

JOE KWAESIKO

v.

PATTY KWAEGALIASI
MAVING BROS. COMPANY LTD.

PLAINTIFF

1ST DEFENDANT
2ND DEFENDANT

High Court of Solomon Islands

(Palmer J.)

Civil Case No. 82 of 1993

Hearing: 16/2/95

Judgment: 23/2/95

T. Kama for Plaintiff/Applicant

P. Tegavota for 1st Defendant/Respondent

F. Waleilia for 2nd. Defendant

PALMER J: The Plaintiff, Joe Kwaesiko applies by Notice of Motion filed on the 16th of December, 1994 for judgment on the grounds inter alia, that no appearance or defence had been filed by the First defendant.

The Amended Writ of Summons and Statement of Claim were both filed on the 25th of August 1994. They were served on the First Defendant on the 19th of September, 1994 at Daringali Market, (see affidavit of Joe Kwaesiko filed on the 16/12/94, at para. 2, and a copy of the Certificate of Service marked "JK1" annexed as an exhibit to that affidavit).

The Notice of Motion for judgment was filed some 3 months thereafter.

In his submissions before this Court, Mr. Tegavota for the First Defendant points out that he was only informed of the service of the documents on Saturday the 11th of February, 1995.

Since then he has not had the opportunity to file affidavits in reply to the Notice of Motion for judgment. However, rather than ask for an adjournment, he decided to proceed with the case and simply make submissions to the Court for its consideration.

One of the matters that the Court should consider in whether to grant the application sought is the question of delay. What was the reason for the delay, and whether there has been undue delay?

No reason has been given for the delay by the First Defendant as to why on receiving the service of the Amended Writ of Summons and Amended Statement of Claim on the 19th of September, 1994, he took no action whatsoever it seems to inform his Solicitor, or to have the documents dispatched to him as soon thereafter. The period of 2 months is more than sufficient to enable him to get in touch with his Solicitor, and if one takes into account the further delay from December and January, then that gives a total of some 3 months, when the First Defendant could have taken some positive action to inform Mr. Tegavota.

It is not Mr. Tegavota's fault that he could not file any appearance, statement of defence and affidavits before this hearing, because those documents were only served on him on the 11th of February, 1995.

Parties to cases must realize that if documents are being served on them personally, then it is their duty to inform their Solicitor, or instruct a Solicitor as soon as possible. It does not assist their case any further to sit on those documents.

Nevertheless, there is a discretion on the part of the Court to decide whether the Motion for judgment should be granted, taking all relevant factors into account.

Another consideration for the Court to weigh is whether there is a possible defence on the merits. This is difficult to assess in the absence of a statement of defence and any supporting affidavits. However, in the Notice of Motion filed on the 16th of December, 1994,

at paragraph 1, the Plaintiff relies on a previous court case between the Plaintiff and the First Defendant's father in 1964, as the basis for his claim of ownership over Asanao land including Mana'ara land. It is therefore important to consider the terms of that judgment in some detail.

A copy of that judgment has been filed attached to the affidavit of Joe Kwaesiko filed on the 16th of December, 1994, marked "JK2".

At page 1 of the record of proceedings of that Local Court, under the subheading "statement" the following is recorded:

"Kwaesiko of Abirakafo claim that Peter K. of Mana'ara using his piece of land called Ngaligwaragwara without permission from him and he asked to be stopped"

The above statement as recorded is quite significant in my view because it describes the land which is the subject of the dispute between the parties.

In the statement of Kwaesiko, he referred to his land as Ngaligwaragwara. This is also significant, because if the land that had been in dispute was Asanao, then surely it would have been mentioned.

I accept that there is some mention of Asanao land in the evidence of witness 1, 2 and 3 of the Plaintiff's side. However, their evidence must be placed in their proper context. The dispute was over a particular land area over which, from the evidence in the record of proceedings, showed, the Defendant had planted coconuts. The fact however, that the Plaintiff may now be claiming that it is part of a bigger land area called Asanao is immaterial. The dispute before the Local Court in my view was clearly over Ngaligwaragwara land.

The record of proceedings showed clearly in my view that the Defendant's mind was addressed to that area of land called Ngaligwaragwara than anything else. Also, the judgment of the Local Court, although it did not specifically say so, can be construed as being directed more to that specific land area than any other bigger land area.

Accordingly, I am not satisfied, (*i.e. that it has not been proven conclusively*) that the decision in civil land case No. 23 of 1964 was in respect of Asanao Land. No boundaries were delineated on a map or in the record of proceedings. In the 'statement of claim', no mention was made of Asanao land. Neither in the Plaintiff's own statement.

Ngaligwaragwara land however is a smaller land area. It has not been challenged that this is so. That being the case, the 1964 case cannot be binding on the First Defendant in respect of other land areas, outside Ngaligwaragwara land. It is not in dispute that the Mana'ara land and the land area where the camp site of the Company is located is outside Ngaligwaragwara land.

The crucial issue in this case would appear to be the question of customary ownership and boundary over Asanao land (*excluding Ngaligwaragwara land*), or ownership in custom of Mana'ara Land (*including the log pond*) and the camp site, as between the Plaintiff and the First Defendant.

These questions remain outstanding, and have not been proven conclusively by the Plaintiff. So although there may have been a default in filing appearance and a defence, I am not satisfied that judgment should be entered in default.

Mr. Tegavota has impressed upon this court in his submissions as best as he could that the ownership claims over those disputed lands have yet to be adjudicated upon as between his client and the Plaintiff's tribe

Mr. Waleilia for the second Defendant has also made submissions impressing upon the Court that there are other tribes whose ownership claims over the same disputed land areas must also be considered. He makes this submission on the basis that his clients rights stem from an agreement made with a number of landowners who may also assert ownership rights over those disputed lands, apart from the Plaintiff himself. Although no affidavits have been filed in support, I do take note of his submission as supporting my conclusions that the questions of customary ownership over the disputed lands are at this stage arguable issues, and accordingly the parties should be allowed to pursue under the Local Courts Amendment Act, 1985, for determination, questions of customary ownership, and before this Court, any other relevant claims in law.

The Notice of Motion filed on the 16th of December, 1994 accordingly is dismissed.

I will grant an extension of time to the First defendant to file a Statement of Defence within 14 days, and any reply 14 days thereafter.

Costs in the cause.

ALBERT R. PALMER

A.R. PALMER

JUDGE