

PAPUA NEW GUINEA

[IN THE NATIONAL COURT OF JUSTICE]

OS. NO. 411 OF 2003

PAPUA NEW GUINEA FOREST AUTHORITY

Plaintiff

AND:

CONCORD PACIFIC LIMITED

First Defendant

AND:

PAISO COMPANY LIMITED

Second Defendant

AND:

THE INDEPENDENT STATE OF PAPUA NEW GUINEA

Third Defendant

WAIGANI: KANDAKASI, J.

2003: 6th and 8th August

PRACTICE & PROCEDURE – Appropriate mode of proceedings – Action seeking to declare a deed of settlement null and void – Only issue whether the deed was entered into under mistake of fact and is therefore null and void – Other issues such as estoppels and damages are consequential on a determination of the main issue – Originating summons appropriate mode – O.4 r.3 National Court Rules.

Cases Cited:

Koitaki Farms Limited v. Kemoko Kenge & Ors (09/07/01) N 2143.

Counsel:

Mr. I. R. Shepherd for the Plaintiff/Applicant.

Mr. J. Yagi for the Defendant/Respondents.

8th August 2003

KANDAKASI, J: I have before me an application by the plaintiff for the substantive

matter in these proceedings to be given an expedited hearing. This is because the World Bank has given the plaintiff and therefore the Government of Papua New Guinea until 30th August 2003 to resolve the issues raised in these proceedings.

The World Bank is the supervising authority under a loan agreement with the State and the International Bank of Reconciliation and Development dated the 20th of December 2001. It was a condition of the loan agreement that the State would comply with recommendations of the Independent Forestry Review Team (IFRT). The IFRT was extremely critical of the Aiambak –Kiunga Project to which these proceedings relate, and World Bank directed the plaintiff to comply with all of the relevant provisions of the Forestry Act. This includes a determination of a validity of the Deed of Settlement dated 12th December 2002 ("the Deed") between the plaintiff and the defendants before the 30th of August 2003. That is consequential on an observation of the IFRT that the relevant Timber Authority (TA), 024 expired on the 18th of April 2000.

The first and second defendants take issue on the mode of proceedings chosen by the plaintiff applicant. They argue through counsel, that the matter requires an examination and resolution of a number of legal and factual issues based on the Deed. These are that TA.024 continued validly and the alternative the plaintiff is estopped from denying its validity as they have relied on its validity and have suffered detriment. Hence, if the Deed is declared null and void, they will sue for damages. These issues they argue require proper pleadings and are therefore not appropriate to raise under an originating summons. Accordingly, they have filed a motion seeking orders for these proceedings to continue on pleadings.

There is no specific argument by the first and second defendants against the need for this matter to be given an expedited hearing. Also the first and the second defendants do not take any issue on the question of, whether or not the Deed is valid, is a determinative issue. There is also no dispute that other issues are dependent on a determination of the determinative question.

So the only issue before me is, has the plaintiff chosen and used the correct mode of proceedings?

As I said in *Koitaki Farms Limited v. Kemoko Kenge & Ors* (09/07/01) N 2143:

"Under our Rules, there are two modes of commencing most civil proceedings. The exceptions to that are limited. They are miscellaneous proceedings for other miscellaneous proceedings such as company wind ups and matrimonial or such other causes where the Rules or an Act of Parliament allows for other modes of commencing proceedings."

"The relevant provisions are Order 4 Rules 2(2) and 3(2). These provisions respectively state that:

‘2. Where writ of summons required. (4/2)

- (1) Proceedings shall be commenced by writ of summons —
 - (a) where a claim is made by the plaintiff for any relief or remedy for any tort; and
 - (b) where a claim made by the plaintiff is based on an allegation of fraud; and
 - (c) where a claim is made by the plaintiff for damages for breach of duty (whether the duty exists by virtue of a contract or of a provision made by or under an Act or independently of any contract or any such provision), and the damages claimed consist of or include damages in respect of the death of any person or in respect of personal injuries to any person in respect of damage to any property; andwhere a claim is made by the plaintiff for damages for a breach of promise of marriage.’

‘3. Where Plaintiff may choose (4/3)

- (2) Proceedings —
 - (a) in which the sole or principal question at issue is, or is likely to be, one of the construction of an Act or of any instrument made under an Act, or of any deed, will, contract or other document, or some other question of law; or
 - (b) in which there is unlikely to be a substantial dispute of fact; or
 - (c) in which a person is authorised by an Act, regulation or by these Rules to make an application to the Court or a Judge with respect to a matter that is not already the subject matter of a pending cause or matter, and no other mode of making the application is prescribed by that Act, or regulation or by these Rules, are amongst those which are appropriate to be commenced by originating summons unless the plaintiff considers the proceedings more appropriate to be commenced by writ of summons.’”

Depending on the nature of one’s claim and the issues it raises, the rules have given a plaintiff an option to choose one of a number of modes of commencing proceedings before this Court. It is clear from the provisions of Order 4 Rule 3(2) that where the proceedings involve the construction of a deed, contract or any other document, it is appropriate to use the Originating Summons process. This mode of proceedings can also be used where there is unlikely to be substantial dispute of the relevant facts.

In the *Koitaki Farm* (supra) case, I found that the facts were not substantially in dispute. I

therefore found that the use of an Originating Summons was correct.

In the present case, the main issue for determination is the validity of the Deed of Settlement between the parties. The plaintiff is claiming that the deed is invalid on the basis of a mistake of fact as to the currency of TA. 024. This is a succinct question of mixed fact and law in my view. It is a factual issue because the Court must be informed of the facts as to the parties' knowledge of the fact of the expiry date of TA. 024. Then based on a finding of the relevant facts, the Court will have to decide the consequence that should follow as against the validity of the Deed. The other issues the first and second defendants raise can not be raised on their own until the validity of the Deed is first resolved.

In these circumstances, I do not consider it appropriate that the proceedings should be ordered to continue on pleadings. If so ordered, it will delay a determination of the determinative issue and the Court may be made or caused to side track from staying focused on the determinative issue. It may also involve the parties in unnecessary costs. A determination of the issues presented in these proceedings will in my view help to decide where they stand and the kind of steps they should take instead of taking all of the steps at the same time, only to find some of them being rendered unnecessary upon a determination of the determinative issue. Thus in my view, it is fair, reasonable and just to all of the parties that the determinative issue be first resolved without wasting time and costs unnecessarily.

It is therefore fair, reasonable and justice to all the parties that the determinative issue to first resolve without the wastage of time and costs quite unnecessarily.

For these reasons, I do not consider it appropriate that the proceedings should be allowed to continue on pleadings. Accordingly, I order a dismissal of the application of the first and second defendants.

This leaves me to decide whether or not to grant the plaintiff's application. I note once again that there is no issue on the basis for the application and the need for it. Besides, the parties agreed that the determinative issue has to be first determined. In these circumstances, I would grant the application of the plaintiff. But before I make the appropriate orders, I note that simply ordering the matter to go before the Registrar to allocate a date for hearing will not expedite the matter. I therefore propose to issue a number of directives to get this matter to a stage of readiness for hearing well before the 30th of August 2003. The directions I propose are the following:

The plaintiff to draft and forward to the defendants' lawyers a draft statement of the basis of its claim with full particulars and the relevant facts by Tuesday the 12th of August 2003.

The defendants' lawyers to respond to the draft statement referred to above setting out with full particulars its response including the facts they rely on by the 19th of August 2003.

The parties then agree on the final text of the statement by the 21st of August 2003 and the plaintiff file the statement with the Court by the same date.

The Parties then attend the Court on the 22nd August 2003 for a hearing of this

matter at 1:30pm.

I have now consulted the parties and with their agreement, I issue directions in the terms proposed above.

Lawyers for the Plaintiff: Blake Dawson Waldron Lawyers
Lawyers for the First and Second Lawyers: Yagi Lawyers