[In the District Court of Justice]
Sitting in its Provincial Land Court Jurisdiction

Provincial Land Case No.01/2007

IN THE MATTER OF AN APPLICATION TO DISMISS AN APPEAL FOR WANT OF

PROSSECUTION

BETWEEN

OK TEDI MINING LIMITED
First Appellant

AND

BIUL KIROKIM
Second Appellant

AND

INDIA KIROKIM
Third Appellant

AND

ANIOK INDIA KIROKIM
Fourth Appellant

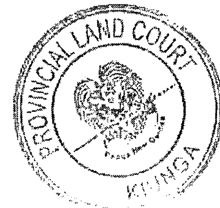
AND

CHIEF KAMBOYAB ALLOLIM
First Respondent

AND

KILKILOK KAMANIMAN
Second Respondent

AND



EMMANUEL MICHAEL MENAP
Third Respondent

Kiunga: Frank Manue
Provincial Land Court Magistrate
2013: 12th July
: 1st, 13th, 14th August
: 20th September

Civil- Local Land Court decisions at Kiunga, 2006 - Appeals lodged at Waigani- Judicial Review in the National Court- OTML application to be joint as a party refused- appeals attempted but not finalized- Appellants' inaction resulted in Application to dismiss Appeal for want of prosecution.

Cases Cited-Supreme Court;

1. *General Accident Fire and Life Assurance Limited v Illimo Farm Products Limited [1990] PNGLR 331*
2. *Juali v The State (2001) SC667*
3. *Doningi v PNGBC SC691*
4. *Paraka v POSF SCA 123 of 2002*
5. *Peter Norr v Dominic Ikamtal SC 185*
6. *Pogera Joint Venture v Joshua Siapu Yako SCA No. 63 of 2005*

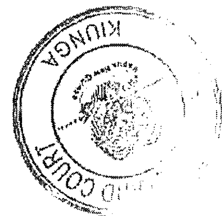
Cases Cited- National Court;

1. *Donald Nicholas v Commonwealth New Guinea Timbers PTY LTD [1986] PNGLR 133*
2. *Singut v Kinamun (2003) N2499*
3. *Pyali v Kabilo(2003) N2492*
4. *Niale v Sepik Coffee Producers Limited (2004) N237)*
5. *Rabaul Shipping Limited v Chris Rupen (2008) N3289*

References

Constitution of the Independent State of Papua New Guinea- Section 59(2);
Land Disputes Settlement Act Sections 19, 31, 47(2), 50, 53,59, & 69

Counsels for the Applicant; Mr.R. Koaru
Counsel Assistant; Mr.W.Windi
Counsel for Respondent 1. No appearance
Counsel for Respondents 2 and Ors; No appearance



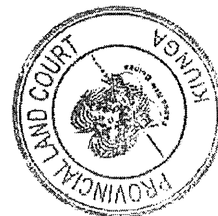
REASONS FOR DECISION

Provincial Land Court Magistrate Frank Manue: There are two (2) purported Appeals which were lodged in 2007 & 2009, and have been pending since. One was by Ok Tedi Mining Limited, and the other by Biul Kirokim and two others. I say there are two purported Appeals as they were said to have been lodged separately on different dates and places. On the 4th July 2013, the Respondents/Applicants through their lawyers –Warner Shand Lawyers, filed a Motion, seeking orders to dismiss these Appeals for want of prosecution, and among other orders, applied that the Court Orders the dispensing with the requirements of service in the proceedings. The Notice of Motion was duly served on the Respondents /Appellants.

NOTICE OF MOTION OF THE APPLICANTS

The Notice of Motion / Application filed on the 4th July, 2013 by the Applicants / Respondents in the appeal case, sought for the following orders:-

1. *Order dispensing with requirements of service in this proceeding;*
2. *Order on the grounds that the Appellant abused the process of court;*
3. *Order that the Appeal of the first Appellant Ok Tedi Mining Limited be dismissed on the grounds that it does not have a locus standi to appeal and that the appeal is defective;*
4. *Order that the third and fourth Appellants' names be struck off the appeal as they did not consent to the appeal*
5. *Order that the appeal of the second Appellants be dismissed on the grounds that the second appellant jointed a party who has no locus standi and that the Appeal is defective.*
6. *Pursuant to Section 50 (1) (2) and (3), Section 53, Section 56 (1) (a), Section 68 & Section 69 of the Land Disputes Settlement Act an ORDER that the Notice of Motion filed by Appellant Ok Tedi Mining Limited on 10th August 2009 be dismissed*
7. *Pursuant to Section 50 (1) (2) and (3), Section 53, Section 56 (1) (a), Section 68 & Section 69 of the Land Disputes Settlement Act an ORDER that whole of this appeal be dismissed on the grounds that the Kiunga Provincial Land Court does not have the jurisdiction to hear and determine the appeal*
8. *Pursuant to Section 50 (1) (2) and (3), Section 54 (1), Section 56 (1) (a), Sections 68 and 69 of the Land Dispute Settlement Act an ORDER that the whole of the appeal be dismissed on the grounds that Ok Tedi Mining Limited is not a person aggrieved within the meaning of the Act and does not have locus standi*
9. *Pursuant to Section 50 (1) (2) and (3), Section 68 and Section 69, of the Land Disputes Settlement Act an ORDER that the Kiunga Local Land Court Order of 21st April 2006 and 6th December 2006 be affirmed and be enforced forthwith.*
10. *An Order that the Appellant Ok Tedi Mining Limited pay all benefits, royalties and equities at 95 % to the respondent within 30 days.*
11. *Time to be abridged to the date of settlement by the registrar*
12. *Any other orders the court deems fit and appropriate.*



BRIEF SEQUENCE OF FACTS IN RESPECT OF THE APPEALS:-

On the 21st of April, 2006 and 6th of December, 2006, the Kiunga Local Land Court made consent Orders for the original parties, except for Ok Tedi Mining Limited who was not a party to the Local Land Court orders and the proceedings. These Orders were granted pursuant to Section 19 of the Land Disputes Settlement Act which empowers the Local Land Courts to approve Agreements by any disputing parties, upon application.

Following these Local Land Court Orders, there have been several court proceedings including the pending appeals lodged by Ok Tedi Mining Limited, on the 1st March, 2007 at Waigani Provincial Land Court and by Biul Kirokim, The application by Kamboyap Allolim for Judicial review of the Provincial Land Court Magistrate's Orders, Bill Noki a Provincial Land Court magistrate in Waigani and the Respondent Biul Kirokim and two others, including Ok Tedi

Mining Limited, Appeal by Biul Kirokim re-lodged on 24th August 2009, which is two years six months from the day the Local Land Court at Kiunga pronounced it's decisions, and the National Court proceedings in OS No. 312 of 2007, which the National Court Orders were made on 14th August 2007 and 2snd July 2009.

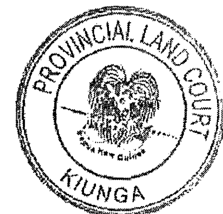
From court documents an appeal by Mr. Biul Kirokim was faxed into Kiunga through fax 548 1095 from Holiday Inn Business, Port Moresby by fax 325 0165 on the 24th August, 2009 and by Kolo and Associate Lawyers. On 31st July 2007, the Deputy Chief Magistrate gave approval for a Provincial Land Court to hear the appeals in Kiunga, which was not completed.

In 2012, Paul Eddie filed an application in the National Court on case OS No.595 of 2012 against Ok Tedi Mining Limited and its Managing Director, Mineral Resource Authority and its Managing Director and Mineral Resource Corporation and its Managing Director and the Independent State of Papua New Guinea through the Mining Minister which was dismissed for non – compliance to *Section 5 of the Claims For and Against The State Act.*

This was a case of the Applicant who desired to have the National Court order the Respondents, in that case to pay some royalties to the applicant and his associates and agents inclusive of Kampoyap Allolim, the Applicant in the current Application, who authorized Mr. Eddie to file that proceeding.

LAW TO GUIDE PROVINCIAL LAND COURT

At the outset I wish to have it on record that this Court is to be guided and bound only by the requirements of Sections 50 and 69 and related provisions of the Land Disputes Settlement Act when determining appeals from decisions of the Local Land Court. I am also guided by Section 59 (2) of the Constitution.



These provisions are quoted here under:-

50. PRACTICE, PROCEDURE AND POWERS OF PROVINCIAL LAND COURTS.

(1) Subject to this part, the practice and procedure of a Provincial Land Court are as prescribed.

(2) Subject to this part and the regulations, a Provincial Land Court,

(a) is not bound by any law, evidence, practice or procedure other than this Act; and
(b) may call and examine, or permit the parties to call and examine, such witnesses as it thinks fit; and
(c) may receive fresh evidence; and
(d) may otherwise inform itself on any questions before it in such manner as it thinks proper; and
(e) Subject to any guidelines laid down in the regulations, shall endeavor to do Substantial justice between all persons interested; in accordance with this Act and any relevant customs.

(3) Where a Provincial Land Court informs itself on any question in accordance with Sub-section (2) (d) it shall,

(a) make the information available to the parties; and
(b) call for and hear arguments on the information.

(4) A Provincial Land Court may, where in its opinion it is necessary to do so, inspect the land in dispute before or during a hearing.

69. GENERAL LAW TO BE APPLIED

In exercising its jurisdiction under this Act, a Provincial Land Court or a Local Land Court is not bound by any law other than this Act that is not expressly applied to it, but shall; subject to Section 68 decide all matters before it in accordance with substantial justice.

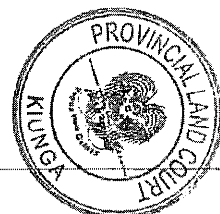
Section 68 of the Land Dispute Settlement Act refers to determination of customs.

Section 59 (2) of the Constitution states:-

59. PRINCIPLES OF NATURAL JUSTICE:

(1) ....

(2) The minimum requirement of natural justice is the duty to Act fairly and, in principle, to be seen to act fairly.



PRELIMINARY ISSUES

Before this court are two purported Appeals lodged in 2007 and 2009 and the Notice of Motion to dismiss the Appeals for want of prosecution of the Appeals.

Other than dispensing with the requirements of service in the proceedings, as applied, the court adjourned the cases, so that the cases be heard inter parte. This was done due to the nature of land court matters as being sensitive, and that justice would better be served if all parties appeared and addressed the court on the two issues once, other than in a sporadically manner as has been the history of this case. More importantly, given the historical background and the whole of the circumstances and time this case has taken in finalizing it, it is good practice to hear arguments by all parties inter parte. The cases therefore were further adjourned to the 1st August, 2013.

On that date the Provincial Land Court did not sit due to health reasons of the presiding magistrate.

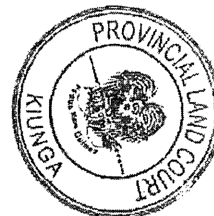
On that same day, (1 August 2013), The presiding magistrate under his own writing wrote an open letter to, Warner Shand Lawyers, representing the Applicants/Respondents, Allen Lawyers, representing Ok Tedi Mining Limited and Kolo and Associate Lawyers representing the second, third and forth Respondents/ Appellants, who did not appear on the 1st August 2013. The open letter was delivered by fax the same day to each of them. The letter informed all the parties that the matter has been rescheduled for inter parte hearing on the 13th August 2013 at 9.00am.

Before that letter, Allen Lawyers through Mr. Kanneth Iniako, by letter date 31st July 2013, wrote requesting to have the appeals heard on Friday 30th August 2013. No reasons were given for the request to postpone the cases from the set date.

Allen Lawyers for Ok Tedi Mining Limited wrote and faxed another letter dated 14th August 2013, affirming their stand of their previous letter dated 31st July 2013, and this time they also informed the Court, that the parties were considering settlement out of court. When the court put the proposition to the counsels of the Applicants/Respondents of the appeal, they denied agreeing to that proposition.

Meantime, prior to these letters by Allen Lawyers, Kolo and Associate Lawyers through its principle had attempted to call the presiding magistrate on his private mobile phone several times and even send sms without success. He made the last attempt to prolong this proceeding on the 14th August 2013 by sms through the wireless phone of the Court Registry. This was an attempt not only to divert the attention of these proceedings, but another delay tactic to delay and prolong further, the proceedings to be heard and possibly finalized.

May I also suggest that the conduct of Mr.Kolo was unethical.



In my view the Appellant and their lawyers have been notified sufficiently and were well aware of these proceedings. In my view from 12th July, 2013 to 14th August, 2013 is an ample and sufficient time for them to organize and appear to represent their clients, given the history of this case. The Court then proceeded to hear the application to dismiss the appeals for want of prosecution ex- parte.
Having pointed out these preliminary matters I now turn to the substantive issues, before this court. They are the application to dismiss the appeals for want of prosecution and the hearing of the purported appeals.

I intend to discuss the application by the late chief Kambomyap Alollim and two others before deliberating on the substantive issue of the appeals, if there are such pending appeals;

That is to say, that the application to dismiss the appeals for want of prosecution would be discussed first and if the application is not granted, the court would proceed to the substantive appeals.

JURISDICTIONAL ISSUE OF PROVINCIAL LAND COURTS

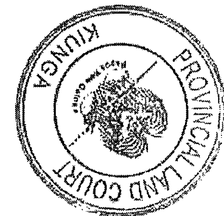
Does a Provincial Land Court have jurisdiction to hear such applications now before this Court?

I ask this question because the **Land Disputes Settlement Act** only provides for appeals to be heard by it. The Act is silent about any other applications to be made before a Provincial Land Court. Counsel of the applicants did not make submissions on this important question, which is crusial as it raises jurisdictional aspect of the Court prior to proceeding in hearing any appeals.

The Act only provides for filling of other applications in a Local Land Court such as Approval of Agreements under **Section 19 of the Act**, and other applications under **Section 31 of the Act** to name a few.
Part V, Division 1, of the Act establishes Provincial Land Courts.
Part V, Division 2, Provides for the practice and procedures of Provincial Land Courts.
Part V, Division 3, Provides appellate jurisdiction to Provincial Land Courts. Provisions under Division 3, Provides for requirements and pre-requisite requirements when filling an appeal from a Local Land Court to a Provincial Land Court.

Section 59, Provides for powers of a Provincial Land Court to exercise in an appeal. There is nothing as in the form of a general application under Section 31 of the Act, for the Provincial Land Court to use or exercise such as Section 31 applications, which is specifically for the Local Land Courts to exercise.

Division 2, in particular Section 50 provides for practice and procedures of Provincial Land Courts and as reproduced at the outset is hereby restated



Section 50 (2) of the Act states:-

(2) Subject to this part and the regulations a Provincial Land Court:-

(a) is not bound by any law or rule of law, evidence, practice or procedures other than this Act: and
b) may call and examine or permit the parties to call and examine such witnesses as it thinks fit; and
(c) may receive fresh evidence; and
(d) may otherwise inform itself on any question before it in such manner as it thinks fit; and
(e) subject to any guidelines laid down in the regulations, shall endeavor to do substantial justice between all persons interested in accordance with this Act and any relevant customs.

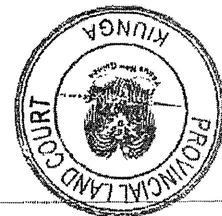
Reading into Subsection (2) and paragraphs (a) (d) and (e); I am of the view that the question of whether the appeal should be dismissed for want of prosecutions, as per the Application, should first be determined before proceeding to hearing the purported appeals.

Subsection (2) of Section 50 of the Act, in my view implies that Provincial Land Courts when faced with a question relating to land disputes or land related matters before it, the Court may deal with the question provided that the concerned parties are informed as required by Section 50(3), and subject to any guidelines provided in the regulations, inquire into the issue.

So far as I know, there are no guidelines under the Regulations in place for this Court to refer to.

I am therefore of the view that, this provision – Section.50 (2) (a), (d) and (e) empowers a Provincial Land Court to hear such applications and therefore would discuss the issues raised in the Application before going into the substantive matter of the Appeals.
I am mindful of the requirement under Section 47 (2), of the Act, for one or two land mediators to sit with the Provincial Land Magistrates, but for the purpose of deciding the issue of whether the application to dismiss the appeal or otherwise are not questions of the relevant customs of the area, but of written and case law, other than customs. I therefore do not see the need for one or more of the mediators to sit with the court as there would not be any questions of customs for them to advise on.

Having said all that, I now turn to the question that has been raised in this application. Should the application be not sustained then, mediators would be asked to sit with the Court and if not I intend to still discuss in brief whether the appeals were competent to proceed.
As I alluded, earlier the Applicants through their lawyer had intended to apply to have the appeals dismissed for want of prosecution in the absence of the Appellants or the Respondents of this application, on the 12th July, 2013.
This was however not granted by the court initially, as it would be seen to be unfair and unjust to the Appellants/Respondents. The application eventually was heard in the absence of the Respondents on the 14th of August 2013 and adjourned for decision today.



SUBMISSIONS

Counsel of the Applicants filed a volume of compiled affidavits and annexures, a written submission and an additional affidavit as directed by the court on the 13th August 2013.
The Respondents Biul Kirokim and two others although did not make representation, filed a volume of compiled affidavit and annextures and documents through their lawyer Kolo and Associates Lawyers on the 30th of July 2013.
The Respondent / Appellant Ok Tedi Mining Limited did not file any documents in response to this application, except to say that their lawyer, Allen Lawyers wrote and requested to adjourn the appeal as alluded, in the preliminary remarks.

In support of their Motion / Application they had filed affidavits by Robert Saga, John Clement and their lawyer Mr. Koaru with annexures and written submissions. Oral submissions by the Applicants were heard on the 14th August 2013.
The Respondents / Appellants Mr. Biul Kirokim and two others, through their lawyers filed a compiled affidavit and a volume of documents on the 30th July 2013 in response to the Respondents/Applicants application. The affidavit in response was by Mr. Jason Kolo of Kolo and Associates Lawyers only.

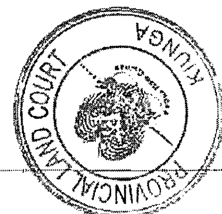
The Respondent /Appellant, Ok Tedi Mining Limited did not respond in filing any submissions or affidavits,

Meantime, the Respondents/Appellants Biul Kirokim and two others through their lawyers made written submissions only. As alluded they did not appear in person nor did their counsel.

In Jason Kolo's affidavit dated 25th day of July 2013, from paragraph 7 – 15, he attempted to give reasons for the delay in prosecuting the appeal.

The Notice of Motion seeking certain orders is in my view, somewhat interwoven with arguments which may be appropriately raised in the appeals. In any case this application to dismiss the appeal for want of prosecution is crucial as the outcome of it will determine whether the purported appeals will be heard, and I would put them in the right perspective in the cause of discussions.
In the applicants' submission, they have extensively submitted precedent case laws which the Supreme Court had laid down as principles to consider and when granting application to dismiss appeals for want of prosecutions in both civil and criminal cases,

They have likewise submitted National Court precedent case laws, which the court has laid down as principles to consider and apply when granting applications to dismiss appeals for want of prosecutions in both civil and criminal cases, as well. Those cases follow the Supreme Court cases, although the Supreme Court follows the Supreme Court Rules while the National Court follows the National Court Rules.



The other deponent's affidavits are not much of assistance, as their affidavits were sworn and filed in 2009 for consideration in the appeals.

I will first discuss the facts and apply them to law relating to the Appellant Mr. Bill Kirokim and then to the Appellant, Ok Tedi Mining Limited.

THE LAW:

First, I state the applicable case laws.

The Supreme Court cases the Applicants submitted, which are applicable to their application are:-

General Accident Fire and Life Assurance Corporation Limited - v- Ilimo Farm Products Limited [1990] PNGLR 331, Juali v State (2001) SC 667, Doningi v PNGBC SC691 (2002) Paraka V POSF SCA 123 of 2002 and Peter Norr v Dominic Ikamtal SC 815 (2005).

The National Court Cases which they cited are:-

Ronald Nicholas v Commonwealth New Guinea Timbers PTY LTD [1986] PNGLR 133, Singut v Kinamun (2003) N 2499, Pyali v Kabilo (2003) N2492, Niale v Sepik Coffee Producers Limited (2004) N2637 and Rabaul Shipping Limited v Chris Rupen (2008) N3289.

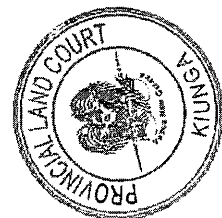
These principles would be applied to the facts during the discussions.

The law regarding application to dismiss an appeal, whether it be criminal or civil cases is well settled in this jurisdiction. This has been highlighted by various cases in both the Supreme Court and National Courts as cited earlier by the Applicants/Respondents in their submissions.

In the Supreme Court case of *General Accident Fire and Life v Ilimo Farm Limited [1990] PNGLR 133*, (supra), The Court held, that; (as per the head note)

(1) *The power to dismiss an appeal for want of prosecution pursuant to r 53 (a) of the Supreme Court rules is to be exercised where the appellant has not prosecuted the appeal with the due diligence having regard to the public interest in finalizing litigation.*
(2) *Matters relevant to the want of diligence include failure to attend on settlement of appeal book, failure to explain non – attendance, failure to provide any explanation for dilatory conduct where an explanation could properly be expected.*
(3) *The discretionary powers under r 53 (a) should not be exercised where no explanation for want of due diligence is made.*

The other cited cases of the National Court followed the same principles.



In the National Court precedent of the case of *Singut v Kinamun N 2499, (17 December 2003),* the Honorable Court when referring to the principles in the Supreme Court case of *Donigi v PNGBC* (supra) the court said; *"Where the appellant failed to do any of the above (take steps it is required to take under the Supreme Court Act or the rules or fails to duly prosecute his appeal), rule 53 gives a respondent the right to apply for a dismissal of court proceedings. The power to dismiss an appeal is discretionary and that discretion is usually exercised where there is a case of undue delay on the part of an appellant to prosecute his appeal without any satisfactory explanation for such a delay".*

His Honor goes on to say that " *This case and others preceding it provide authority for the proposition that once an applicant for dismissal for want of prosecution has established a case of want of prosecution, the burden then shifts to the respondent to such an application to rebut it. The respondent's burden is then to satisfactorily explain the delay and demonstrate a readiness to take the step in the proceeding and proceed without further delay. Where a respondent fails to discharge that onus, the court is left with little or no choice but to grant the application".*

His Honor further said that;

"These principles apply quite specifically for Supreme Court Appeals. In the case of National Courts, similar principles apply but in the context of the relevant National Court Rules.

Order 10 rule 5 of the National Court Rules require that an application for dismissal of proceedings for want of prosecution may be granted if,

1. *The plaintiffs default is intentional or is allowing for an in ordinate and excusable delay in a prosecution of his claim.*

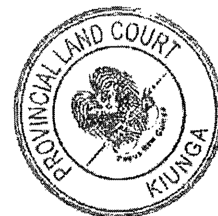
2. *There is no reasonable explanation given by the plaintiff for the delay and*

3. *That the delay has cause injustice or prejudice to the defendant".*

This court has not been referred to any such applications being made previously before a Provincial Land Court nor was there any such on record in my limited time for research of case laws of the issue.

APPLICATION OF FACTS TO LAW IN THE CASE OF APPEALANT BIUL KIROKIM AND OTHERS

The respondent, Biul Kirokim through his lawyers, had not made any submissions but I suppose they would rely on the affidavit of their lawyer and the compiled documents he had filed for that purpose as alluded.

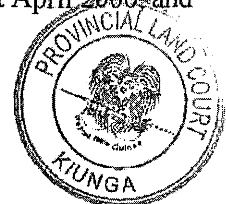


In paragraph 10 of Mr.Kolo's affidavit, he explains that he had requested Ok Tedi Mining Limited for funding of his clients appeal in a letter dated 21st August 2012, but to dute there has been no response. This excuse is pretty shallow. An appellant has an obligation to ensure funding out of his own expense, and not relying on another to process his appeal. *In Juali v the State (2001) SC667*, it was held that the *"onus is on an appellant to prosecute an appeal with due diligence."* That includes securing funding on his own or making an effort on his own behalf. Apart from attempting to source funding from Ok Tedi Mining Limited, there is no evidence that the Appellant / Respondent attempted other means to fund the appeal process. On that basis, this excuse, must fail.

In paragraphs 7 to 9 the lawyer explained that there was no service or availability of a Provincial Land Magistrate in the Western Province as of 2006, to date (2013) even though they had attempted to secure a Provincial Land Court Magistrate to hear the appeals, through the Chief Magistrate's office. The only attempt to have the appeals heard was in 2007 by Magistrate Allan Kopi who was then based in Daru District Court.

Whilst I appreciate the Respondent/Appellant approaching the Chief Magistrate to approve a circuit to hear the outstanding appeals, there is no evidence of how many times the Chief Magistrate was approached, nor is there any evidence of correspondence being entered, either to the Chief Magistrate or the Kiunga Provincial Land Magistrate or Local Land Court clerk or the Registry for that matter. The only time that I find, when they approached the Chief Magistrate was in 2007, resulting in Mr. Kopi travelling into Kiunga to hear the appeals. There have been no other attempts, prior to that date nor is there record of any other attempts thereafter.

In line with that argument, the counsel stated that there was no Provincial Land Magistrate on ground, until recently when he learnt of Magistrate Singomat, and Presiding Magistrate doing circuit in Kiunga and eventually the later Magistrate taking up residency in Kiunga. While this court appreciates the argument, as I had alluded earlier, between 2007 when Mr. Kopi attempted to hear the appeal and to date, no attempts by correspondence whatsoever was entered into for the expediting of the appeals. As Magistrate on the ground, I know Mr. Singomat did conduct a circuit to hear Local Land Court appeals totaling four. (4) The appellants made no enquiry in any manner during his court circuit towards the end of 2012. There is no evidence of any correspondence entered to the office of the Chief Magistrate or to the Kiunga Provincial Land Court clerk or the Court Registry since 2007. As the Magistrate on the ground but not on circuit as stated by Mr. Kolo, since June 2011, I know that there is no record of the appellant pursuing persistently to expedite the appeals. From available court deposition, the purported amended notice of appeal by the appellant Biul Kirokim was, faxed into Kiunga from Port Moresby on 24th August 2009. Since the Local Land Court pronounced its decisions on 21st April 2006 and



6th December 2006 respectively, to the 24th August 2009, it would be about two (2) years eight (8) months from the dates of the Local Land Court decisions.

This raises the question of whether the appeal was lodged within the statutory time limit under **Section 54 of the Land Disputes Settlement Act.**

There is nothing on file at Kiunga Court House of the purported appeal No.1 of 2007, which was said to have been lodged before 2009. If the appeal had been lodged in 2007, which Mr. Allan Kopi attempted to hear in 2007, then the files may have been taken to Daru. Our attempts to retrieve them were unsuccefull. This is further found to be so in the facts of proceedings of OS 312 of 2007.

The cited case authorities, both of the Supreme Court and the National Court, make it very clear that an applicant in an application to dismiss an appeal for want of prosecution has the burden to show a case of delay. Once that is discharged, the burden then shifts to the respondent to such an application to provide a reasonable explanation for the delay and indicate to proceed to a hearing of an appeal. These cited cases also applied the principles of ***General Accident Fire and Life Assurance Co operation Ltd [1990] PNGLR 331***, which has been referred to by counsels of the applicants.

In that case the Supreme Court ruled that; (from the head note),

1. *The power to dismiss an appeal for want of prosecution pursuant to r 53 (a) of the rules is to be exercised where the appellant has not prosecuted the appeal with due diligence having regard to the public interest in finalizing litigation.*
2. *Matters relevant to due diligence include, failure to attend settlement of the appeal book, failure to attend non attendance, failure to response to correspondence and failure to provide any explanation for dilatory conduct where an explanation could properly be expected*
3. *The discretionary power under r 53 (a) should not be exercised where no explanation for want of due diligence is made".*

I find from available court depositions and compiled documents that the appellant Biul Kirokim had not only failed to prosecute the appeal with due diligence but that he has not explained to the satisfaction of the court for non attendance to the court and persistently pursue to finalize the appeal, using his personal means, resources and ways to prosecute the appeal.

APPLICATION OF FACTS TO LAW IN THE CASE OF APPEALANT OK TEDI MINING LIMITED

As alluded, the Respondent/Appellant Ok Tedi Mining Limited had not filed any explanation for the delay of prosecuting the purported appeals, and so the case authorities make it very clear that where the Respondent/Appellant, gives no explanation for the delay in prosecuting the Appeals,

this Court has no option but to accept wholly the submission by the applicants and grant the application accordingly.

This court believes that, the Respondent has not responded nor has it pursued the said appeals vicariously which was said to have been lodged on 1st March, 2007, was due to the outcome of the National Court proceedings in **OS 312 2007**, BETWEEN: KAMBOYAP ALLOLIM

PLAINTIFF / APPLICANT

AND

BILL NOKI

Sitting as Waigani Provincial Land Court Magistrate

FIRST / DEFENDANT / RESPONDENT

AND

BIUL KIROKIM

SECOND DEFENDANT / RESPONDANT

AND

INDIA KIROKIM

THIRD DEFENDANT / RESPONDENT

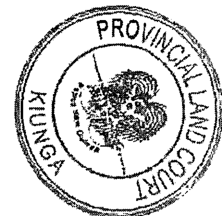
AND

OK TEDI MINING LIMITED

FORTH DEFENDAND / RESPONDENT

In that case which was an application for judicial review, His Honor Batari J made orders on 17th August 2007 that the application by *"Ok Tedi Mining Limited to be joined as a party in these proceedings is refused*".

The Court order is very clear and that is OTML was not to be jointed as a party in the whole of the Land Court proceedings. I take that order to mean that OTML would not be a party even for appeal purposes to a Provincial Land Court because, as I understand, their application to the National Court was for them to be a party in that review and the appeal which they had earlier filed at Waigani Provincial Land Court.



The final outcome of the proceedings in that case was that the court made the following orders that:-

"1. The application for judicial review is granted.

2. The Decision of Waigani Provincial Land Court made on 14th April 2007 is removed into this court and quashed

3. The stay orders of Waigani Provincial Land Court made on 14th April 2007 is removed in to this court and quashed."

The back ground of that case is well known by the parties and I need not canvas on them.

THE ISSUE OF RES JUDICATA

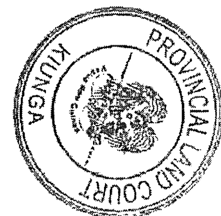
In addition to the aforesaid relating to the orders of **0S 312 of 2007**, the applicants submitted that the whole proceedings of the appeal is res judicata following that case. Reading from that case at page 3 and 4, His Honor when summarizing the facts found that:-

"Aggrieved by the decisions of; the Local Land Court, the second respondent lodged an appeal and obtained stay orders against the Kiunga Local Court orders from Waigani Provincial Land Court. OTML, the forth respondent is an added party to this review by virtue of it's interest in the proceedings. The company has lodged a separate appeal against the same orders of the Kiunga Local Land Court. Its appeal was lodged with Kiunga Provincial Land Court. ***It appears from the records, this appeal has been consolidated with the second respondent's appeal for hearing". (Emphasis added)***

The court further goes to say that *"other than return to Tabubil District Court on 13th March 2007, the second respondent filed an appeal,* ***(instead of at Tabubil or Kiunga Provincial Land Court)-(added))*** *on 13th March 2007 in Waigani Provincial Land court Registry."*

At this juncture, may I also say that, the appellant Biul Kirokim seems to have filed two appeals? One, as alluded at Kiunga in 2009, by fax from Port Moresby and another on 13th March 2007 as per the judgment of OS 312 of 2007, in Waigani.

This in my view, would amount to an abuse of process of law. Section 55 of the Land Disputes Settlement Act is crystal clear where an appeal against a Local Land Court decision must be lodged. It must either be at the Provincial Land Court or at the Local Land Court in which heard



the dispute. Waigani is no where near or within the Western Province, nor is it the Provincial Land Court where the land dispute is located and heard.

The subject of the review in the National Court proceeding of OS 312 Of 2007 was that on the 14/3/07, the Waigani Provincial Land Court had granted ex-parte orders inter alia that;

1: *The Waigani Provincial Land Court Registry accepts files and registers the notice of appeal and proceeds to hear the appeal expeditiously.*
2: *The Kiunga Local Land court orders as per LLC No. 004 / 06 of 21/4/ 06 and the Local Land Court order of 06/12/ 06 be stayed pending the hearing of appeal No. 01 of 2007.*

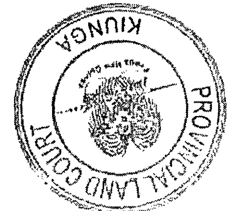
On the face of all these facts, I find that:-

(a) Soon after the Local Land Court decisions in 2006, the appellant, Mr. Biul Kirokim attempted to obtain stay orders at Tabubil District Court.
(b) The appellant Bill Kirokim then proceeded to obtain stay orders in Waigani Provincial Land Court and simultaneously filed an appeal on 13th March 2007.
(c) The appellant OTML also applied in the proceedings of 0S 312 of 2007 to be a party to the whole proceedings, that is., the National Court proceedings and the Provincial Land Court Appeal.
(d) OTML also filed an appeal on the 1st March 2007 in Waigani Provincial Land Court before It applied to be a party in the National Court proceedings of 0S 312 of 2007.
(e) In the reading of that case and the orders issued, it is clear that, the appeals of both the Appellants (OTML and Biul Kirokim) ***"have been consolidated"*** when filed at the Waigani Provincial Land Court and consequently after the Waigani Provincial Land Court made orders on 14th March 2007, which then went for review.
The National Court eventually reviewed the decision and the stay orders of the Waigani Provincial Land Court and were then removed to and quashed by the National Court.

(f) I find that, thereafter there were no appeals pending in the Waigani Provincial Land Court or in Kiunga Provincial Land Court.

(g) I further find from these facts that OTML could not pursue further in their appeal as it Was not granted leave by the National Court in that same proceedings to be a party in the whole of the Land Court proceedings, thus rendering it, no *locus standi* status.

(h) Furthermore, the case of OS N595 of 2012, was lodged because the Appellants did not Prosecute quickly the appeals and with due diligence and that the applicant in that case Mr. Eddie, wanted the Local Land Court Orders of 2006 to be fast tracked and implemented when the Respondents/ Appellants were sitting on it. Mr. Eddie in that case acted with the authority of the Applicants'/Respondents'.



With these findings, I accept the submission by the Applicants'/Respondents' that the whole of the Appeals are res judicata.

POST DECISION OF OS 312 OF 2007

Having found that the whole of the purported appeals are res-judicata, the question I ask is why the appellants had sat on their appeals as if they were competent appeals on foot. The answer really lies with them.

However this all adds up and gives more weight to what the Applicants /Respondents have submitted in that there is more reason to say that, the "purported" Appellants, OTML and Biul Kirokim have not prosecuted the appeals with due diligence, having regard to the public interest in finalizing litigation and that they have not given any satisfactory explanation for the failure, the discretion of the Provincial Land Court has to go in favor of the application.

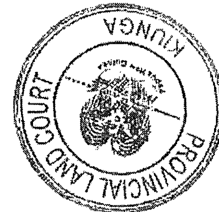
They had the options of applying to withdraw or discontinue the appeals or to concede and comply with the Local Land Court orders of 21st April 2006 and 6th December 2006 sooner after August, 2007 or July, 2009.

OTML in particular was not an interested party initially in the Local Land Court as it had no *locus standi* and that it did not have an interest in any customary land at Mt. Fubilan, as decided in a similar case in *SCA NO 63 of 2005, Pogera Joint Venture and Joshua Siapu Yako* nor was it an aggrieved party.

It is my humble view that this matter would not have dragged on this long had OTML initially refrained from what it did, and had Lawyers who were involved, contemplated professionally about the issue and the application and process of the Land Disputes Settlement Act, prior to launching Legal advise and action for their respective clients.

Again this gives more reasons in favor of the Applicant's application. In my humble view the actions of the Appellants / Respondents in this application in not applying to either discontinue or to withdraw their purported appeals, amounts not only as inordinate and inexcusable delay but intentional and contumelious conduct, as was held to be so in the cited case of *Nicolas v Commonwealth Timber Pty Ltd* (**supra**). It's now about six years from 2007 and seven years from 2006 when the Local Land Court gave the decisions. Nothing constructive has been achieved. Only injustice has been done to the applicants as, I am told by the third Applicant / Respondent and reading from media, that the First and Second Applicants/Respondents have passed away or past on in life. It's tragic to think of someone who has fought for their rights but have not seen the outcome and benefited to date.

JURISDICTIONAL ISSUE



Does the Provincial Land Court have declaratory powers, as the Supreme Court and National Courts?

This question is being raised because of the way the Notice of Motion has been drafted and filed and subsequently, the Application. The Applicants / Respondents have sought the orders as stated earlier.

Counsels of applicants did not address the Court on this issue in their submissions.

This court is sitting as an Appellate Court under the **Land Disputes *Settlement* Act** and can only exercise powers under the provisions of the said Act. This is clear under Sections 53and 69, of the Act; which states:-

53 JURISDICTION

*53 Subject to this part, **a Provincial Land Court has jurisdiction to hear and determine appeals from a decision of a Local Land court**..(**Emphasis added**)*

*Section 69 has been quoted earlier and in particular the phrase, **"a Provincial Land Court...............is not bound by any other Law other than this Act that is not expressly applied to it** ....(**emphasis added**).*

*These provisions keeps the Provincial Land Court within the parameters of the **Land Disputes Settlement Act**.*

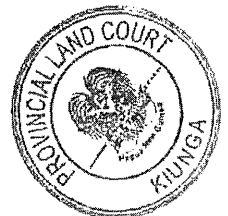
The court has however in the cause of the discussions made findings to orders sought in the Notice of Motion, which would be summarized in the conclusion remarks.

CONCLUSION

Before conclusion let this issue be born in mind. Had the appeals gone ahead, there was still the question of competency of the appeals to be determined. For instance the issue of whether the appeals were filed within the requirements of Law, such as the provisions of **Sections 54, 55, 56 and 57**. I have thoroughly perused the submitted documents and find that, these vital requisite and pre- requisite requirements seems not to be in place. Neither is there an Appeal book/s which could have been of assistance on this issue. If they were ever lodged, the files may have been left in Waigani and amalgamated in Waigani District Court Registry, and the result of those processes, have been concluded **in OS 312 of 2007 *(supra)*.**

In conclusion I find the following:-

1. The Appellants have shown that their was a delay of over six (6) years for the



Respondents/Appellants to prosecute the appeals and that Appellants/Respondents failed to prosecute the appeals quickly and with due diligence. Their actions were inordinate and inexcusable and intentional and contumelious.

2: There are no pending appeals by either of the appellants on foot; and

3: Even if there were appeals, they had been amalgamated in the **National Court Case of OS 312 of 2007** and therefore they are res judicata; and

4: Even if there were appeals, legal requirements and pre- requisite requirements, were not complied with and therefore are incompetent; and

5: The National Court proceedings in OS 312 of 2007 also dismissed the purported Appellant OTML to be a party to the appeals thus rendering it in a no *locus standi* status; and

6: The purported Appellants and in particular OTML in attempting to be a party and their non actions and actions after the decision of the National Court in OS 312 of 2007, intentionally, contumeliously and inordinately, in not only delaying the prosecution of the purported appeals, but in the whole of the circumstances are responsible for the injustice caused to the initial parties in the Local Land Court proceedings. Their actions and non-action have prejudiced the initial parties; and After the National Court decision in **OS 312 of 2007**, I find that the Local Land Court orders of Kiunga, on the 21st April 2006 and 6th December 2006 still stands in full force.

Having ruled that, this Court makes the following orders:

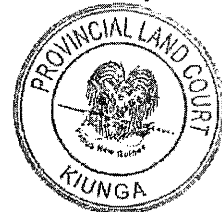
ORDERS

1: The application to dismiss the purported Appeals for want of prosecution is granted and the Appeals No.1 of 2007 is dismissed for want of prosecution.

2: The Local Land Court Orders of 21st April 2006 and 6th December 2006 which are Paraphrased respectively here under are UPHELD:-

*" **ORDERS:** (OF 21st April 2006)*

(1) That the application is granted and the Agreement made by the parties dated 6 July 2004 is approved pursuant to Section 19 (1) (2) and (5) of the Land Disputes Settlement Act chapter No. 45.
(2) That the Agreement approved under Section 19 Subsections (5) shall have effect as an Order of the Local Land Court under the Act.
(3) The orders No. 1 and 2 above will have the legal effects to the Agreement dated 6 July 2004;



AND

ORDERS: ***(Dated 6th December 2006)***

The Local Land Court Orders that:-

1: That royalties between the parties, the Complainants / Applicants be at 95% and the Defendants/Respondents be at 5% paid out every month by Ok Tedi Mining Limited, the State and Department of Mining, pursuant to Agreement dated 9th day of November 2006; the main Agreement dated 6 July 2004; and the Local Land Court Order dated 21st April 2006.

2. That Ok Tedi Mining Limited, the State, Mining Department and Mineral Resources Development Company Limited that such payments of royalties take effect for month of November 2006 payment between the parties; that is 95% to the Complainants / Applicants and Respondents share at 5%.

3: As of the 6th of December 2006, 95% royalties be addressed and paid into Kimka Sepiyan sub Tribe Group Incorporated (Inc) Trust account No: 1001194552 Bank South Pacific, Kiunga.

4: Any other benefits, rights that Respondents have, also flow onto Kimka Sabiyan Sub Tribe Land Group Incorporated (Inc), such as social and educational services, such as housing, Transport, by road or air transport and spin off businesses in Kiunga and Tabubil.

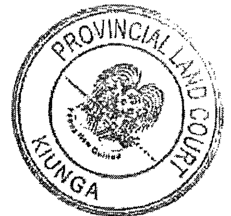
5: That pursuant to Local Land Court order dated 21st April 2006, the OK Tedi Mining Limited, the State, Mining Department and Mineral Resource Development Company Limited recognize, them also as equal with Biul Kirokim and Principle land owners of Mt Fubilan- Ok Tedi Mine.

6: The time be abridged that these Orders to take effect at the Settlement by the Clerk of Local Land Court to be forthwith"

3. Any security deposits by the Appellants be forfeited wholly to the State.

4. The cost of the whole of these proceedings be paid by OTML.

Orders Accordingly



Lawyers for the Applicants/Respondents: Warner Shand Lawyers

Lawyers for Respondent Ok Tedi Mining Limited: Allen Lawyers.

Lawyers for Respondent Biul Kirokim & Others: Kolo and Associates Lawyers