WUITLYN VIULU, YALU REVO, BROWN LAMU, ISSAC NAPATA AND SETH PIRIKU (representing the Veala Tribe) **-V- TUI KAVUSU, MOLTON LUMA, SAMSON SAGA, PESETI KUITI, HAMI LAVI, GORDON YOUNG, PAUL KAVUSU, OPHIU VENDI, STEVEN VENO ISACH NOGA AND ABRAHAM KUMITI,** (representing Nama Development Company) **AND OTHERS**

HIGH COURT OF SOLOMO ISLANDS
(KABUI, J.).

Civil Case No. 198 of 2002 (2)

Date of Hearing: 9th and 10th October 2002
Date of Ruling: 18th October 2002

Mr G. Suri for the Applicant
Mr A. Radclyffe for the 1st-6th Defendants
No appearance for the 7th Defendant
No appearance for the 8th Defendant
Mr J. Sullivan for the 10th Defendant

RULING

Kabui, J. This is an exparte Summons by the applicants filed on 8th August, 2002 for extension of time to enable the applicants to seek leave to apply for an order of certiorari under Order 61 of the High Court (Civil Procedure) 1964, "the High Court Rules". The application was however heard interparte because the Defendants had had notice of it prior to the hearing date. Mr. Yalu Revo had filed an affidavit in support of this application on 8th August 2002. Counsel for the 10th Defendant, Mr. Sullivan, objected to paragraphs 11, 12, the last sentence in 13, paragraphs 16, 17, 18, 20, 21, and 22 of Mr. Revo's affidavit. The ground for the objection was that those paragraphs did not comply with Order 40, rule 3 of the High Court Rules. That is, those paragraphs including the last sentence in paragraph 13 contained hearsay evidence. I ordered that those paragraphs and the last sentence in paragraph 13 be deleted. Counsel for the applicant, Mr. Suri, then said that he would apply for an adjournment to file a fresh affidavit. Mr. Sullivan opposed this supported by Counsel for the 1st-6th Defendants, Mr. Radclyffe. I ruled against Mr. Suri and refused his application for an adjournment to file fresh affidavit. I said I would give my reasons later. I do so now.

Order 40, rule 3 of the High Court Rules

The opposing arguments by Counsel on both sides were focused on the application of rule 3 of Order 40 above. Rule 3 states-

...**"Where any judgment is pronounced by the Court, the entry of the judgment shall be dated as of the day on which such judgment is pronounced,**

unless the Court shall otherwise order, and the judgment shall take effect from that date: Provided that by special leave of the Court is judgment may be ante-dated or post-dated"...

It is the proviso that applies but only to interlocutory proceedings or with leave of the Court if the application is to do with application for directions under Order 32, rule 2 or with evidence in Court under Order 39, rule 1 of the High Court Rules. The crucial words are **"an affidavit may contain statements of information and belief, with sources and grounds thereof".** The origin of this rule was stated long ago in **Gilbert v. Endean** (1878) 9 Ch. D. 259. Cotton, L. J. explained that in interlocutory applications where the rights of the parties were not being decided but to maintain the status quo pending the time to decide such rights, the Court could act upon evidence given on the witness' information and belief. His Lordship said that such evidence could also be acted upon by the Courts where the application was to obtain some direction from the Court as to how the action could progress towards the settlement of the rights of the parties. However this is not the point that arose in this case. The point was whether or not the paragraphs I deleted did contain hearsay evidence. In other words, whether the form of Mr. Revo's affidavit together with its wording in the paragraphs I deleted was sufficient to satisfy the rule in the proviso cited above. In **Bidder v. Bridges** (1884) 26 Ch. D. 1, the same point such as in this case arose. The affidavit in that case had three paragraphs. These were-

1. **The several persons whose names and addresses are set forth in the 1st and 2nd columns of the schedule hereto are, as Iam advised, material witnesses in this action on behalf of the Plaintiffs.**

2. **The persons named in the schedule hereto are respectively upwards of seventy years old.**

3. **Iam advised and believe that by reason of the age of the said witnesses it is desirable and important that these examinations should be taken without delay.**

The objection taken was that the order made had been so made on insufficient affidavit and ought to be discharged. Having referred to the relevant paragraphs of the affidavit in question and the relevant rule of practice, Kay, J. at pages 5-6 said,

..."The affidavit is made in a form which is entirely wrong, and this order was obtained, I have not the least doubt, without the judge's attention being called to the peculiar form of this affidavit"...

The order that had been made previously was discharged. The Plaintiff appealed and lost on this point. At pages 10-11, Earl of Selborne, L. C. said,

..."The learned judge in this case, looking at that affidavit, has said that it does not comply with the requirements of Order XXXVIII, rule 3. I quite agree

with him. I think it does not. A gentleman of whom I desire to speak with all possible respect, and who I have no doubt intended to do his duty in the most upright way, but yet who gives the Court no reason to believe that he has any personal knowledge whatever of the ages of any of these witnesses, makes an affidavit in the form of a positive statement that they are all above seventy. Now would that be any prima facie evidence whatever, even for the purposes of an interlocutory order, of that fact, as to any of them, in any other case? I think not. It appears to me that the Court ought to know specifically what information as to age of each of those persons he has received, and what means have been taken to inquire in the best quarters upon that subject, and on what his belief is founded. I think it ought also to appear what is the nature of the evidence, which these persons are to give. Beyond that, of course, it is not the office of the Court to tell the parties what affidavit they are to make. They must make the best affidavit they can and its sufficiency will be judged of"...

Turning now to Mr. Revo's affidavit and the paragraphs therein that I deleted. Paragraph 11 uses the phrase "we learnt". Paragraph 12 uses phrase "who heard about". The last sentence in paragraph 13 uses the phrase "I have been informed that". Paragraph 17 uses the phrase "was also unduly influenced by". Paragraph 18 uses the same phrase as in 17 above. Paragraphs 20, 21 and 22 are the resultant of paragraphs 11, 12, the last sentence in paragraph 13, 17, and 18 above. The last sentence in paragraph 16 uses the phrase "became known to us" whilst the first sentence is the resultant of the paragraphs cited above. All the paragraphs that I deleted were obviously tinted with hearsay, which fell short of the requirements of Order 40, rule 3 cited above. That is to say, the paragraphs I deleted do not contain what information had been received, by what means and on what ground the deponent's belief was based. Mr. Suri however said that in the past, no objection had been taken under Order 40, rule 3 of the High Court Rules as the practice in this Court as far as he was aware. I wish Mr. Suri did not say that as a lawyer. The High Rules are there for a purpose. They must be followed at all times. They must be read and studied in depth by both the judges and practitioners alike. The answer to this kind of remark lies in Kay, J.'s judgment in **Bidder v. Bridges** cited above. At page 5, His Lordship referring to Order 38, rule 3 of the Rules of Supreme Court 1883 being the equivalent of Order 40, rule 3 said,

..."It is quite true it is common knowledge to all of us that in the negligent way in which affidavits are continually prepared and brought before the Court, this rule is systematically ignored. But does it follow that when a person against whom such an affidavit is made brings it to the knowledge of the judge the judge is bound to ignore the rule, and that the Court can say, because the rule is systematically disregarded by those whose duty it is to regard it, therefore the rule must be treated as obsolete and of no consequence? I dissent from such proposition. If it be the case that the parties do not choose to bring the attention of the Court to the defect of an affidavit made in this way, and are content to take the judgment of the Court upon such an affidavit, that is one thing. It does not follow that the Court is always bound to take the objection, but where the

objection is taken, and where it is an objection of substance, and not a mere technical and frivolous objection, it seems to me that the Court would be acting contrary to its plainest duty if it refused to observe the rule"...

This passage clearly speaks for itself on this point. I need not paraphrase it. Whilst it is true the rule is somewhat technical in nature that should not be a bar to getting it right. It is the duty of those who draw up affidavits under this rule to do them correctly. They must strive to do so correctly.

The request for adjournment

Realizing that I had deleted the relevant paragraphs in Mr. Revo, Mr. Suri applied for an adjournment in order to file fresh affidavit. Mr Sullivan opposed any adjournment. Mr. Radclyffe also gave his support in opposing any idea of an adjournment. Mr. Radclyffe said that the whole case had been delayed enough and any further adjournment would be prejudicial to his clients. He pointed out that the defects in Mr. Revo's affidavit were not an oversight since the affidavit had been filed on 8th August 2002. He said the Solicitor for the Plaintiff had had sufficient time to prepare a proper affidavit and should not be given time to further delay the case. Mr. Radclyffe then attacked the basis of the affidavit in that it verified no facts under Order 61, rule 2(2) of the High Court Rules. Mr. Sullivan supported Mr. Radclyffe and again stressed the delay element in this case. That is, pointing out the delay in the interparte hearing not being proceeded with speedily.

Refusal for an adjournment

The Plaintiff first commenced his action by Writ of Summons and Statement of Claim filed on 30th January2002. He sought declarations and certain orders, loss and damages. In the meantime, he applied exparte for restraining orders and obtained them on 6th February 2002. The Court amended these orders on 21st February 2002. In the meantime, the Plaintiff filed a Notice of Motion on 29th April 2002 under Order 27, rules 2, 3 and 4 seeking the determination of certain issues of fact and the granting of certain orders. On 19th July 2002, the Plaintiff filed an Amended Notice of Motion seeking the determination of certain issues as in the first Notice of Motion together with relief under Order 61 of the High Court Rules as an alternative relief if the application under Order 27, rules 2 and 3 above was refused. On 24th July 2002, the Plaintiff filed a re-Amended Notice of Motion in which he asked for leave to extend time under Order 64, rule 5 of the High Court Rules. On 31st July 2002, the Plaintiff filed an Amended Statement of Claim in which he alleged that Form 2 was null and void. On 8th August 2002, the Plaintiff filed a Writ of Certiorari in Civil Case No. 198 of 2002. The steps taken by the Plaintiff to prosecute his intention were set out in my ruling on 11th October 2002 in Civil Case No. 015 of 2002. This case and Civil Case No. 198 of 2002 above are one and same case. Apparently, Civil Case No. 015 of 2002 had been for some reason split into two cases by the Plaintiff. Clearly, in the midst of all these steps

taken by the Plaintiff, the Plaintiff had lost sight of the need for an interparte hearing. This fact had indeed given rise to the 10th Defendant deciding to apply to the Court to discharge the exparte orders subsisting against it since 6th February 2002. Although Mr Suri had said that he was postponing the application under Order 27 of the High Court Rules, his application under Order 61 of the same Rules and the Writ of Summons were still on foot. The Amended Statement of Claim filed on 31st July 2002 cited above would seem to have added the issues raised in the Statement of Claim. The pleadings would also seem to be still on foot. But it would seem that the application under Order 61 in Civil Case No. 198 above would also serve the same purpose as Civil Case No. 015 of 2002. I felt that the manner in which the Plaintiff had conducted his case up to the present hearing was unfair to the Defendants. The Plaintiff had been increased the goal posts in this action by splitting Civil Case No. 015 of 2002 into two and thus distorting the white lines on the field. To allow him time to file fresh affidavits would create more delay and more apprehension in the minds of the Defendants as to what would be next. That is not good litigation. Mr. Suri asked for justice and so did Mr. Sullivan for the 10th Defendant. In weighing the situation, I had decided to refuse the application by the Plaintiff for an adjournment. So I did. I then adjourned the application for extension of time to 9:30am the next day.

Application the next day

The hearing of the Plaintiff's application for extension of time was at 9:30 am on 10th September 2002. Mr. Suri filed an affidavit made and sworn by him on 10th October 2002. He filed it at 8:40am that same morning of the hearing. Mr Sullivan opposed this affidavit on the ground that I had refused Mr. Suri's application to file fresh any affidavit the day before. He said the affidavit ran counter to my ruling the day before. Mr.Radclyffe supported Mr. Sullivan in opposing the affidavit. Mr. Suri's argument was that I had made no order stopping the making of any fresh any affidavit. I disallowed the affidavit on the ground that I had already refused Mr. Suri's application the day before for an adjournment to file any fresh affidavit. Mr. Suri then proceeded with the application for extension of time. He relied upon what was left in Mr. Revo's affidavit in support of the application. In terms of there being evidence to support extension of time, there was none. What was left in Mr. Revo's affidavit bore no relevance to the point in issue. What was said by Mr. Suri on this issue in his submission was no more than unsworn evidence from the bar table. I do not accept that as evidence upon which I can decide this application. Mr. Suri however raised the argument that the time limit of 6 months specified in Order 61, rule 3 of the High Court Rules did not apply to the Western Provincial Executive because the determination by the Western Provincial Executive could not possibly be construed to mean, "any judgment, order, conviction or other proceedings" as used in Order 61 of the High Court Rules. In my view, this argument is self-defeating because if the determination by the Western Provincial Executive is not amenable to an order for certiorari, why is it that the Plaintiff had chosen to quash its determination by certiorari under Order 61 of the High Court Rules? If the Plaintiff wants to come to the Court by way of certiorari, he must abide by the 6

months time limit in Order 61. If however he wishes to escape the time limit in Order 61, he must look elsewhere for relief. Mr. Radclyffe, however, argued to the contrary. He said the meaning of the word "proceeding" was wide enough to cover any determination by any Provincial Executive performing its duty under the Forests and Timber Utilization Act. He cited **R. v. Licensing Authority Established under the Medicine Act 1968 exp Smith and French Laboratory** (No. 2) [1989] 2 W. L. R. 378. I think Mr. Radclyffe was correct because any determination by any Provincial Executive always follows a hearing. This is the practice derived from the old Area Council days when Area Councils used to issue determination of timber rights. I take judicial notice of this practice. I reject the argument by Counsel for the Plaintiff. Mr. Suri's next argument was that the delay in this case was not excessive so that it was excusable and justified. As I have said, there is no evidence to justify this argument. As correctly pointed out by Mr. Radclyffe, the period of 6 months runs from the date of the proceeding. This is clear from the wording of Order 61, rule 3 of the High Court Rules. So, the relevant date from which time would have ran in this case was 11th October 2001. The wording of Order 61 of the High Court Rules is very clear on this point. No other date is relevant in this case. In the end, the Plaintiff has failed to make out a strong case for extension of time. There is no evidence of such delay. I would dismiss this application. This application is refused with costs.

F. O. Kabui
Judge