

PAPUA NEW GUINEA
[IN THE NATIONAL COURT OF JUSTICE]

OS (JR) NO. 954 OF 2018

BETWEEN:
JACK DAU & IAN BARAI
Plaintiffs

AND:
PAPUA NEW GUINEA FOREST AUTHORITY
First Defendant

AND:
HONOURABLE DOUGLAS TOMURIESA MINISTER FOR FOREST
Second Defendant

AND:
THE INDEPENDENT STATE OF PAPUA NEW GUINEA
Third Defendant

AND:
EVERWIN ENTERPRISES LIMITED
Fourth Defendant

Waigani: Miviri J
2020: 24th June

PRACTICE & PROCEEDURE – Judicial Review & appeals – Notice of Motion – Substantive Judicial Review – Proper parties – Locus Standie – Representative action – Authority to act – Lawyer Notice ceasing to act – effect of on parties represented – effect on parties in cause of action – No notice of discontinuance – consequences on action before court – action unaffected – parties unrepresented directed secure counsel – matter fixed further directions – costs follow event.

Cases Cited:

Tulapi v Steamships Trading Company Ltd [2012] PGSC 43; SC1210
Mali v State [2002] PNGLR 15

Counsel:

N. Kopunye, for first & Second Plaintiffs
S. Mitige, for first Defendant
G. Geita, for second & Third Defendants
I. Shepperd & M. Muga, for fourth Defendants

RULING

26th June, 2020

1. **MIVIRI, J:** This is the Ruling on the fourth defendant's contention of incompetency on the part of the two plaintiffs that they are not properly before the court, they are not representatives of the 13 other persons who were initially in the proceedings. In this regard it is not part of the review book that a notice of discontinuance has been filed by the 13 plaintiffs sourced from Order 8 rule 61 (1) *National Court Rules*, "the Rules". There is no notice in accordance with Order 8 rule 64 giving effect to the discontinuance.
2. Effectively for all intent and purposes they are still part of the proceedings here. Because Leave was granted 2nd April 2019 in their favour inclusive for Judicial review to review the decision of the 1st, 2nd and 3rd defendants made the 27th November 2017 to grant and or extend Timber permits in favour of the 4th defendant, that is Timber permit number 13-35 in respect of Morobe South Coast Timber rights purchase agreement; Timber permit number 13-36 in respect of Maiama A TRP Agreement area; Timber permit number 13-37 in respect of Maiama B TRP Agreement area. Leave was granted to the plaintiffs to file Notice of Motion pursuant to order 16 rule 5 (1) of the *National Court Rules* for substantive Judicial review.
3. That in effect recognizes a genuine claim by all grounds necessary to entail leave. It follows that the 13 plaintiffs are still part and parcel of this proceeding. Their no appearance is not because of severance from the proceedings but a notice of ceasing to act by the lawyer Kopunye Lawyers who initially was their lawyer on record. It means they will have to instruct another lawyer or choose how they pursue their cause of action before this court. They have come a long way with a cause of action which must be given its day in court. It also begs as to why the sudden take to abandon the initial lawyer after all and to not come to the hearing today 24th June 2020, and notice affected all. They must be heard as to reasons pertaining and what course they seek to take on the matter. The issues raised are serious curtailing grant of leave.
4. The court is of record and law here a judicial review is pursued, and the rules denote composition and filing of a review book Order 16 Rules 6 (3) (n) & 7.

In this regard there are two volumes before this court in pursuance of this matter by the parties for and against. Material in there are relied by either side in the pursuit of their cases. For the plaintiffs including the 13 not before the court now because of non-representation this is the basis upon which the judicial review is pursued. In all fairness the material before it is before the court necessary for the dispensation of Justice. In my view where, as here there is a dispute as to the proper parties or any other similar, it is necessary to view the history of the file and the proceedings. Here relevant is the two volumes of the review book of the 31st January 2020. In there are string of affidavits about 35 in all beginning from Pages 13 to 436 after which begins the statement of agreed and disputed facts and legal issues for the hearing. This is evidence intended for the proceedings opened before court.

5. Of particular relevance are the affidavits of the 13 plaintiffs now not before court but on record in the proceedings as parties to the cause of action. These are as per their notice of motion dated 2nd April 2019 in the review book pages 50 to 52 clearly naming as parties, Avi Gutai, John Morobe, John Somo, Yauna Uwaiso, Ago Koeta, Chacky Dau, Jowe Yauna, Suam Yeni, Teddy Nick, Turi Akoko, Sai Bore, Buka Paigara, and Nivis Bais as Plaintiffs against the four dependents.

6. The first Avi Gutai's affidavit begins at pages 69 to 77. He deposes that he is a plaintiff to the case. He is a village councillor covering the two timber projects namely Morobe Coast TRP and Maima B TRP. The projects are benefitting his people he wants to withdraw the case and has seen his lawyer Kopunye Lawyers with a letter to this effect to withdraw the case. He attaches that letter to his affidavit as annexure B. He seeks the permission of the court to withdraw the case. That is instruction from this deponent as plaintiff with another plaintiff Jowe Yauna instructing Kopunye Lawyers to file a notice of discontinuance forthwith.

7. Affidavit of John Morobe dated the 26th June 2019 is in similar terms including the instructions signed by both Avi Gutai and Jowe Yauna for notice of discontinuance to be filed. Affidavits of John Somo, Yauna Uwaiso, Ago Koeta, Chacky Dau, Jowe Yauna, Suam Yeni, Teddy Nick, Turi Akoko, Sai Bore, Buka Paigara, and Nivis Bais are all the same in all material particulars.

8. The consensus arising common to all is to discontinue the proceedings from the majority 13 plaintiffs now not before the court. The Judicial review intended would appear to be only by the two now before the court. They cannot move without the authority of the remaining 13 which must be settled either by Notice of discontinuance filed by the 13 effectively relinquishing them as parties in the proceedings leaving the two now before the court: *Tulapi v Steamships Trading*

Company Ltd [2012] PGSC 43; SC1210 (4 December 2012). This will effectively amend the proceedings.

9. This is supported by the first, second and third defendants in unison contending that the two plaintiffs cannot move on the notice of motion without amendments because the 13 other plaintiffs are no longer part of the proceedings.

10. Except for the review book pages 442 to 446 where there are two Notices of Ceasing to Act filed by Kopunye Lawyers first dated 28th June 2019, and the second dated the 21st November 2019. In both cases that firm ceases to act for, Avi Gutai, John Morobe, John Somo, Yauna Uwaiso, Ago Koeta, Chacky Dau, Jowe Yauna, Suam Yeni, Teddy Nick, Turi Akoko, Sai Bore, and in latter Buka Paigara, and Nivis Bais. A total of 13 persons still parties to the cause of action, *Tulapi (supra)* no longer before court by counsel. In the ordinary course of events they would have to secure the services of counsel to assist dispose off the matter by law given. And this they will do before the next directions and appear with counsel following.

11. The notices ceasing to act does not alter nor does it affect the substance of the notice of motion as to the parties to that cause. Incumbent upon the two plaintiffs is that they must show standing and sufficient interest that they are now not only representing themselves but also the interests of the 13 others now not before the court. Plainly plaintiffs have neither capacity nor the Standing to sue representing the 13 others. They are not representative of a class action because, *"In representative actions, the legal representatives are required by law to have the names of the plaintiffs included in a schedule (to the Writs) or for their written consents to be filed and these consents to be by way of an Authority to Act Form. [Order 5 Rules 3 & 8 of the National Court Rules], Mali v State [2002] PNGLR 15 (3 April 2002).* That is not the case here. The cause of action arising from the Timber permit number 13-35 in respect of Morobe South Coast Timber rights purchase agreement; Timber permit number 13-36 in respect of Maiama A Timber Rights Purchase Agreement area; Timber permit number 13-37 in respect of Maiama B Timber Rights Purchase Agreement area are such that all 15 and not two should be before the court.

12. Given the fourth defendant sustains on the preliminary issue raised. The substantive notice of motion is further adjourned to the next directions date Monday 3rd August 2020 at 9.30am.

13. It is further ordered that the 13 plaintiffs namely, Avi Gutai, John Morobe,

John Somo, Yauna Uwaiso, Ago Koeta, Chacky Dau, Jowe Yauna, Suam Yeni, Teddy Nick, Turi Akoko, Sai Bore, Buka Paigara, and Nivis Bais are to engage a lawyer of their choice. They will cause a notice of appearance of the same in the records of the proceedings. And will appear on Monday 3rd August 2020 with that lawyer. He will assist the court at directions as to what position his clients take in the matter.

14. Alternatively, if they maintain discontinuance appropriate notice of that fact be filed in accordance with the rules set out above and the matter be so informed at the next directions date set.

15. Cost will follow the event.
Orders Accordingly.

Kopunye Lawyers: *Lawyer for the Plaintiffs*

Simpson Lawyers: *Lawyer for the Fourth Defendants*

Office of the Solicitor General: *Lawyer for the Second & Third Defendants*