JOHN NENETE –V-. ATTORNEY-GENERAL, COMMISSIONER OF FORESTS RESOURCES AND MIQA INTERGRATED DEVELOPMENT COMPANY

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

Civil Case No. 294 of 2001

Date of Hearing: 23rd July 2003
Date of Judgment: 28th July 2003

Mr D. Tigulu for the Plaintiff
Mr G. Deve for the 1st and 2nd Defendants
Mr A. Radclyffe for the 3rd Defendant

JUDGMENT

Kabui, J. By Summons filed on 22nd June 2003, the 3rd Defendant seeks an order to strike out the Originating Summons filed by the Plaintiff on5th November 2001. The 3rd Defendant also seeks an order for costs against the Plaintiff.

The Brief Background.

The Plaintiff by Originating Summons filed on 5th November 2001 seeks a number of declarations against the Defendants. The first declaration is that by reason of the non-publication of the Forests Act (No. 3 of 1999) that Act never came into operation thus nullifying the things done under it. The second declaration is that the licence issued to the 3rd Defendant based on the compliance with the relevant the procedure is also void.

The 3rd Defendant's Summons.

Counsel for the 3rd Defendant, Mr. Radclyffe, having cited Order 58 of the High Court (Civil Procedure Rules), 1964 'the High Court Rules,' argued that in terms of rule 2 of Order 58 of the High Court Rules, there was no written law to be interpreted in this case because the relevant Act had not been gazetted to come into operation. The second point he made was that in terms of rule 1 of Order 58 of the High Court Rules, the licence could not possibly be a written instrument within the meaning of that rule because the Plaintiff was questioning the validity of the licence and not claiming an interest in the licence. Counsel for the 1st and 2nd Defendants, Mr. Deve agreed with the points made by Counsel for the 3rd Defendant, Mr. Radclyffe. Counsel for the Plaintiff, Mr. Tigulu, insisted that the Plaintiff's action should nevertheless proceed in the interest of the Plaintiff.

The decision of the Court.

Order 58 of the High Court Rules states-

"...(1) Any person claiming to be interested under a deed, will, or other written instrument, may apply by originating summons for the determination of any question of construction arising under the instrument, and for a declaration of the rights of the persons interested.

(2) Any person claiming any legal or equitable right in a case where the determination of the question whether he is entitled to the right depends upon a question of construction of any provision of a written law, may apply by originating summons for the determination of such question of construction, and for a declaration as to the right claimed.

(3) ----------.

(4).----------.

(5) ----------.

The arguments advanced by Counsel for the 3rd Defendant, Mr. Radclyffe, found their mark in the case of **Rigden Whitstable Urban District Council** [1958] 3 W.L.R.205. In that case, a declaration was sought that an enforcement notice did not comply with the provisions of section 23 of the Town and Country Planning Act, 1947 and therefore was invalid. This was being done by way of an Originating Summons. The court held that this was not a proper case for an application by Originating Summons. The application by Originating Summons had been brought under the English equivalent of Order 58 of the High Court Rules. At page 208, Danckwerts, J. said-

"...I have come with some reluctance, to the conclusion that the plaintiff cannot bring himself within the terms of other of those rules. It is perfectly true that he is interested in the question of the validity of the notice, and it may be true that the question of the proper construction of the statute, but the jurisdiction conferred by Order 54A is very restricted, and if it does not fall within the terms of the rules, I have no power, whatever I would like to do, to consider the application. I do not think that the plaintiff can be said to be a person *"interested under a deed, will, or other written instrument"* within the meaning of rule 1, since he cannot really be interested under a notice: he is merely trying to show that the notice is invalid and does not comply with the Act. Again, with regard to rule 1A, he is not *"claiming any legal or equitable right"* which depends upon a question of the construction of the statute..."

Commenting on Order 58 of the High Court Rules in **Avaiki Shipping Company Limited v. Attorney-General, Central Bank of SI and Muggava Muggiki Investment Company Limited,** Civil Case No. 248 of 2000 (unreported), I said-

"...The words *"or other written instrument"* are in my view very general in scope but that "such other instrument" must necessarily be capable of conferring rights of some sort to some persons having an interest in that written instrument for it to be of any legal value. This is the limitation..."

Like in this case, the Plaintiff is only interested in showing that the licence was invalid. He has no interest in the licence as a written instrument creating a right in which he can claim as his under the licence.

Section 16(1) of the Interpretation and General Provisions Act, (Cap.85) defines the phrase 'written law' as 'an Act, any subsidiary legislation or an Imperial Act'. I think the meaning here is that a written law is a law that is in force for a Bill that has been assented to by the Governor-General on behalf of the Head of State in accordance with section 59(2) of the Constitution is also law but yet to commence by publication in the Gazette. A law that is not in force is not operative and therefore confers no actionable right. Therefore for this reason, Order 58, rule 2 of the High Court Rules must be taken to speak in terms of a written law that is in force. The Forests Act (No. 3 of 1999) is therefore not a written law that is in force in terms of Order 58, rule 2 of the High Court Rules. No legal or equitable right arises in this case for there is no written law in force. The licence is also not a deed, will or written instrument in terms of Order 58, rule 1 of the same Order 58 of the High Court Rules. The application is granted. The Originating Summons is accordingly struck out. The parties will meet their own costs.

F.O. Kabui
Judge