

N8612

PAPUA NEW GUINEA
[IN THE NATIONAL COURT OF JUSTICE]

OS (COMM) NO. 18 OF 2020 (IECMS)

BETWEEN:
GREEN WOOD PNG LIMITED
Plaintiff

V

CAKARA ALAM (PNG) LIMITED
Defendant

Waigani: Anis J
2020: 14th October, 3rd November

NOTICE OF MOTION — application to dismiss the proceeding – Order 12 Rule 40(1) – National Court Rules - want of reasonable cause of action, frivolity and abuse of process – alternative relief - section 155(4) – Constitution – stay pending related proceeding – exercise of discretion

Cases Cited:

Electoral Commission of PNG v. Peter Charles Yama (2014) SC1383
IPBC v. MVIL (2015) N595

Counsel:

Mr I Shepherd, as briefed out counsel for Simpsons Lawyers, for the Plaintiff
Mr T Tape, for the Defendant

RULING

3rd November, 2020

1. **ANIS J:** The defendant applied to dismiss or alternatively stay the proceeding, on 14 October 2020. The application was contested. I heard the arguments and reserved my ruling to a date to be advised.
2. Parties have been notified so I will rule on it now.

BACKGROUND

3. The plaintiff seeks damages for trespass and permanent injunction, as its primary relief in its originating summons filed on 27 August 2020. A summary of the background of the case is this. The land in question is a logging area. It is situated in West New Britain Province over an area described as Pulie Anu Local Forest Area. It is described as a project area within the meaning of the *Forestry Act* 1991 (***Forestry Act***).

4. The project area is subject to a timber permit that has been issued under the *Forestry Act*. The timber permit is described as TP14-04 (**timber permit**). It was issued to GR Logging Ltd (**the permit holder**) on 29 July 2020 for a period of 5 years. The plaintiff currently has a logging and marketing agreement with the permit holder as its contractor, to harvest logs within the project area the subject of the timber permit. The agreement is dated 14 November 2016 (**the 2016 LMA**).

5. The defendant had been granted a license under the *Forestry Act* over the project area for a period of 12 months. The said license was granted on 20 August 2019. It expired on 21 August 2020. It had been the contractor to the previous timber permit holder, a company called Pulie Anu Timber Company Limited. It said it had or has applied for a further extension of the license. As it is, it seems that the permit holder has now been granted the timber permit over the said project area or site, and the plaintiff appears to be its present contractor.

6. The plaintiff essentially wants the defendant to clear out its operations on site so that it could begin work based on its 2016 LMA that it has with the permit holder. It seems that the defendant has not which is why it has filed this proceeding. The defendant, on the other hand, states that it has plant and machinery on site and that it would take time to remove them, including felled logs that have not yet been shipped. It also states that it will challenge or has already challenged the Forestry Department's decision to grant the timber permit to the permit holder and to not extend its license, over the project or logging area.

NOTICE OF MOTION

7. The defendant's notice of motion filed on 24 September 2020, seeks the

following main relief, (i), to dismiss the proceeding, or alternatively, (ii), to stay the proceeding pending determination of related proceedings that have been commenced.

DISMISSAL CLAIM

8. The defendant's submission on why it says the proceeding should be dismissed is this. It claims that the plaintiff did not plead a substantive cause of action except permanent injunctive orders against it, in the originating summons. It therefore submits that because there is no substantive cause of action, the originating summons filed is unmeritorious and must be dismissed. It also alleges that there are existing related proceedings which have been duly pleaded which are also pending before the National Court for hearings, and as such, the continuation of the present proceeding is not warranted, would prejudice the other proceedings, and therefore should be dismissed or alternatively stayed pending these related proceedings. The defendant relies on various affidavits including the affidavits of Reynaldo Lambo filed on 23 and 24 September 2020, to support its application.

9. The plaintiff on the other hand submits that its claim is duly pleaded, and as such, the application should be dismissed. It also submits that its action was filed earlier or first in time ahead of the 2 related proceedings, so it should remain. It also submits that there is no prejudice or harm in the proceedings being heard separately or whilst the other proceedings continue to remain on foot. It also submits that it is not known when the other proceedings may be completed and it is likely that they will continue into the next year. As such, it submits that it should not be prevented from pursuing this matter by a stay order. The plaintiff relies on various evidence including the affidavit of Thomas Kong filed on 14 September 2020.

10. I have considered the evidence and submissions of the parties. In regard to the defendant's claim of want of cause of action, I will say this. I find the defendant's submission baseless. I say this because when I consider the originating summons, relief 2 at page 3 reads, and I quote in part, *Damages for trespass to be assessed*. The substantive cause of action is in tort, that is, the tort of trespass with other relief including a relief for permanent injunction.

11. But that said, let me address the argument regarding related proceedings that are pending. These may be seen in the evidence and attachments to Mr Lambo's affidavits as I identify above. My first observation is this. The present proceeding was filed on 27 August 2020. As for the 2 related proceedings, proceeding OS 114 of 2020, was filed by the permit holder against the plaintiff herein on 8 September 2020. The permit holder in the proceeding is, amongst others, seeking to declare the 2016 LMA null and void. The second related

proceeding is judicial review, and it is described as OS (JR) 44 of 2020 (IECMS). It appears to have been commenced in August of 2020. The plaintiff therein is Pulie Anu Timber Company Limited, the previous timber permit holder of TP14-04, that is, before it was cancelled etc and was awarded to the present permit holder or G.R Logging Limited. The only court document that is attached to Mr Lambo's affidavit, is a notice of motion for stay orders, filed by the said former timber permit holder of TP14-04, against a number of defendants including the permit holder. It appears that the former permit holder is challenging the grant of the timber permit TP 14-04 to the permit holder in the said judicial review proceeding.

12. My view is this. The 2 court proceedings are related to the present proceeding because they all involve the same timber permit; they concern the same project area; and they are involved at the same location or site. The validity of timber permit TP14-04 which has been awarded to the permit holder is now being challenged in the judicial review proceeding. Also, in contest is the 2016 LMA between the plaintiff and the permit holder. It seems that the relationship between the 2 is shaky in the sense that the permit holder now wants out of the agreement, namely, the 2016 LMA, which permits the plaintiff to remain on site at Pulie Anu Local Forest Area, to log or to remain as the duly appointed contractor for the permit holder.

13. The present action is between the 2 contractors, the plaintiff for the permit holder and the defendant for the former permit holder. However, I note that the right of the plaintiff to sue the defendant for trespass is based on the 2016 LMA. The said LMA is now also being challenged separately in proceeding OS 114 of 2020. To me and given this scenario, I do not think it is prudent that I should ignore this fact and allow the present proceeding to continue. Proceeding OS 114 of 2020 appears to have a real connection with the present proceeding. If the 2016 LMA is found to be valid, then this case may proceed on to trial on its merits. If the 2016 LMA is however declared null and void, then this proceeding may not continue on to trial on the basis that it may not have merit. I also note that any interim orders whether it be for preservation of the properties of the parties or otherwise, may be sought in the 2 related proceedings.

STAY

14. For a grant of stay, I refer to the case authorities. I find the Supreme Court case *Electoral Commission of PNG v. Peter Charles Yama* (2014) SC1383 relevant on point. The Supreme Court stated, and I quote:

7. The power to grant stay is discretionary and the decided cases have held that the test to be applied for the exercise of the

discretion is not exceptional circumstances, but whether a grant of stay is necessary to do justice in the circumstances of the particular case. The phrase “necessary to do justice in the circumstances of the particular case” has been held by the Court in the decided cases to encompass first, the competing rights of each of the parties and secondly, the question if there has been delay in making the Application: Viviso Seravo’s case (supra).

8. The third consideration is of the type of order sought to be stayed: David Arore’s case (supra). These are in, our respectful view, the relevant considerations to be applied by the Court when deciding to grant a stay. These principles guide the Court in making an assessment of whether a grant of stay is necessary to do justice in the circumstances of the case. We apply these principles.

15. I also refer to the case of *IPBC v. MVIL* (2015) N5982. Justice Hartshorn stated at page 11, and I quote:

11. It is usually the case that in an application for a stay where there are related proceedings, the proceeding not sought to be stayed requires determination first as it may affect the outcome of the proceeding sought to be stayed. Here however, the concern of NNL is that the decision sought to be stayed may preempt or pre-judge issues in an appeal that has already been heard in a higher court.

16. It is my view that the asserted right of the plaintiff in its claim for trespass against the defendant is dependent upon the validity of the 2016 LMA, and right now, the 2016 LMA is being challenged in proceeding OS 114 of 2020. And I note that the continued rights of both parties in the proceeding to remain at the site, may depend on the findings by the judicial review Court in regard to the grant of TP 14-04 to the permit holder. If the judicial review Court, in the substantive hearing provided that leave is granted, finds flaws in the awarding of the timber permit to the permit holder, then that may have devastating effect to the 2016 LMA if the latter survives the OS 114 of 2020 challenge.

17. When I weigh-up all that, I think it is prudent that I should exercise my discretion and grant the alternative relief that is sought in the notice of motion, that is, to stay of the present proceeding pending the outcome of the related proceedings. Again, the plaintiff’s asserted right as pleaded or claimed in the present proceeding is being challenged. One way to look at it is that the challenge to void the 2016 LMA in proceeding OS 114 of 2020 may be

regarded as questioning the primary right of the plaintiff in this present proceeding which it is seeking to protect. That being the case, the way forward in my view would be to stay this proceeding whilst the plaintiff defends or asserts its primary right, that is, its interest in the 2016 LMA in proceeding OS 114 of 2020. I am however not convinced that the stay should extend to the pending judicial review proceeding. Proceeding OS (JR) 44 of 2020 (IECMS) concerns interests over the timber permit which does not concern the contractors which includes the plaintiff and the defendant. I will therefore refrain from making orders to also stay this proceeding pending determination of the judicial review proceeding.

SUMMARY

18. I will grant the alternative relief sought in the defendant's notice of motion filed on 24 September 2020 with the necessary qualification.

COST

19 Awarding cost in this instance is discretionary. I will order cost to follow the event on a party/party basis to be taxed if not agreed.

ORDERS OF THE COURT

20. I make the following orders:

- (i) The defendant's alternative relief in its notice of motion filed on 24 September 2020 is granted in that this proceeding is stayed pending the final determination of proceeding OS 114 of 2020.
- (ii) The plaintiff shall pay the defendant's cost of the application on a party/party basis to be taxed if not agreed.
- (iii) Time for entry of these orders is abridged to the date and time of settlement by the Registrar which shall take place forthwith.

The Court orders accordingly.

Simpsons Lawyers: *Lawyer for the Plaintiff*
Kandawalyn Lawyers: *Lawyers for the Defendant*