

N8922

PAPUA NEW GUINEA
[IN THE NATIONAL COURT OF JUSTICE]

OS (JR) NO. 13 OF 2021

BETWEEN:
PAPIR HOLDINGS LIMITED
First Plaintiff

AND:
WOODBANK PACIFIC LIMITED
Second Plaintiff

AND:
**FAITH BARTON KEENE, KEN MONDIAI, SEBASTIAN MIYONI,
KONEY SAMUEL, GUNTHER JOKU, BOB TATE, WILLIAM BANDO
AND TUNOU SABUIN in their capacity as members of THE NATIONAL
FOREST BOARD**
First Defendant

AND:
THE PAPUA NEW GUINEA FOREST AUTHORITY
Second Defendant

AND:
THE INDEPENDENT STATE OF PAPUA NEW GUINEA
Third Defendant

AND:
INOVEST LIMITED
Fourth Defendant

AND:
**ADOLF PAROPET, LEO BARIS, LUKE IRUM, ALBERT PURARUM AS
SHAREHOLDERS AND DIRECTORS OF PAPIR HOLDINGS LIMITED**
Fifth Defendant

Waigani: Narokobi, J
2021: 2nd & 22nd July

***JUDICIAL REVIEW – application for stay of proceedings following grant of
leave to seek judicial review – National Court Rules, Order 16, Rule 3(8) –
principles to apply when determining whether to grant a stay of proceedings.***

The applicant applied for leave for judicial review, which was granted, and then a stay was ordered ex parte of the decision sought to be reviewed. What is now before the court is the inter partes hearing of the stay.

Held:

- 1) The applicant has an arguable case and given an undertaking as to damages, however the balance of convenience and the interests of justice require the interim orders to be set aside.
- 2) Additionally, given the existence of the Supreme Court proceedings in SCA No. 110 of 2019, SCA 111 of 2019 and SCA 138 of 2019 which outcome will have a bearing on the issues presently before the court, to avoid multiplicity of proceedings in relation to the issues before the court, the present proceedings should be stayed pending the outcome of the Supreme Court appeal.

Cases Cited

Ewasse Landowners Association Inc v Hargy Oil Palms Ltd (2005) N2878
Gelu v Somare (2008) N3526
McHardy v Prosec Security and Communication Ltd [2000] PNGLR 275
Tzen Pacific Ltd v Kanawi Pouru (2013) N5156

Statute Referred to:

Constitution
Forest Act 1991

Counsel

Mr J Wohuinangu, for the First Plaintiff
Mrs J Kare, for the Second Plaintiff
Mr J, Dalid, for the First and Second Defendants
No appearance, for the Third Defendant
Mr A, Mana, for the Fourth Defendant
Mr R Mannrai, for the Fifth Defendant

RULING

22nd July, 2021

1. **NAROKOBI, J:** The First Plaintiff obtained a stay ex parte on 18 May 2021 of the decision of the First and Second Defendants after leave for judicial review was granted on 13 February 2021. On 2 July 2021 the stay order was argued inter partes before me, and I now give my ruling on the application.

2. The First Plaintiff is a landowner company in the Bogia and Sumkar District of Madang province who was granted a Timber Permit No TP 12-22 on 5 December 2017 for a period of five years over an area known as Kumil Timber Rights Purchase area (TRP).

3. The First Plaintiff has had an ongoing dispute amongst the landowners over their choice of the preferred developer. One group favours the Second Plaintiff, with whom they have signed a Logging and Marketing Agreement (LMA) while the other supports the Fourth Defendant, and also signed another LMA with them. It has resulted in a number of court proceedings. The one pertinent to this proceeding is SCA No 110 of 2019, SCA No 111 of 2019 and SCA No 138 of 2019. In SCA No 110 of 2019 the Supreme Court granted a stay on the orders made by the National Court in OS No 780 of 2018 and OS No 15 of 2019. The orders in SCA 110 of 2019 are in the following terms:

1. The relief sought in the Amended Application both filed on 17 December 2019 and SCA No. 111 of 2019 are granted in terms of paragraphs 1 (i) in both Applications.
2. Pursuant to Section 5(1) and/or Section 19 of the Supreme Court Act Chapter No. 37, terms 1, 5 and 6 of the Orders of the National Court made on 19 July 2019 in proceedings OS No. 780/2019 be stayed pending the hearing and determination of the appeal herein, or earlier order.
3. The costs of the said Amended Applications are costs in the Appeal.

4. The effect of the orders in OS No 780 of 2018 and OS No 15 of 2019 which were consolidated was to recognize the LMA entered into by the Fourth Defendant and its faction of directors, most of whom are now the Fifth

Defendants.

5. While the dispute has been going on, the First and Second Defendants has decided to issue two Timber Licenses in the Kumil TRP – one to the Second Plaintiff and the other to the Fourth Defendant on 28 November 2020. The basis of that decision as it appears from the submissions in court was to recognize the wishes of the landowners in terms of their preferred developer (refer affidavit of Adolf Paropet, filed 11 June 2021, paragraph 17).

6. That decision to issue two Timber Licences is now being challenged in the present proceedings by the First and Second Plaintiffs. Several grounds have been relied on, including breach of s 91 of the *Forest Act* 1991 by the First and Second Defendants in granting two Timbe Licence over one TRP area; non-observance of natural justice; and that the decision made was unreasonable. Essentially the judicial review challenges the issuance of two licences and the also the approval of the Annual Work Plan of the Fourth Defendant on 17 November 2020, presumably as the basis to grant it a Timber Licence on 28 November 2020.

7. The Fourth Defendant provides the main opposition for the stay to continue. It argues that the injunctions should be set aside for the following reasons which I highlight only the main points, relying principally on the affidavit of Eli Sing Hii filed on 26 February 2021:

- The Second Plaintiff's LMA was nullified by the National Court on 19 July 2019;
- The appeals in SCA 110 and 111 does not give the Second Plaintiff's any preferential rights;
- On 19 July when the National Court decided on the LMA issue, the Fourth Defendant had the only valid license renewed on 17 September 2019 for another 12 months before the renewal on 28 November 2020;
- The Second Plaintiff had a license before its Annual Logging Plan was approved on 17 November 2020;
- The decision to grant two licences on 28 November 2020 was done in a bipartisan manner; and
- The records of the Second Defendant shows that the actual landowners gave their consent to the Fourth Defendant.

8. The Fourth Defendant submits on the authority of *Tzen Pacific Ltd v Kanawi Pouru* (2013) N5156 that s 91 of the *Forest Act* is no bar to the Papua New Guinea Forest Authority issuing two licences over the same TRP, that it has been done before and was sanctioned by the National Court by the said authority.

9. The Fifth Defendant supports the submissions of the Fourth Defendant and relies on the affidavit of Adolf Paropet, filed 11 June 2021.

10. The First and Second Defendants takes a neutral position but defends its decision to issue two Timber Licences in order to respect the wishes of the landowners preferred choice of developer. They say “consent” is a fundamental requirement that cannot be overlooked. It says that it relied on the authority of *Tzen Pacific Ltd v Kanawi Pouru* as the basis of its decision.

11. The First Plaintiff submits that the injunction or stay should continue for the reason that the stay orders of the Supreme Court recognizes its LMA with the Second Plaintiff and its choice must be respected. It relies on the affidavit of Albert Waket filed on 10 February 2021, Justin Wohuinangu filed 10 February 2021 and Albert Waket filed 20 April 2021. The First Plaintiff submits:

- The First Defendant’s decision to issue a Timber Licence to the Fourth Defendant is contrary to s 91(1) of the *Forest Act*;
- The Annual Logging Plan was issued contrary to s 102(2) of the *Forest Act*;
- An Undertaking as to damages was filed on 17 May 2021;
- The balance of convenience favours the grant because the issuance of two timber licences over the same TRP would cause confusion; and
- The Supreme Court has issued a stay of the LMA with the Fourth Defendant.

12. In support of the First Plaintiff, the Second Plaintiff relies on the affidavits of Jacinta Kare and Jeffrey Ling in that the stay orders in SCA 110 of 2019 validates the LMA it has with the First Plaintiff and on that basis it should be the preferred developer as it has a valid agreement in place.

13. Parties appear to be in agreement on the principles for the court to consider whether it should continue the injunction or not in the circumstances of

the case. These principles were enunciated in the case of *McHardy v Prosec Security and Communication Ltd* [2000] PNGLR 275. I agree and proceed to consider whether the injunction should continue on the basis of that authority. *McHardy v Prosec Security and Communication Ltd* also incorporates principles in other case authorities such as *Gelu v Somare* (2008) N3526.

14. After considering the facts of the case, I determine now each of the factors for purposes of assisting me to arrive at a decision.

a) Whether leave to appeal is required and whether it has been obtained

15. This is not appeal but a judicial review application. Leave for judicial review was sought and granted by the National Court in Madang on 13 February 2021.

b) Whether there has been any delay in making the application

16. Leave was granted on 13 February 2021 and application for stay was moved on 18 May 2021 and court granted the stay on 18 May 2021. I determine that there has been no delay in making the application.

c) Possible hardship, inconvenience or prejudice to either party

17. As it is, the party that will face the greatest prejudice is the Fourth Defendant. It potentially cannot run its business if the stay continues.

d) The nature of the judgement sought to be stayed

18. The judgement that is being stayed is a decision of the First and Second Defendants to issue two Timber Licenses over the same TRP area and the approval of the Fourth Defendant's Annual Logging Plan on 17 November 2020.

e) The financial ability of the applicant

19. At this stage I am not sure whether the First Plaintiff will be able to meet any damages suffered as a result of the business losses suffered by the Fourth Defendant in the event that the proceedings are determined in favour of the Defendants. However, they have given an undertaking as to damages, and in the absence of contrary evidence, I accept the undertaking.

f) Preliminary assessment about whether the applicant has an arguable case on the proposed appeal

20. There are two decisions that are being challenged, the first one relates to the issuance of the Fourth Defendant's Timber License and related failures to observe natural justice and act reasonably. The second decision relates to the First and Second Defendants approval of the Fourth Defendant's Annual Logging Plan.

21. After reading through all the affidavit materials and considering the Counsel's submissions, in my respectful view, the stay orders of the Supreme Court in SCA 110 of 2019 issued on 7 January 2020 appears to maintain the validity of the LMA between the First Plaintiff and the Second Plaintiff, but it is not altogether clear. If the orders of OS 780 of 2018 and OS 15 of 2019 are stayed, that means as a matter of fact, that there are two LMAs, one with the Second Plaintiff and the other with the Fourth Defendant. The Supreme Court did not say which one was valid. It simply said the one the National Court recognized in those two proceedings are stayed. In my respectful view, it returns the matter to the status quo before the decision remains. It cannot however put a stay on the First and Second Defendant renewing a Timber Licence that has expired. It was therefore open to the First Defendant and Second Defendant to issue a Timber Licence to the Second Plaintiff and the Fourth Defendant. The legal question remains, that is whether s 91 of the *Forest Act* empowers the First and Second Defendant to issue another Timber Licence to a developer outside of the existing parties to the LMA but in the same TRP area. This is an arguable point. But it is made weaker by the National Court decision in *Tzen Pacific Ltd v Kanawi Pouru*.

g) Whether on the face of the record of the judgement there may be indicated apparent error of law or procedures.

22. This consideration is not relevant for purposes of this application as no issues arises on this aspect.

h) The overall interests of justice

23. I am of the view that whilst the First Plaintiff has an arguable case, the overall interest of justice, would mean that I consider all the parties interest in respect of this matter. What would be an outcome that would cater for all their interests. I give much weight to the submission of the First and Second Defendants that they were driven to the decision they took by the individual landowners concerned. The landowners wanted to have a choice as to which developer exploits their resources. The *Forest Act*, in its long title states that one of its objectives is to:

“(b) maximise Papua New Guinean participation in the wise use and development of the forest resources as a renewable asset; and...”

24. The court must take a course which enables resource owners to have a say in the development that takes place on their land. That to me would be in the overall interest of justice.

i) Balance of Convenience

25. Another explanation of this requirement as Cunnings, J explained in *Ewasse Landowners Association Inc v Hargy Oil Palms Ltd* (2005) N2878 is to ask, who would suffer the most if the injunction is not granted. As I have said earlier, the course which the First and Second Defendant has taken will enable all parties interest to be catered for, including the First and Second Plaintiffs.

26. I accept the Plaintiff’s submission that I cannot go past the Supreme Court Orders in SCA 110 of 2019. The position that I will now take as a result of this line of argument is to put a stay on the present judicial review proceedings until that appeal is determined and the outcome brought to this court.

27. If the Supreme Court upholds the appeal, then the Plaintiffs have a stronger ground to run their argument that they have a valid LMA as ordered by the Supreme Court.

28. On the other hand, if the Supreme Court refuses the appeal, the Fourth Defendant would be in the position that the Second Plaintiffs are now in.

29. Whatever decision the National Court makes in this current proceedings either way, will still be affected by the Supreme Court’s decision in SCA 110 of 2019. This is clear from the submissions by all parties.

30. For those reasons, I am of the considered view that the current proceedings should be stayed until the outcome of the Supreme Court in SCA 110 of 2019. There are also related proceedings in SCA 111 of 2019 and SCA 138 of 2019. To avoid multiplicity of proceedings, these appeals should be determined first.

31. It would not be in the Plaintiffs and the Defendants interests that I put a complete stop to all logging until the Supreme Court decides the various appeals, as was suggested by Adolf Paropet, in his affidavit filed 11 June 2021.

So I am left with the position to accept the First and Second Defendants decision to issue a Timber Licence to the Second Plaintiff and the Fourth Defendant. This however is temporary until the outcome of the Supreme Court proceedings and the determination of this proceedings thereafter.

32. Ultimately, I take this course for the reason that operating by way of a stay order, albeit from the Supreme Court, for an extended period is a tenuous way to conduct business. Business must operate in an environment of certainty as vast resources are being expended. This can come about when all related proceedings are brought to a conclusion and the legal position is clear to guide the manner of conducting business.

j) Whether damages would be sufficient remedy

33. Essentially, what is at issue is not so much monetary compensation, but the recognition of the landowner's rights to have a say in who would be their developer. Taking that point of view would result in endorsing the course that the First and Second Defendants have taken.

34. The end result of this would be that the First Plaintiff has an arguable case, and may well stand up in the substantive hearing on this point of law, if this court does not endorse the view in *Tzen Pacific Ltd v Kanawi Pouru* but as it stands at this point in time, the interests of justice and the balance of convenience rests with uplifting the stay order, in which case I issue the following orders:

1) The stay orders issued on 18 May 2021 is set aside and the Timber License issued to the Second Plaintiff and the Timber License issued to the Fourth Defendant in the Second Defendant's decision of 28 November 2020 shall be valid for all intents and purposes until the determination of SCA No. 110 of 2019, SCA 111 of 2019 and SCA 138 of 2019 and this present proceeding.

2) For this purpose, the First and Second Defendant must ensure that the Annual Work Plan of the Second Plaintiff and the Fourth Defendant do not cover the same area.

3) For avoidance of doubt, Term 1 above does not affect the annual renewal process of timber licences undertaken by the First and Second Defendant under the *Forest Act 1991*.

4) Pursuant to s 155(4) of the *Constitution*, the present

proceeding is stayed pending the determination of SCA No. 110 of 2019, SCA 111 of 2019 and SCA 138 of 2019.

5) After the determination of SCA No. 110 of 2019, SCA 111 of 2019 and SCA 138 of 2019, the parties shall have this matter relisted before the National Court for the continuation of this proceeding in light of the decision of the Supreme Court in those three appeals.

6) Each party will bear their own costs in relation to the hearing of this application.

Orders accordingly

Gileng & Co Lawyers: *Lawyers for the First Plaintiff*

Bradshaw Lawyers: *Lawyers for the Second Plaintiff*

Inhouse Counsel: *Lawyers for the First and Second Defendants*

Corrs Chambers, Westgarth Lawyers: *Lawyers for the Fourth Defendant*

Mannrai Lawyers: *Lawyers for the Fifth Defendant*