

DC4029
PAPUA NEW GUINEA

In the District Court of Justice

DC NO: 330 OF 2018

Between

Cakara Alam (PNG) Limited

-First Complainant

Pulie Anu Timber Limited

-Second Complainant

And

Thomas Kong also known as Heng Siong Kong

-First Defendant

Green Wood PNG Limited

-Second Defendant

Grand Shine PNG Limited

-Third Defendant

Kimbe: AMANU Jasper

2019; 14th January

CIVIL –Application to dismiss proceeding for abuse of court process and disclosing no cause of action – National Court injunctive orders on foot – whether defendants affected – Defendants not parties to National Court Proceeding – District Court should maintain status quo

PRACTICE & PROCEDURES – Whether Undertaking As to Damages necessary to be filed in the District Court – No provision in the District Court Act for Undertakings – discretion upon the Court – Parties may seeking for damages if Restraining Orders discharged and if damages incurred as a result of the restraining orders.

Legislations

Constitution of the Independent State of Papua New Guinea

National Court Rules

District Courts Act

Cases cited

Mugga Logging Company Pty Ltd vs. South Pacific Oil Palm

Development Pty Ltd (No.1) [1977] PNGLR 80

Kurt Reimann & Others vs. George Skell & Others (2001) N2093

Counsels

No Appearance for the Complainant/Respondents

Mr. Meli Muga for the Defendants/Applicants

RULING

INTRODUCTION

1. **J.AMANU** This is my ruling in respect to the Defendants' application by way of Notice of Motion filed on the 17th December 2018 seeking the following orders:

A. Pursuant to Section 43 of the District Court Act, the Applicants dispense with the requirement for service of this Notice of Motion and Affidavits and move this Notice of Motion on Thursday 20th December 2018 at 9:30am.

B. Pursuant to Section 22 and Section 25 of the District Court:

(a) The interim restraining order made ex parte on 6th December 2018 in favour of the First Complainant and Second Complainant is set aside.

C. Alternatively, pursuant to Section 22 of the District Court and Order 12 Rule 40 of the National Court Rules, these proceedings are dismissed for:

(a) failure to disclose a reasonable cause of action;

(b) an abuse of court process.

D. The First Complainant and Second Complainant pay the Defendants costs.

E. Such further or other orders as this Honourable Court deems fit.

F. Time for entry of these orders be abridged to the date of settlement by the Clerk of Court which shall take place forthwith.

FACTS

2. The Complainants instituted this proceeding against the Defendants seeking orders that the Defendants compensate the Complainants K8000. It was alleged that the Defendants have detained certain Directors of GR Logging Limited and Pulie Anu Timber Company Limited to oppose logging operation in Puli Anu LFA area. This has caused inconvenience and frustration to the Complainants.

3. On the 06th December 2018, the Complainants obtained interim restraining orders against the Defendants pending the

determination of the substantive issue. The restraining orders are in the following terms:

1. Pursuant to Section 22 of the District Court Act, Defendants be restrained in the interim from interfering in any manner or form including funding and/or influencing landowners or any dialogue with any of the landowners of Pulie Anu LFA No. 14-4 including Directors and Shareholders of G.R. Logging Limited as well as directors and shareholders of the Second Complainant Company from disturbing the Complainants from their peaceful logging operations at Pulie Anu LFA No. 14-4 and such disturbance includes funding, aiding or such other assistance to the landowners and directors and shareholders of G.R. Logging Limited to challenge the Timber Permit and licence of the Complainants.
2. Pursuant to Section 22 of the District Court Act, the Defendants be restrained in the interim from interfering in any manner or form including funding and/or influencing landowners or any dialogue with any of the landowners of Pulie Anu LFA No. 14-4 including Directors and Shareholders of G.R. Logging Limited as well directors and shareholders of Second Complainant Company from disturbing the complainants from their peaceful logging operations at Pulie Anu LFA No. 14-4 and such disturbance includes funding, aiding or such other assistance to the landowners and directors and shareholders of G.R. Logging Limited to challenge the Timber Permit and the licence of the

Complainants.

3. Pursuant to Section 22 of the District Court Act, the Defendants be restrained in the interim from interfering in any manner or from in respect of any dealing or dialogue with Papua New Guinea Forest Authority concerning the Pulie Anu LFA No. 14-4 including Directors and Shareholders of G.R Logging Limited as well as directors and shareholders of the Second Complainant Company in respect of any dealing or dialogue with Papua New Guinea Forest Authority concerning or relating to Pulie Anu LFA No. 14-4.

4. On the 17th December 2018, the Defendants filed this application to set aside these interim restraining orders and to dismiss the entire proceedings.

ISSUE

5. Base on counsel's arguments, I find two issues as follows:

1. Whether the interim restraining orders be set aside and discharged for failure to file Undertaking as to Damages
2. Whether the entire proceeding be dismissed for abuse of process and disclosing no cause of action

6. This is an ex – parte hearing since the Complainants/ Respondents were not present although they are properly notified and all court documents served.

LAW

7. Below are the relevant laws considered.

8. Section 155 (4) of the Constitution provides that:

(4) Both the Supreme Court and the National Court have an inherent power to make, in such circumstances as seem to them proper, orders in the nature of prerogative writs and such other orders as are necessary to do justice in the circumstances of a particular case.

9. The District is a creature of the statute and it assumes its jurisdiction from the District Courts Act.

10. Section 21 provides for civil jurisdiction.

(1) Subject to this Act, in addition to any jurisdiction conferred by any other law, a Court has jurisdiction in all personal actions at law or in equity where the amount of the claim or the amount or value of the subject matter of the claim does not exceed—

(a) where the Court consists of one or more Principal Magistrates.—K10,000.00; and

(b) where the Court consists of one or more Magistrates.—K8,000.00.

(c - d) ^[15] ***[Repealed.]***

(2) [Repealed.]

(3) Subsection (1) shall not be taken to limit the jurisdiction of Courts in cases where, by any law, money, irrespective of amount, may be recovered before a Court.

(4) A Court has no jurisdiction in the following cases:-

(a) where the validity or effect of a devise or bequest or a limitation under a will or settlement, or under a document in the nature of a settlement, is in dispute;

(b) the infringement of trade names;

(c) an action for or in the nature of slander of title;

(d) an action for illegal arrest, false imprisonment or malicious prosecution;

(e) for seduction or breach of promise to marry;

(f) when the title to land is bona fide in dispute.

(5) Subject to this section, a Court has jurisdiction when-

(a) the defendant, or one of two or more defendants, as the case may be, is usually resident, or carries on business; or

(b) the cause of action wholly or partly arose; or

(c) the defendant has given an engagement or written promise to pay a debt or sum at a specified place,

in the area for which the Court is constituted.

(6) A Court has jurisdiction under this section notwithstanding that the defendant is not within the country, if the defendant is within a State or a Territory of or under the authority of Australia.

(7) Subsection (6) applies whether the defendant has or has not ever been resident in or carried on business in the country.

(8) For the purposes of Subsections (6) and (7), "defendant"

means, where there are more defendants than one, a defendant not within the country.

11. Section 22 provides for general ancillary jurisdiction:

Subject to this Act, a Court as regards a cause of action for the time being within its jurisdiction, shall, in proceedings before it–

(a) grant such relief, redress or remedy, or combination of remedies, whether absolute or conditional; and

(b) give the same effect to every ground of defence or counterclaim, whether equitable or legal,

as ought to be granted or given in a similar case by the National Court and in as full and ample a manner.

DEFENDANTS/APPLICANTS' ARGUMENTS

12. In support of the application, Mr. Muga of counsel for the Defendant relied on the Affidavit of Christine Copeland filed on 17 December 2018.

13. Mr. Muga made oral submission emphasising on two (2) main points. Firstly, Undertaking As To Damages and secondly that there is an injunctive order in place from National Court thus this proceeding is an abuse of court processes.

14. Mr. Muga submitted that it is a requirement that the Complainants should file Undertaking As to Damages in obtaining restraining orders. Mr. Muga argued that the undertakings is not filed, the interim restraining order should be discharged/dismissed. It is a requirement in the National Court that in any application for injunctive orders, undertaking as to damages must be filed.

15. Mr. Muga submitted that all these are National Court proceedings on foot and it is a gross abuse of court process that Mr. Kua, counsel for the Complainant did not disclose this facts to the court when making application for interim restraining orders.

ANALYSIS

16. I have perused the Affidavit of Christine Copeland in detail and appreciated the evidence explaining conduct of National Court proceedings. I agree that Mr. Kua failed to do that and I appreciated that counsel have put forward these facts through the affidavit of Christine Copeland. Upon perusal of the Affidavit I note that the relevant National Court proceeding is OS (JR) NO. 116 of 2017. I have considered the injunctive orders granted on 18th October 2018 by His Honour Justice Gavara - Nanu. I have not being provided with the Originating Summons to ascertain the substantive orders sought in that proceeding.

17. This court (District Court) is creative of statute which is the District Court Act. The Court assumes its jurisdiction from the Act unless its jurisdiction is specifically provided for by other laws such as Summary Ejection Act.

18. Section 21 of the District Court Act gives civil jurisdiction and it specifically provides monetary jurisdiction which is amount totalling up to K10,000.00 be heard by Principal Magistrate and up to K5,000.00 by a Magistrate. This court therefore invoked its powers under Section 21 and 22 of the District Court Act and granted interim restraining orders.

19. However, it is not specifically provided for in the District Court

Act and I have not come across a National Court judgement nor did Mr. Muga provide any to convince this court that in any application for restraining orders in the District Court, Undertakings must be filed. In the absence of such provisions and any case authorities, I cannot discharge the interim restraining orders for failure to file Undertakings. Undertaking as to Damages is not mandatory requirement. It is discretion and it really depends on the nature and merit of the case. The important requirement that the Court should consider is whether there is a serious question to be tried. The National Courts have invoke their powers under Section 155(4) of the Constitution in granting injunctive orders including considering whether Undertaking as to Damages are required (see the case of *Muga Logging Company Pty Ltd vs. South Pacific Oil Palm Development Pty Ltd (No.1)* [1977] PNGLR 80 and *Kurt Reimann & Others vs. George Skell & Others (2001) N2093*). I was unable to use S.155(4) of the Constitution as it does not apply to District Courts. I therefore invoked my powers under Section 22 of the District Courts Act and above mentioned National Court case authorities to grant the interim restraining orders.

20. I am also of the view that, in the event the entire proceeding is dismissed and restraining orders discharged, the defendants may take recourse against the Complainants in appropriate courts for damages incurred due to the existence of the restraining orders. I therefore would not discharge the restraining orders because of non-filing of Undertakings.

21. Order 2 of the Notice of Motion is refused.

22. 11. According to the Injunctive Orders, I note, in essence as follows;

(a) GR Logging Limited obtained the injunctive orders against Defendants restraining Pulie Anu Timber Company Limited, Matufi (PNG) Limited and its agents/servants from conducting any activities in the Pulie Anu LFA project site.

(b) PNG Forestry Authority and its agents/servants from taking any actions in respect to Pulie Anu LFA project.

23. The allegation in this District Court proceeding is that Thomas Kong and his companies have allegedly interfered with the Directors of GR Logging Limited and Pulie Anu Timber Company Limited.

24. There is no mention of Thomas Kong and his companies nor their interest in the above mention National Court proceeding therefore they are not affected in anyway by the National Court injunctive orders.

25. So I ask myself why is Thomas Kong so interested in the Pulie Anu LFA project and why is he not included in the National Court if he has any interest in the said project?

26. All parties including Thomas Kong should respect the National Court injunctive orders and refrained from any activities in respect to the project until the National proceeding is fully dealt with.

27. I find that this matter should proceed to proper hearing to determine whether the Defendants have interest and if so, are they covered by the National Court injunctive orders. And whether the allegation that Thomas Kong has detained the

Directors can be substantiated? This is the crucial issue before this Court.

28. Furthermore, according to the Affidavit of Thomas Kong filed on 17th December 2018 at paragraphs 24 and 26 it is deposed that the Defendants have Basic Project Agreement and Logging and Marketing Agreement with GR Logging Limited. Why were these facts not disclosed in the National Court so that the injunctive orders may reflect to that extent. This is to show that the Defendants do have interest in the Pulie Anu project. Therefore this proceeding must proceed to trial proper.

29. Again, I must emphasis here that the Defendants are not parties to the National Court proceeding and the National Court injunctive orders may not necessary apply to them and therefore this court, to maintain the status quo and to give effect to the intention of the injunctive orders, should maintain the restraining orders until the substantive issue is fully dealt with.

30. I therefore, I find that, with respect, there is no abuse of court processes and there is a cause of action disclosed which needs proper determination.

31. I refuse ground 3 of the Notice of Motion.

FORMAL COURT ORDER

1. The Defendants' application is dismissed.
2. Costs be in the cause
3. The interim restraining order of 06th December 2018 is

further extended to 24th January 2019.

4. Parties shall file and serve any or further court documents.

5. The substantive matter is set for hearing on the 24th January 2019 at 9:30am.

Counsel for the Complainant/Respondent: Kua Lawyers

Counsel for the Defendants/Applicants: Simpsons Lawyers