimo Jaya Limited. On the 5 October 2015 the Court in the said proceeding issued Orders endorsing the *Mediation Agreement*.

10. The plaintiff having been aggrieved by the implementation of the Court Orders of 5 October 2015 in *OS No.411 of 2013* especially by the second defendant and Julian Pawa then filed *OS No. 904 of 2016-Vanimo Jaya v Julian Pawa and Moile Resources Owners Limited*.

11. The decision of Court in *OS No. 904 of 2016* was delivered on the 11 May 2017 which as claimed by the plaintiff, ruled for the plaintiff to be maintained as the main developer by the second defendant in the subject SABL as per Terms 2 and 3 therein.

12. This proceeding filed by Vanimo Jaya Limited is basically to enforce its rights it claims is breached by the defendants. These are trespass and encroachment by the first defendant and beach of the *Mediation Agreement* as endorsed in *OS No. 411 of 2013* and to enforce the judgment in *OS No. 904 of 2016*. The plaintiff claims that by virtue of these orders, its investments in the Portion 248C SABL, Vanimo Jaya must remain the only developer or investor for any agro-forestry projects within the original boundaries of Portion 248C.

Evidence

13. The parties rely on affidavits filed as follows:

For the plaintiff

1. Affidavit of Ignas Aro filed on 24 September 2018.
2. Affidavit of Chew Pang Heng:
 - (i) filed on 24 September 2018;
 - (ii) filed on 13 December 2018;
 - (iii) filed on 14 June 2019.
3. Affidavit of Kevin Lakuna filed on 8 February 2019.
4. Affidavit of Camron Ninwale filed on 19 August 2022.
5. Affidavit of Philipus Wita filed on 6 October 2022.

6. Affidavit of Godfried Soropo filed on 6 October 2022.
7. Affidavit of Mathew Gawing filed on 7 October 2022.

For the defendants

1. Affidavit of Julian Pewa filed on the 1 April 2015 in *OS 411 of 2013* between the same parties.
2. Affidavit of Julian Pewa filed on the 1 February 2020 between the same parties.
3. Affidavit of Julian Pewa filed on the 16 November 2019 in *OS 443 of 2019* between the same parties.
4. Affidavit of Julian Pewa filed on the 2 February 2022 in *OS 293 of 2021* between the same parties.
5. Affidavit of Andrew Yuangi filed on the 23 December 2022 in *OS 293 of 2021* between the same parties.
6. Affidavit of Anthony Donigi filed on the 18/5/2017 in *OS 904 of 2016* between the same parties.
7. Affidavit of Anthony Donigi filed on the 4/7/2017 in *OS 904 of 2016* between the same parties.

Submissions

For the plaintiff

14. Ms. Dauma of counsel for the plaintiff presents three (3) issues which she based her submission. I refer to each in seriatim.

- 1 *Whether the first defendant's commercial logging operations in Tadj, Aitape, West Sepik Province amounts to trespass upon the plaintiff's SABL area of Portion 248C?*

15. In opening her submission, Counsel referred me to *Malewa v Pidi* [2019] PGNC11; N7675 and *Sam Samoua v Access Venture Ltd* (2013) N5325, cases which sets out the elements of the tort of trespass. I will scrutinize these elements in my consideration shortly.

16. Ms. Dauma submits that there is evidence of transfer of the shares in the entry in the journal or memorial in the Registrar of titles which reads, “from *One-Uni Development Corporation* of its shares to *Vanimo Jaya Ltd*, the whole of the land now held by *Vanimo Jaya Ltd* on the 11 May 2007 “from *One-Uni Development Corporation* of its shares to *Vanimo Jaya Ltd*, the whole of the land now held by *Vanimo Jaya Ltd*.”

17. She submits that the actions of the first defendant on the 20 December 2016,

when it encroached on the SABL by landing a ship full of logging equipment on site and allegedly conducted logging operations by clear felling of trees for export amount to trespass.

18. Counsel also referred me to Rimbunan *Hijau v Ina Inai* (2017) SC 1605 a case in which the Supreme Court considered the term “*actual possession*” and held that unlike the common law position where actual possession is required, it is not necessary to prove possession or actual possession of land in Papua New Guinea as a precondition to a claim in trespass.

2. *Whether the Second Defendant’s commercial arrangements for logging operations in Portions 277C, Tadjji, Aitape, amounts to a breach of the Mediation Orders of 05/10/2015 (OS No. 411 of 2013 and the Mediation Agreement of 11/09/2015?*

19. Counsel submits that the second defendant is a party to the *Mediation Agreement* dated 10 September 2016 and is bound by the signatures of its directors namely, Martin Winkolo and Julian Pawa. The *Mediation Agreement* was then formalized into a Court Order dated 5 October 2015, in *OS No. 411 of 2013*.

20. It follows that the *Mediation Agreement* and the Court Order of 5 October 2015, in *OS No. 411 of 2013* are both binding on both the plaintiff and the second defendant in this proceeding.

21. Further Counsel contends that the plaintiff has exclusive commercial agro-forestry rights to be exercised in partnership with the landowners of Portions 276C and 277C, guaranteed by the Court-annexed Mediation Orders of 5 October 2015, in *OS No. 411 of 2013*. She submits that when the second defendant on the other hand had entered into a commercial agreement with the first defendant, it breached the said Mediation Orders of 5 October 2015.

3 *Whether the National Court judgment of 11 May 2017 in OS No. 904 of 2016, is a finding of liability against the second defendant for breach of agreement?*

22. Ms Dauma contends that this proceeding is about enforcing Terms 2 and 3 of the Orders of the Court in *OS No. 904 of 2016* dated 11 May 2017 which the defendants had breached. She submits that the said Terms 2 and 3 specifically provides for the plaintiff to be retained as the main developer by the second defendant in the subject SABL.

23. She contends that the particulars of the first defendant’s encroachment and or trespass are clearly stated in the Amended Statement of Claim filed on the 11

April 2019, specifically referred to in paragraphs 7, 8, 9, 10 and 11. Further the interference with landowners, procuring and poaching illegally are stated in paragraphs 12, 13, and 14. At paragraph 15 the plaintiff specifically pleads breach of agreement by the second defendant.

24. Ms. Dauma submits further that by virtue of an expressed term of that *Mediation Agreement*, its investments in the Portion 248C SABL, Vanimoy Jaya must remain the only developer or investor for any agro-forestry projects within the original boundaries of Portion 248C.

Submission for the first defendant

25. Mr. Donigi of counsel for the first defendant submits that the first defendant entered onto the Ono customary land which is now titled as portion 277C upon invitation of the customary owners, who also constitute Moile Resource Owners Limited. As such he submits that there is no encroachment and trespass over the **One** customary land or otherwise portion 277C by the first defendant.

26. In relation to the plaintiff's pleading in the Amended Statement of Claim on encroachment and trespass by the first defendant, Counsel submits that the plaintiff's reliance on the SABL portion 248C is invalid in law as the Court in proceeding *OS No. 411 of 2013* dated 5 October 2015 when endorsing the *Mediation Agreement* ruled as per Term 1 that: "*Vanimoy Jaya Limited through (Aitape West Oil Palm Limited) conditionally surrender the SABL Title over Portion 248 C Volume 13 Folio 177 to the Registrar of Titles*". [my underlining]

27. Counsel submits that Term 1 is clearly an order to conditionally surrender the SABL Title portion 248C which means that the said SABL is a legal nullity and to be cancelled by the Registrar of Titles. The second defendant fully consented to and endorsed the plaintiff's conditional surrender of the *SABL Title over Portion 248 C Volume 13 Folio 177 to the Registrar of Titles*.

28. Also, on the pleading in the Amended Statement of Claim that "*The first defendant and its partner the Landowners Company Moile Resource Owners Limited in interfering, procuring, poaching, and breaching of the plaintiffs right*", Counsel submits that such pleading is invalid in law and in fact in that the plaintiff is not a customary landowner nor has the automatic or perpetual land ownership rights to customary land.

29. Mr. Donigi submits that the issuance of a Voluntary Customary Land Registration Title, portion 277C to **One** Tribe in compliance with Term 2 of the Court Order of 10 October 2015 in *OS No.411 of 2013* nullified SABL 248C. Thus, it is within the legal right of the second defendant to choose the first

defendant as its development partner. The entry and involvement of Emo Holdings Ltd, the first defendant on portion 277C is not trespass as the owners, **One** tribe the second defendant had given permission and consent in the first place.

30. Counsel submits that the first defendant in collaboration with the second defendant have all relevant approvals including Permit for defendant's development proposal issued by the Forestry Authority and the Environment and Conservation Authority, as the successful developer engaged in logging project within Portion 277C the customary land of the **One** people. To that extent on the 30 of November 2021 Moile Resource Owners Limited representing the entire customary landowners of portion 277C, applied to the National Forest Board for an issuance of a five (5) year development plan in a Joint Venture Development Agreement with the second defendant for a period of 50 years.

For second defendant

31. Mr. Donigi who is also counsel for the second defendant submits that the second defendant's commercial arrangements for logging operations in Portions 277C, Tadj, Aitape, is not a breach of the Mediation Agreement of 10 September 2015 as endorsed by the Court on the 5 October 2015 in OS No. 411 of 2013. Mr. Donigi submits that the second defendant has not breached and accepts in good faith Terms 1, 2, 3 and 4 of the Court Order of 5 October 2015 in *OS No.411 of 2013* which endorsed the *Mediation Agreement* and determined the substantive matter.

32. Counsel draws my attention to Term 2 of the Order of 05 October 2015 in OS No. 411 of 2013 and submits that this is a direct flow on from the surrender and cancellation of the SABL 248C as ordered in Term 1. Thus, by agreement of the 57 ILG's the two (2) customary land-owning groups divided their 47, 626 hectares of customary land formerly SABL 248C into two (2) new titles granted pursuant to Voluntary Customary Land Registration (hereinafter "the VCLR") as Portion 277C for the **One** tribe and the other VCLR title as Portion 276C for the **Uni** tribe.

33. Mr. Donigi submits that it is because of the plaintiff's involvement and investment in the **Uni** land now portion 276C that the plaintiff has claimed it has investments in the Oil Palm Plantation. Counsel thus submits that Term 3 of the Order of 10 October 2015 in *OS No. 411 of 2013* is satisfied in that the "*Developers' interest is recognized, and its business investments is protected.*".

34. On the other hand, there is absence of proper consent given to the plaintiff in portion 277C. He submits that there is no legal basis for the plaintiff to forcefully retain the legal control over Portion 277C and cannot seek to enforce what is not in the mediation agreement in regard to taking away and to control the second

defendant's perpetual land rights and commercial lease-lease back agreements it has with the first defendant.

35. He contends that any entry by the plaintiff on to **One** registered customary title land of portion 277C for purposes of harvesting timber by Vanimo Jaya Ltd is encroachment on its part for which it must be held liable and accountable. He submits Vanimo Jaya Limited had not assisted the second defendant to develop its portion 277C with costs totaling almost K2 million kina.

36. Further, in reference to the pleading in the Amended Statement of Claim at paragraph 15 inclusive of 16, 17 and 18, alleging breach of agreement by the second defendant by opting out of the *Mediation Agreement* and engaging with the first defendant, Counsel submits the Amended Defence had denied and traversed such a claim. There is no agreement to give the second defendants portion 277C land to the plaintiff, nor for the continuous existence and control of the surrendered plaintiff's SABL portion 248C.

37. On the enforcement of the judgment in *OS No. 904 of 2016* which the plaintiff alleges was breached by the second defendant, Mr. Donigi submits as pleaded in its Amended Defence, that *OS No. 904 of 2016* is in direct contempt of the earlier Orders in *OS No.411 of 2013*.

Consideration

38. Trespass to land is defined as the intentional and wrongful invasion of another's real property. It involves the unjustifiable interference with the right of ownership or possession of land in the immediate and exclusive possession of another whether the invasion or interference is by a person or by something that person has set in motion.

39. It is actionable *per se* without the claimant necessarily proving that he suffered harm, *League Against Cruel Sports v Scott* [1985] 2 All ER 489.

40. In certain circumstances or instances trespass can be negated. These defences include licence, justification by law, necessity and *jus tertii*. License is where the possessor of the land had expressly or by implication given permission to the alleged trespasser to be on the land. Possession does not necessarily mean ownership of the land, but the right to eject or exclude others from it. Leaving aside justification by law and necessity which do not apply here the other *jus tertii* is a situation where the alleged trespasser proved in evidence that the land is not possessed by the claimant but by a third party: *Doe d Carter v Barnard*, [1849] 13

41. The application of the common law principles of torts is applicable in Papua New Guinea in accordance with the provision for adoption of common law and equity under Schedule 2. 2 of the *Constitution*. Trespass in land has its own considerations compared to trespass in goods and chattels. A registered title under the Torrens System in Papua New Guinea usually gives the registered proprietor an indefeasible title. However, in certain situations termed as exceptions in Section 33 (1) of the *Land Registration Act* a registered title can be cancelled: *Mudge –v- The Secretary of Lands* [1985] PNGGLR 387

42. In *Sam Samoua v Access Venture Ltd* (2013) N5325 the Court identified a number of criteria for consideration of the tortfeasor of trespass. These preconditions were further considered in *Malewa v Pidi* [2019] PGNC11; N7675 and affirmed the discussion in the Sam Samoua’s case and settled the elements of the tort of trespass to be:

- (a) The defendant interfered with (e.g. by damaging or destroying);
- (b) The plaintiff’s chattels (any property other than freehold land);
- (c) The defendant acted intentionally;
- (d) The defendant acted without lawful authority; and
- (e) The plaintiff had actual possession of the chattels.

43. The Supreme Court in *Rimbunan Hijau v Ina Enei* (2017) SC1605 a case involving customary land it considered the term “*actual possession*” and held that unlike the common law position where actual possession is required, it is not necessary to prove possession or actual possession of customary land in Papua New Guinea.

44. The Supreme Court pronounce this as a peculiar situation to Papua New Guinea dating back to the colonial times where it was recognized that no land is *waste and vacant* in Papua New Guinea. There is a presumption that in PNG no land is ownerless. This recognizes our inherent lifestyle of gatherer, hunter fisherman, gardener so there are large portions of land reserves for such which is owned by some clan. If the State wishes to acquire customary land it had to first establish that the land is indeed “waste and vacant”. This principle was discussed in the pre independence Supreme Court in *Re Era Taora Land* (1971) Full Court 18. Section 7 of the *Lands Act* 1996 reflects this in the mode of acquisition as a public duty by the Minister, who may on behalf of the State acquire land-

- (i) by agreement; or
- (ii) by compulsory acquisition.

45. In *Kanga Kawira & Ors v Kepaya Bone & Ors* (2017) N6802, Kandakasi J (then) held *inter alia* that “*the State and any developer have an obligation to properly identify and organize the customary land-owning group that owns any land they might be interested in ...*”

46. The Supreme Court in *Rimbunan Hijau v Ina Inai* (supra) in relation to Special Agriculture Business Development Leases (SABLs) states, “*developers and the State alike are failing to either deliberately or by inadvertence to first ascertain, then properly organize, empower and deal with the properly identified and confirmed customary owners. Rather than taking this most important critical first step the state and developers are entering customary land and are proceeding with their activities and in so doing, choosing to and are indeed dealing with persons who claim to be landowners when in fact they may not be the true and correct landowners...*”

47. The Supreme Court endorsed the trial judge ruling that Rimbunan Hijau’s conduct of entering the land without the express or tacit consent and approval of Moga clan, thereby carrying on its operation was clearly illegal. It was disrespectful and in total disregard of Moga’s ownership rights and interest in the Land and in any case the ownership issue was in Court.

48. In the perspective of this case, the second defendant denies receiving any benefits from the plaintiff’s investments and further says that Plaintiffs Title and Logging and Marketing Agreement had been recommended for cancellation because of the massive destruction of the forest by its subsidiary companies logging within the East and West Aitape Lumi Electorate. The permit however has been renewed by the plaintiff who is still holding onto a defective Title.

49. In this proceeding, Vanimoya Jaya Limited (otherwise Aitape West Oil Palm Limited) claims against the first defendant for *encroachment and trespass* and for *breach of agreement* against the second defendant.

50. In relation to trespass and encroachment, the plaintiff seeks to enforce its rights breached by the actions of the first defendant when on or about 20 December 2016 it landed a ship full of logging equipment on site and allegedly conducted logging operations by clear felling of trees for export in Tadjai, Aitape, West Sepik Province upon the plaintiff’s SABL area of Portion 248C. The plaintiff’s claim of trespass by the first defendant is continuing even to this date.

Findings

51. The legal basis and foundation of the plaintiff's claim of trespass and encroachment against the first defendant is premised on enforcement of its rights under the SABL portion 248C containing an area of 47, 626 hectares of customary land described as Volume 13, Folio 177, Portion 248C, Milinch Tadj, Fourmil Aitape, West Sepik Province issued on the 31 July 2005 to Vanimo Jaya Limited and One-Uni Development Corporation as tenants in common for 99 years from 20 July 2006 to 19 July 2105.

52. On the 14 May 2007 Vanimo Jaya bought out 50% of shares purportedly held by or in the name of One-Uni in the tenancy in common for consideration of K2, 000.00. The transferee in the transfer was one Ignas Aro of the Uni Tribe.

53. The evidence shows that at the time of the grant of the SABL, Vanimo Jaya was only dealing with Ignas Aro who was and is the Elder and Chairman of the **Uni** speaking customary owners. At that time in 2005 Ignas Aro would have to be either legally appointed with the full authority of 57 ILGs or he purported to represent all the customary owners of the massive 47, 626 *hectares* of customary land. I find no evidence of any formal authority given by the 57 ILGs to Ignas Aro. This raises doubts about the land dealing at the time culminating in the SABL but it is not an issue for consideration here nor it is necessary for me to venture back into time.

54. Regarding the second claim of breach of agreement against the second defendant, the starting point here is the Court Order of 5 October 2015 in *OS No. 411 of 2013* which was an endorsement of the *Mediation Agreement* signed by parties to *OS No.411 of 2013* on the 10 September 2015. Proceeding *OS No.411 of 2013* was filed on the 1 August 2013 by *Julian Pewa on behalf of 57 ILGs and Moile Resources Owners Ltd v Ignas Aro* seeking *inter alia* the surrender or cancellation of the said SABL portion 248C.

55. The Court directed parties to mediate resulting in the execution of the Wewak Heads of Agreement referred to as the *Mediation Agreement*. The essential terms of the Court annexed Mediation Agreement had been formalized into the Court Order dated the 5 October 2015. The text of that Court Order is:

- “1. That the Defendant Vanimo Jaya Limited through (Aitape West Oil Palm Limited) conditionally surrender the SABL Title over Portion 248 C Volume 13 Folio 177 to the Registrar of Titles.
2. That the Registrar of Titles through the Customary Land Registration Division to register Portion 248 C Volume 13 Folio 177 in the

nominated ILG names of the One Tribe and the Uni Tribe respectively.

3. That the current Developers' interest be recognized, and their business investments be protected by both the One Tribe ILG's and the Uni Tribe ILG's in the endeavor to develop Portion 248 C Volume 13 Folio 177.
4. That the perpetual rights and interest of the customary landowners be recognized and protected by the current Developer by giving them the maximum benefit in their participation in developing their held Titles and leases over Portion 248 C Volume 13 Folio 177... [my underlining]

56. Term 1 of the above Court Order is clear. It requires Vanimo Jaya Limited through Aitape West Oil Palm Limited to conditionally surrender the SABL Title over Portion 248 C Volume 13 Folio 177 to the Registrar of Titles. What is clear from the evidence is that the SABL has not been surrendered and instead the plaintiff continues to rely on and pleads the SABL 248C notwithstanding the clear intention of Term 1 of the Order of 5 October 2015.

57. In my view, the conditional surrender of the plaintiff's SABL was to allow for Term 2 of the Court Order to be fulfilled. The registration of two (2) VCLR Leases as portion 277C and portion 276C complied fully with Term 2 and were direct flow on from Term 1. The details of the VCLR are:

(a) the **One** tribal group with their land area of 29, 626 hectares out of a total land area of 47, 626 hectares of customary land secured title under the Voluntary Customary Land Registration (hereinafter "the VCLR") Registered Cat. Plan 2/170 as Portion 277C. The **One** tribe under Julian Pewa's chairmanship gave no consent for the plaintiff to take control nor to occupy their land.

(b) the balance of about 18,000 hectares was registered by the **Uni** speaking people and given title under the VCLR as Portion 276C. The **Uni** tribe under Ignas Aro's chairmanship had allowed Vanimo Jaya Limited into their portion 276C pursuant to a joint venture agreement. There is now an oil palms plantation on the said portion 276C.

58. The plaintiff also pleads and seeks to enforce the terms of the *Mediation Agreement* of 10 September 2015 it claims is affirmed in the judgment of *OS No. 904 of 2016*. The *Mediation Agreement* had not been tendered as a standalone document. There is no clear evidence led by the plaintiff to substantiate a particular breach of the *Mediation Agreement*. It is only referred to as being breached on the

basis of its purported endorsement by the Order of 5 October 2015. Even then, the plaintiff only pleads general reliance and not any specific Term of the Order of 5 October 2015 in OS 411 of 2013.

59. In my view, the closest term of the Order the plaintiff can relate would be Term 3 which provide for the *“current Developers’ interest to be recognized, and their business investments be protected by both the One Tribe ILG’s and the Uni Tribe ILG’s in the endeavor to develop Portion 248 C Volume 13 Folio 177.”*

60. Using the plain meaning rule of interpretation, Term 3 relates to current developers’ interest and their business interests to be recognized and protected, not those that may arise in future. Thus, in as far as the evidence indicates the current plaintiff’s (Developer’s) interest is in logging and oil palm development in the **Uni** land under the chairmanship and control of Ignas Aro.

61. The plaintiff also pleads the application of Terms 2 and 3 of the Order in *OS No. 904 of 2016* dated the 11 May 2017 wherein Counsel submits these terms ruled for the plaintiff to be maintained as the main developer by the second defendant in the subject SABL. The pertinent part of Terms 2 & 3 of *OS No. 904 of 2016* are:

Term 1 “the defendant’s actions in purporting to engage another contractor to enter into the SABL is contrary to the binding Agreement and is a breach of the said Agreement”.

Term 3 “...permanent order restraining the Defendants both jointly and severally including their servants and or agents that they represent from engaging in or entering or completing any agreement with another Developer other than the plaintiff”.

62. I find that Terms 2 and 3 of *OS No. 904 of 2016* bear no resemblance to the *Mediation Agreement* and Court Order dated the 10 October 2015. On the face of it the Orders are clearly contemptuous to Term 1 of Order of 10 October 2015. It borders on defiance on the part of Vanimo Jaya Limited. It is a serious matter of the plaintiff filing incompetent and multiplicity of proceedings.

63. The reliance on SABL 248C by Vanimo Jaya Limited which has been ordered to be conditionally surrendered must be viewed as a nullity. However, Vanimo Jaya Limited can still maintain its commercial relationship and protect its investment in portion 276C where on evidence it has exclusive commercial Agro-Forestry rights which it can exercise in partnership with the landowners of Portion 276C.

64. On the part of the first defendant, I am satisfied that its entry on to portion 277C was consented to and at the invitation of the second defendant, the customary

owners and registered owner of portion 277C under VCLR on a lease-lease arrangement.

65 The land on which Emo Holdings Limited operates is owned by the Moile Resource Owners Limited, the second defendant, comprising of members of the **One** tribe and not owned by Vanimo Jaya Limited as per the principle of *jus tertii*, *Doe d Carter v Barnard*, [supra].

66. Before closing, I take judicial notice of other proceedings instituted in relation to the same land area of 47, 626 *hectares* of customary land with notation.

- (i) *WS No.1667 of 2017-Vanimo Jaya v Julian Pewa & Others. Status not aware.*
- (ii) *OS No.443 of 2019-Vanimo Jaya v PNGFA & EMO Holdings Ltd/ Moile Resource Owners Ltd. On the 25 August 2022 the Court Ordered: “1. The entire proceeding(s) herein is dismissed for failing to disclose a reasonable cause of action.”*
- (iii) *OS No.885 of 2019- Moile Resource Owners Limited & Emo Holdings Limited v Vanimo Jaya Limited & Aitape West Palm Oil Limited & Ors- In an unnumbered Ruling in February 2023 the Court inter alia ordered “Vanimo Jaya Limited & Aitape West Palm Oil Limited shall comply with the Order of 5 October 2015 in OS 411 of 2013 within 30 days from the date of these Orders.”*

67. This case demonstrates multiple issue which the Court can deal with, however I will only rule on the issue of liability in this cause of action. Issues may include whether there was full compliance with Sections 7, 11 and 102 of the *Lands Act* for acquisition of customary land including it being properly have been extinguished by the State in favour of a Forest Management Area lease to the plaintiff or a separate consideration under the regime of the *Forestry Act 1991*. These issues will remain unanswered.

68. In consideration of all the above, I conclude that the second defendant has a clear title issued pursuant to Section 340 of the *Customary Land Registration (Amendment) Act 2009*. The *Customary Lease* being Volume 1 Folio 124 is described as Portion 277C, Milinch Tadgi Fourmil Aitape, West Sepik with a Land area of 45, 383.4 ha was issued on the 16 March 2018 to Moile Resource Owners Limited for 99 years. Moile Resource Owners Limited then subleased to Emo Holdings Limited for a term of 50 years from date of registration on the 4 April 2018.

69. In the end I find that apart from the finding of lack of capacity on the part of

the plaintiff which makes the pleadings on trespass and breach of agreement incontestably bad it is also manifestly vague. It follows that the plaintiff has not established a reasonable cause of action.

Order

70. The Order of the Court will be:

1. The plaintiff claim for trespass and encroachment is dismissed.
2. Breach of contract is not established against the second defendant and is also dismissed.
3. Costs follow the cause and is ordered against the plaintiff.
4. Time is abridged to time of settlement which takes effect forthwith.

Ordered Accordingly

Nelson Lawyers: *Lawyers for the Plaintiffs*

Ama Wali: *Lawyers for the First and Second Defendants*