

**N7756**

PAPUA NEW GUINEA  
[IN THE NATIONAL COURT OF JUSTICE]

**OS (JR) NO. 275 OF 2018**

BETWEEN

**JACK APAI for himself and for and on behalf of the 67 customary landowners of the Block 6 Area of the Vanimo Timber Rights Purchase Agreement (TRPA) whose names appear on the Power of Attorney given to him filed in this proceeding**  
*Plaintiff*

AND

**HON. DOUGLAS TOMURIESA, MP, in his capacity as the Minister for Forests**  
*First Defendant*

AND

**NATIONAL FOREST BOARD**  
*Second Defendant*

AND

**PAPUA NEW GUINEA FOREST AUTHORITY**  
*Third Defendant*

AND

**VANIMO FOREST PRODUCTS LIMITED**  
*Fourth Defendant*

AND

**THE INDEPENDENT STATE OF PAPUA NEW GUINEA**  
*Fifth Defendant*

Waigani: Makail, J  
2019: 8<sup>th</sup> & 12<sup>th</sup> March

***JUDICIAL REVIEW – Extension of Timber Permit – Timber Permit expired - Decision of Minister for Forests to extend Timber Permit after it expired –***

***Effect of expired Timber Permit – Requirement by National Forest Board to obtain report from Provincial Forest Management Committee prior to extension of Timber Permit – Mandatory requirement – Breach of – Forestry Act, 1991 – Sections 78(3) and 137(1B) & (1D)***

**Cases Cited**

**Papua New Guinea Cases**

*Joseph Kelange & Ors v. Kanawi Pouru & Ors* (2011) N4662

*Kanawi Pouru & Ors v. Peter Apoi*: SCA No 87 of 2015 (Unnumbered and Unreported Judgment of 27<sup>th</sup> October 2017)

*Madang Timbers Limited v. Valentine Kambori* (2009) SC1000

*Peter Apoi v. Kanawi Pouru* (2015) N5983

*Sinene on behalf of the Land Owners of the Vanimo TRP Area v. Ikoirere & Ors* (2005) N2903

**Overseas Cases**

*Associated Picture Houses v. Wednesbury Corporation Ltd* [1948] 1 KB 223

**Counsel:**

*Mr. B. S. Lai*, for Plaintiffs

*Ms. P. Yom*, for First and Fifth Defendants

*Mr. S. Mitige*, for Second and Third Defendants

*Mr. W. Mininga*, for Fourth Defendant

**JUDGMENT**

**12<sup>th</sup> March, 2019**

1. **MAKAIL, J:** This is an application for judicial review.

**Timber Rights Purchase Agreement**

2. The uncontested facts are that on 8<sup>th</sup> February 1967 the customary landowners of the Vanimo Block 6 Area entered into a Timber Rights Purchase Agreement (TRPA) with the Crown. The term of the TRPA was for a period of 40 years and was to expire on 8<sup>th</sup> February 2007.

3. By the TRPA, the customary landowners agreed to alienate their rights in the timber resources to the Crown to negotiate and secure a developer to harvest and sell the timber resources in the Vanimo Block 6 area.

## **Project Agreement**

4. On 5<sup>th</sup> October 1990 pursuant to the TRPA, the State (replacing the Crown) and the Fourth Defendant entered into a Project Agreement whereby the Fourth Defendant was selected as the developer and to harvest and sell timber resources of the customary landowners of the Vanimo Block 6 Area. It was also agreed that the Fourth Defendant will pay monetary benefits to the customary landowners.

## **Timber Permit**

5. On 31<sup>st</sup> October 1991 the Third Defendant granted to the Fourth Defendant a Timber Permit. It is described as TP 10-8. It conferred on the Fourth Defendant exclusive rights to harvest timber resources within the Vanimo Block 6 Area. The term of the Timber Permit was for a period of 20 years and was to expire on 31<sup>st</sup> October 2011.

## **Expiration of Timber Rights Purchase Agreement and Timber Permit**

6. On 8<sup>th</sup> February 2007 the TRPA expired and was not extended. The Timber Permit expired on 31<sup>st</sup> October 2011 and was not extended. It is also conceded by the parties that after the TRPA and Timber Permit expired, there is no evidence to establish whether logging operations or harvesting of forest resources continued.

## **Extension of Timber Permit**

7. It was not until 11<sup>th</sup> April 2017 that the Timber Permit was extended by the First Defendant for a further term of 5 years. By the extension, the Timber Permit was to expire on 11<sup>th</sup> April 2022. The extension was granted by the First Defendant pursuant to Section 78 of the *Forestry Act* 1991.

## **Breach of Forestry Act, 1991**

8. The first ground of review is based on breach of the *Forestry Act* 1991, in particular Sections 78(3) and 137(1B). The Plaintiffs submit that for the exercise of power by the Minister for Forests to be validly exercised, the National Forest Board (Forest Board) must receive a report from the Provincial Forest Management Committee (PFMC) which must support the extension and thereafter there must be a recommendation by the Forest Board to the Minister to extend the Timber Permit.

9. In this case, the decision by the First Defendant to extend the Timber

Permit was made without a report from the Sandaun PFMC. A letter produced by the Plaintiffs coming from Mr. Conrad Tilau, the Chairman of the Sandaun PFMC confirms the lack of the report. This letter is dated 18<sup>th</sup> June 2018 and relevantly states that “*the decision to grant the extension of the term of permit for the former Vanimo TRP blocks 3-6 was a Ministerial decision.....*” and “*that the submission and approval was direct from the National Forest Board, and not through the Provincial Forest Management Committee level*”.

10. The Plaintiffs submit that according to Section 78 and Section 137(ID), it is mandatory that the Forest Board obtain a report from the Sandaun PFMC before deciding whether to recommend an extension of the Timber Permit to the Minister. They further submit that where a statutory provision prescribes a procedure in mandatory terms, the action taken must be in strict compliance with the mandatory requirements as Injia DCJ (as he then was) stated in *Sinene on behalf of the Land Owners of the Vanimo TRP Area v. Ikoirere & Ors* (2005) N2903. In this case since the procedure for extension is expressed in mandatory terms, a failure to obtain a report from the Sandaun PFMC will result in a breach of this requirement and renders invalid, the decision of the First Defendant.

11. The Second and Third Defendants concede this point but submit that there is no evidence from the Plaintiffs to establish that the Sandaun PFMC did not provide a report to the Second Defendant. This is because the letter from the Chairman of Sandaun PFMC Mr. Tilau is vague as it does not state that the PFMC did not provide a report to the Forest Board and is insufficient to support the ground that there was a report by the Sandaun PFMC upon which the Second Defendant acted on to recommend to the First Defendant to extend the Timber Permit of the Fourth Defendant. In the absence of this evidence, it must be assumed that one was provided to the Second Defendant upon which the latter recommended to the First Defendant to extend the Timber Permit of the Fourth Defendant.

12. The First and Fifth Defendants support the submissions of the Second and Third Defendants while the Fourth Defendant did not take any particular position on this point.

13. For the First and Fifth Defendants, they submit that by virtue of Section 99(3) of the *Constitution* in principle, there is a separation of power between the three arms of Government; the Legislature, Executive and Judiciary. The decision under consideration is a Ministerial decision and is not open to judicial review. If the Court were to review it, it would be tantamount to interfering with the Minister’s exercise of power by the Judiciary and would constitute a fundamental breach of the doctrine of separation of power enshrined in Section 99 of the *Constitution*.

14. The Plaintiffs’ brief response to this submission is that, the First and Fifth

Defendants' submission is misconceived. This is because they challenge the exercise of power by the Minister as conferred on him by Statute, namely the *Forestry Act* 1991 to extend a Timber Permit which they contend was exercised in breach of the said Act, hence falling within the jurisdiction of the Court to review.

15. Section 137(1B) states:

*“(1B) Where the term of a timber rights purchase agreement granted under the Forestry Act (Chapter 216) (repealed) is longer than the term of a timber permit granted in respect of the timber rights purchase agreement, the timber permit may be extended or renewed under this section subject to—*

*(a) the social acceptability of the timber permit in the project area by the customary owners in writing; and*

*(b) the satisfactory performance of the holder of the timber permit in carrying out the operations including compliance with the Act, the terms and conditions of the timber permit and the Papua New Guinea Logging Code of Practice; and*

*(c) the amount of forest resources available in the project area to commercially support the operations for not less than two years; and*

*(d) the rate of the annual allowable harvest which shall not be increased at the time of the application for extension; and*

*(e) the currency of or payment of a performance bond as prescribed; and*

*(f) where applicable, amendments to the terms and condition of the timber permit to include a time table for the delivery of infrastructure and other community based benefits and any forest management and other silvicultural treatments specified in the permit.”*

16. Section 137(1D) states:

*“(1D) The Board shall obtain a report from the Provincial Forest Management Committee on the requirements in Subsection (1B) and where satisfactory, shall recommend to the Minister to extend or renew the term of the timber permit and the Minister may grant such extension or renewal subject to the term of the timber rights purchase agreement.”* (Underlining is mine).

17. Section 78 states:

*“78. Extension or renewal of timber permit.*

- (1) *The holder of a timber permit may apply to the Board for extension or renewal of the term of the permit.*
- (2) *An application under Subsection (1) shall—*
  - (a) *be in the prescribed form; and*
  - (b) *be accompanied by the prescribed fee; and*
  - (c) *be lodged with the Managing Director.*
- (3) *The Board shall obtain from the Provincial Forest Management Committee a report on—*
  - (a) *the social acceptability of the holder of the timber permit in the project area; and*
  - (b) *the performance of the holder of the timber permit in carrying out the operations authorized by the timber permit; and*
  - (c) *the amount of forest resources available in the vicinity of the project area in accordance with sustained yield management practices.*
- (4) *Where the reports required under Subsection (3) are satisfactory, the Board shall recommend to the Minister that an extension or renewal of the term be granted to the holder of the timber permit and the Minister may grant such extension or renewal.” (Underlining is mine).*

18. From parties’ submissions, it is common ground that where a statutory provision is in mandatory terms, it requires strict compliance. In this case, under Section 78(3) and Section 137(1D) (supra) in an application for extension of a Timber Permit by a holder, it is mandatory that the Forest Board obtain a report from a PFMC, in this case, the Sandaun PFMC. A failure to comply with this requirement will result in a breach and render invalid, the decision of the Minister. See *Sinene on behalf of the Land Owners of the Vanimu TRP Area v. Ikoirere* (supra); *Peter Apoi v. Kanawi Pouru* (2015) N5983 and *Madang Timbers Limited v. Valentine Kambori* (2009) SC1000. I accept this to be the correct position in law.

19. The question is, did the Forest Board obtain a report from the Sandaun PFMC before making a recommendation to the First Defendant to extend the Timber Permit of the Fourth Defendant? The Plaintiffs did provide evidence that there was no report by the Sandaun PFMC provided to Forest Board prior to the Forest Board’s decision to recommend to the First Defendant to extend the Timber Permit of the Fourth Defendant. This evidence comes from the principal Plaintiff Mr. Jack Apai and 10 other customary landowners whose

affidavits were relied upon without any objection. Each of them deposed that he was not aware of any meeting held by the Sandaun PFMC to recommend to the Forest Board an extension of the Timber Permit of the Fourth Defendant. Their evidence is accepted because as customary landowners within the Block 6 area, they are and should have been privy to information before the Sandaun PFMC regarding extension of the Timber Permit of Block 6 area including being advised of any application by the Fourth Defendant for extension and the report by the PFMC prior to the recommendation by the Forest Board to the Minister to extend the Timber Permit.

20. On the other hand, I consider that the defence is obliged to produce this report, if it exists and the Second Defendant as the party in receipt of it by virtue of Section 78(3) and Section 137(1D) (supra) should have it in its possession and quiet easily produced it at trial. In the absence of this report, Mr. Apai's evidence and that of the other 10 witnesses on the lack of this report stands uncontroverted and is sufficient to prove that no report from the Sandaun PFMC was obtained by the Second Defendant prior to its decision to recommend to the First Defendant to extend the Timber Permit of the Fourth Defendant.

21. In addition, the Chairman of the Sandaun PFMC Mr. Tilau confirms the lack of report in the letter dated 18<sup>th</sup> June 2018. It relevantly states that *"the decision to grant the extension of the term of permit for the former Vanimo TRP blocks 3-6 was a Ministerial decision....."* and *"that the submission and approval was direct from the National Forest Board, and not through the Provincial Forest Management Committee level"*. Contrary to the Second and Third Defendants' submissions that this letter is vague, I am satisfied that it sufficiently explains the position of the Sandaun PFMC, in that, it can be inferred that it was not consulted by the Forest Board in terms of providing its report prior to the decision to recommend to the First Defendant to grant an extension of the Timber Permit to the Fourth Defendant.

22. As to the First and Fifth Defendants' submission that it is not open for the Plaintiffs to seek judicial review of the exercise of power by the First Defendant, I accept the submission of the Plaintiffs for the reasons given at [13] (supra) and I find the First and Fifth Defendants' submission misconceived and reject it.

23. In the end result, I find, as a matter of fact, the Sandaun PFMC did not provide to and the Forest Board (Second Defendant) did not obtain a report from the Sandaun PFMC as required by Section 78(3) and Section 137(1D) (supra) prior to recommending to the First Defendant to extend the Timber Permit of the Fourth Defendant. As a matter of law, I find that the First, Second and Third Defendants breached Section 78(3) and Section 137(1D) (supra) and the breach renders the decision of the First Defendant to grant an

extension of the Timber Permit of the Fourth Defendant invalid, null and void.

24. This ground of review is upheld.

### **Unreasonableness of the decision**

25. The second ground is based on the *Wednesbury* principle of unreasonableness founded in the case of *Associated Picture Houses v. Wednesbury Corporation Ltd* [1948] 1 KB 223. The Plaintiffs submit that a Timber Permit is granted subject to a current TRPA. For a Timber Permit to be valid, the TRPA must be extended prior to its expiry. In this case, as the TRPA had expired on 8<sup>th</sup> February 2007, there is no current and valid TRPA upon which the First Defendant may grant an extension of the Timber Permit for the Fourth Defendant to continue harvesting forest resources in the Block 6 area.

26. To make matters worse for the defence, the Timber Permit also expired on 31<sup>st</sup> October 2011. For it to be a current and valid Timber Permit, it should have been extended prior to 31<sup>st</sup> October 2011. It was not and there is no current and valid Timber Permit upon which the First Defendant could lawfully extend. In the circumstances, the decision by the First Defendant to extend the Timber Permit almost 6 years after the expiry of the Timber Permit is totally unreasonable and absurd.

27. Finally, the Project Agreement which is dependent on the Timber Permit expired when the Timber Permit expired on 21<sup>st</sup> October 2011. The Second Defendant sought to overcome the expiration of the said Agreements and Timber Permit by granting a grace period to the Fourth Defendant pursuant to Section 137(3) of the *Forestry Act* 1991 to which the provisions of the said Act would not apply to them. This is to avoid the expiration of the said Agreements and Timber Permit and allow them to continue until 11<sup>th</sup> April 2022. This, the Plaintiffs submit, is not permitted because Section 137(3) does not apply to this type of case.

28. The Second and Third Defendants' second ground in opposition is that, the application for judicial review is flawed because there is no evidence of a TRPA for Block 6 area. The one produced and relied upon by the Plaintiffs is for customary landowners of Blocks 1 to 5. The First and Fifth Defendants support this submission. The Fourth Defendant refers to the decision of the Supreme Court in *Kanawi Pouru & Ors v. Peter Apoi*: SCA No. 87 of 2015 (Unnumbered and Unreported Judgment of 27<sup>th</sup> October 2017) where it referred to one Timber Permit (TP 10-8) based on two TRPA and submits that it may be inferred from that case that there is a TRPA for Blocks 1 to 5 area and another for Block 6 area and the Timber Permit sufficiently covers all of these



Blocks of land area.

29. In response to this ground in opposition, the Plaintiffs also take the same position as the Fourth Defendant and adds that the Fourth Defendant's General Manager Mr. David Ling acknowledges that there is a TRPA for Block 6 area which is consistent with the observation by the Supreme Court in *Peter Apoi's* case. It is, therefore, sufficient to infer that there is in existence a separate TRPA for Block 6 area and this ground by the Second and Third Defendants should be dismissed.

30. As to the Second and Third Defendants' submission that there is no evidence of a TRPA for customary landowners of Block 6 area to support the Plaintiffs' claim for relief, this is a question of standing of the Plaintiffs to seek judicial review which should have been decided at the leave stage. In my view, if leave was granted, it must be accepted that the Plaintiffs have been granted standing to seek judicial review of the extension of the Timber Permit which covers Block 6 area.

31. Alternatively, I accept the Plaintiffs' submission which is consistent with the submission of the Fourth Defendant that while there is no evidence of a separate TRPA for Block 6 area, it can sufficiently be inferred from the Timber Permit and the Supreme Court decision in *Peter Apoi's* case (*supra*) including the evidence of Mr. Ling that there are two separate TRPAs, one for Blocks 1 to 5 and the other for Block 6 with one Timber Permit (TP10-8) covering all of these Blocks. For these reasons, I find the submission of the Second and Third Defendants misconceived and reject it.

32. As to the question of reasonableness of the decision, the Second and Third Defendants concede that where a TRPA has expired, it cannot be extended under Section 137 (*supra*). Further, a Timber Permit cannot be extended if a TRPA has expired. Given this concession, I am satisfied that the TRPA expired on 8<sup>th</sup> February 2007. I am further satisfied that the TRPA was not extended prior to its expiration and that the Timber Permit also expired on 31<sup>st</sup> October 2011 and was not extended prior to its expiration. The effect of this is as explained by Manuhu J in *Joseph Kelange & Ors v. Kanawi Pouru & Ors* (2011) N4662 at [9]: “.....termination or expiration of a timber rights purchase agreement also renders impractical and useless a timber permit that is issued against that timber rights purchase agreement.” (Underlining is mine).

33. This being the effect, I am further satisfied that the TRPA for Block 6 area and Timber Permit for Block 6 area are not current, and useless and cannot be relied upon by the Fourth Defendant to conduct logging operations or harvest forest resources in Block 6 area.

34. Finally, I accept the Plaintiffs' submission that it is unreasonable and absurd that the Project Agreement which is dependent on the Timber Permit has

also expired when the Timber Permit expired on 31<sup>st</sup> October 2011 and yet the Second Defendant granted a grace period to the Fourth Defendant pursuant to Section 137(3) of the *Forestry Act* 1991. This provision is a saving clause or provision intended to save permits, agreements, licences, etc., granted under the former Act and to carry them over to the current *Forestry Act* after the former was repealed. In other words, Section 137(3) is inapplicable and it is unreasonable and absurd for the Second Defendant to use this provision in an attempt to avoid the expiration of the said Agreements and Timber Permit and allow them to continue until 11<sup>th</sup> April 2022.

35. For these reasons, this ground is upheld.

### **Error of Law**

36. The Plaintiffs repeat the submissions made in ground one, that is, breach of law. The Defendants makes the same sorts of submissions in ground one. For the same reasons given in ground one, this ground is also upheld.

### **Relief**

37. In the event that the application for judicial review is upheld, the Plaintiffs seek orders in the nature of declaration, certiorari and injunction. These orders are intended to firstly affirm their claim that the extension of the Timber Permit is illegal, null and void, secondly, quash the decision of the First Defendant to extend the Timber Permit and finally, put in place an order by way of an injunction to stop any further extensions and/or grant of the TRPA and Timber Permit until they are consulted and have given their consent or authorisation for logging operations or activities on the land.

38. I am satisfied that the lack of report by the Sandaun PFMC is a serious breach in the process for consideration of extension of a Timber Permit and must be rectified before any decision to extend and/or grant the Timber Permit of the Fourth Defendant can be made. Such a decision cannot be made at this time when the TRPA and the Timber Permit have also expired and the provision of Section 137(3) (supra) is inapplicable. This means that any grant of a new TRPA and Timber Permit must be done in consultation with the customary landowners of Block 6 and after obtaining their consent or authorisation for logging operations on their land. The Court will grant the orders sought by the Plaintiffs, except for the order for entitlement to damages. This is because parties concede that there is no evidence to establish logging operations or harvesting of timber after the expiration of the TRPA and Timber Permit and further, at this stage there is no evidence of any loss suffered.

## Order

39. The orders are:

1. The application for judicial review is upheld
2. A declaration that the decision of the First Defendant to extend the Timber Permit (TP10-8) of the Fourth Defendant dated 11<sup>th</sup> April 2017 is unlawful, illegal, null and void.
3. A declaration that the decision of the Second Defendant to recommend to the First Defendant to grant an extension and a grace period of 5 years to the Fourth Defendant to be exempted from the provisions of the *Forestry Act* 1991 and to continue logging activities within the Block 6 area is unreasonable, unlawful, illegal, null and void.
4. An order in the nature of certiorari be issued to bring up and into this Court the decisions of the First Defendant and Second Defendant dated 11<sup>th</sup> April 2017 and to quash the said decisions.
5. An order in the nature of a permanent injunction restraining the Defendants forthwith from entering into any further agreements or making further extensions and/or grant of a Timber Rights Purchase Agreement and Timber Permit over the Block 6 area unless in consultation with and consent or authority of the customary landowners of the area.
6. The Defendants shall pay the costs of the proceedings, to be taxed, if not agreed.

B. S. Lai Lawyers	:	<i>Lawyers for the Plaintiffs</i>
Acting Solicitor-General:		<i>Lawyers for the First and Fifth Defendants</i>
In House Counsel	:	<i>Lawyers for the Second and Third Defendants</i>
Bradshaw Lawyers	:	<i>Lawyers for the Fourth Defendant</i>