

JOSEPH PA'ASI, STEPHEN TAHUNIMAKE, ROMEO TOISUTA, WILLIE POIRARO, JOHN MAHANE, AND FRANCIS HASI'AU (Plaintiffs)-v-JOHN HERO'AU (First Defendant), MICHAEL ORITAIMAE, JOHN HERO'AU, JOHN KEREHAI, MORAMAI PAINA, KO'UAROSI, JOACHIM PAROISU'U, SOLOMON NAOTORO AND FRANCIS ANIRATANA (Trading as Arasihenua Land Trust Incorporated) (Second Defendants), JOY ITAIA (Trading as Oceania Trading Company) (Third Defendant) AND COMMISSIONER OF FOREST RESOURCES (Fourth Defendant).

**HIGH COURT OF SOLOMON ISLANDS
(Mwanosalua, J.)**

Civil Case No: 479 of 2004

Hearing: 4th November 2004, 3rd and 4th February,
6th April and 24th May 2005

Ruling: 30th June 2006

James Apaniai for Plaintiffs

Andrew Nori for the First, Second and Third Defendants

RULING

Mwanosalua, J: The First Defendant is the head Chief of Hanuaraua tribe. He included the tribe as member of Arasihenua Land Trust ("ALT") by the execution of the Trust Deed ("Deed") of ALT on 8th August 2003. He vested, inter alia, all rights to timber and forest resources, inclusive of all decisions relating to commercial planting, harvesting and marketing of forest and forest products on Hanuaraua Customary Land in ALT when he executed the Deed. On 9th July 2003, the Second Defendants executed a timer rights agreement ("the agreement") with the representatives of the tribes which became members of ALT on 8th August 2003. On 24th July 2003, the Malaita Provincial Executive ("the Executive") convened a public meeting at Waisisi to decide whether the representatives of the tribes which made the agreement with the Second Defendants on 9th July 2003 were willing to negotiate for the disposal of their timber rights to the Second Defendants. The Executive did not reach any timber rights determination over Hanuaraua Customary Land as the members of the Hanuaraua tribe did not reach any consensus to grant timber rights to the Second Defendants. The Executive did not re-convene any public meeting to determine timber rights over Hanuaraua Customary land between 24th July and 31st December 2003. On 11th December 2003 the Fourth Defendant issued timber licence No. 10307 ("the Timber Licence") to the Second Defendants which covers Hanuaraua,

Hanuapusu, Huro, Ohoraha, Siararaitoro, Surairu and Tari'ohu Customary Lands. The Second Defendants engaged the Third Defendant to carry out logging on these Lands.

On 20th October 2004, the Plaintiffs filed their writ of summons together with a statement of claim seeking orders and costs against the Defendants. In their amended statement of claim ("*claim*") filed on 7th December 2004, they claimed the following reliefs:

- "...16(1) A declaration that the purported inclusion of Hanuaraua tribe as member of the Arasihanua Land Trust Incorporated through the execution of the Deed by the First Defendant is null and void.**
- 16(1A) A declaration that no valid timber rights agreement exists between the members of the Hanuaraua tribe in respect of Hanuaraua Customary Land entitling the Second Defendants, their servants and agents, to carry out logging operations within Hanuaraua Customary Land.**
- (2) A declaration that the Second Defendants' *timber Licence No. A10307* issued on 11th December 2003 is invalid null and void in respect of Hanuaraua Customary Land.**
- (3) Permanent injunction restraining the Second and Third Defendants, their servants and agents, from entering or remaining in, Hanuaraua Customary Land and/or constructing any roads therein and/or felling or removing any trees from within the Hanuaraua Customary Land or otherwise from carrying out any logging activities within Hanuaraua Customary Land; and**
- (4) The First, Second, Third and Fourth Defendants pay the Plaintiffs' costs.**

In the meantime, by their re-amended notice of motion filed on 26th January 2005, the First and Second Defendants sought the following orders:

- "1. The Plaintiffs' action be struck out on the following grounds -**
 - (a) in relation to the relief sought in paragraph 16(1) of the statement of claim ("*claim*") -**
 - (i) it raises no reasonable cause of action; or**
 - (ii) in the alternative it raises issues of customary law over which this Honourable court has no jurisdiction;**

- (b) in relation to the relief sought in paragraph 16(1A) of the claim the Plaintiffs do not have locus standi to challenge the validity of the timber rights licence issued to the Second Defendants in that -
- (i) none of the Plaintiffs is a party to the timber rights agreement executed by the Second Defendants on 29th October 2003 with the First Defendant and others, prior to the issue of the timber rights licence number A10307 on 11th December 2003; and
 - (ii) the Plaintiffs have neither shown nor have they satisfied the court that they have a previous court decision in their favour or had taken positive steps to assert their title to the Hanuaraua Customary Land or any portion of land within the said land area and are relying on mere assertions of ownership; and
- (c) Since the Plaintiffs have accepted the First Defendant's membership of Hanuaraua tribe and his chieftainship of the said tribe their action is frivolous and vexatious.

2. Costs on Solicitor/Client basis."

The First and Second Defendants based their application to strike out the Plaintiffs' action under order 27 of the High Court (Civil Procedure) Rules 1964 ("the Rules"). Rule 4 of Order 27 of the Rules gives power to the court to strike out any pleading where it discloses no reasonable cause of action or where it is shown to be frivolous or vexatious.

The issues to be decided in this application are:

That the claim discloses no reasonable cause of action; that the Plaintiffs lacked locus standi to challenge the validity of the agreement and timber licence; that the action is frivolous and vexatious; and, that costs be on Solicitor/Client basis. The court now proceeds to consider these issues.

No reasonable cause of action.

The First and Second Defendants say that paragraph 16(1) of the claim above raises no reasonable cause of action. That paragraph seeks a declaration that the inclusion of Hanuaraua tribe as a member of the ALT through the execution of the Deed by the First Defendant is null and void. That declaration relates to paragraph 3A of the claim. Paragraph 3A alleges that the First Defendant had no right or power to include Hanuaraua tribe as member of ALT without the consent of the members of the Hanuaraua tribe and that no such consent has been obtained from Hanuaraua tribe.

- The questions raised by paragraph 3A are:
 - (a) whether the First Defendant has the right or power to include Hanuaraua tribe as member of ALT without the consent of the members of the Hanuaraua tribe; and
 - (b) whether the consent of the members of Hanuaraua tribe has been obtained by the First Defendant to include Hanuaraua tribe as member of ALT.

The right or power of the First Defendant being raised in question (a) above, relates to the right or power of the First Defendant in his capacity as head chief of the Hanuaraua tribe. Such right or power would have to be determined in accordance with customary law. On that basis, the questions would have to be determined by the Chiefs rather than this court which lacked jurisdiction to determine them.

But the Plaintiffs say that they have already referred the questions to the Arahamimane Council of Chiefs ("*the Council*") for hearing and determination.

Further, they also say that because the questions are now before the Council, this court has power to stay their action until the Council made determinations on the questions.

There is evidence that Plaintiffs Joseph Pa'asi and Stephen Tahunimake have referred disputes to the Council on two separate occasions by letter. The First was on 14th September 2004 and the Second was on 11th January 2005.

- It was the letter of 11th January 2005 which relates to the questions. That letter was written on behalf of all the Plaintiffs by Joseph Pa'asi and Stephen Tahunimake. The letter was addressed to the Secretary of the Council, Mr. Michael Savainao. He was served with the letter by Joseph Pa'asi at Onepara village on 19th January 2005. Joseph Pa'asi also served a copy of the letter on Mr. Felix Moramai (Junior) on 17th January 2005 in his capacity as a member of the Council. After reading the letter, Mr. Moramai wrote to express his opinion on the issues raised in the letter to Joseph Pa'asi¹.

In their letter of 11th January 2005, the Plaintiffs expressed their grave concern about the provisions of the Deed. For example, that "*all rights to timber and forest resources within Arasihangua Iroa (which includes Hanuaraua Customary Land) have been vested in ALT*" and "*all decisions relating to commercial planting, harvesting and marketing of forest and forest products within Arasihangua Iroa (which includes Hanuaraua Customary Land) have been vested in ALT.*" The Plaintiffs have thus asked the Council to determine the questions "*whether the provisions of the Trust*

¹ I see Exh. "JP1b" annexed to further affidavit of service by Josep Pa'asi filed on 28th January 2005.

Deed are in accordance with the Custom and Practices of the Hanuaraua tribe and whether Mr. John Hero'au has the authority to bind the Hanuaraua tribe to the trust without consulting the tribe." I find that there are disputes relating to the tribal membership of ALT by the Hanuaraua tribe and the vesting of Hanuaraua tribe's Customary Land rights over Hanuaraua Customary Land in ALT pending determinations before the Council.

5. This court has power to stay proceedings before it in cases where there is dispute over ownership of Customary Land² and where there is dispute over the membership of a tribe pending determination before the Local Court.³ There is no reason why this power should not be invoked in this case, where a dispute over the tribal membership of a trust and where a dispute on the vesting of customary land rights in a trust are pending determinations before the Chiefs. After all, these forums hear and determine Customary Land issues, tribal membership issues, triable membership of trusts and the vesting of Customary Land rights in a trust on the basis of Customary Law.

The action by the Plaintiffs also raise other issues apart from those which they have referred to the Council. Those other issues relate to the claim by the Plaintiffs that both the agreement and the timber licence were invalid in respect of Hanuaraua Customary Land. These are serious issues of law which are triable before this court. The contention by the First and Second Defendants that the action by the Plaintiffs discloses no reasonable cause of action cannot be accepted.

Locus Standi

The First and Second Defendants contend that the Plaintiffs do not have locus standi to challenge the validity of the timber licence issued to the Second Defendants. They advanced the reasons set out in paragraph 1(b)(i) and (ii) of the re-amended Notice of Motion above to support their contention. I proceed to consider those reasons.

1(b)(i). It is true that none of the Plaintiffs was a party to the agreement signed by the Second Defendants with the representatives of the tribes which granted their timber rights to the Second Defendants. But that agreement was not signed on 29th 2003, but rather on 9th July 2003 at Waisisi⁴. The First Defendant never executed that agreement⁵. He never signed his signature in the space provided for him in the agreement.

² *Gandly Simbe-v-East Choiseul Area Council and others* – Civil Appeal No. 8 of 1997 at p.23.

³ *Harold Hilly and other-v-Letipiko Balesi and others* – Civil Case No. 224 of 2001 at 4.

⁴ & ⁵ See page 12 of Exh. "AAN7" annexed to the affidavit of Albert Alick Nori filed on 29th November 2004.

In general, the validity of a contract may only be impugned by a person who is a party to it. But a non party may intervene or challenge validity of the contract if he or she is directly affected by it⁶. Here, the Plaintiffs were affected by the agreement in that their timber rights in Hanuaraua Customary Land were purported to be covered by the agreement and therefore they can challenge the validity of the agreement.

1(b)(ii). The Defendants say that the Plaintiffs must have a final judicial decision vesting title or ownership of Hanuaraua Customary Land in their favour before they can come to court to ask for injunctive orders and to challenge the validity of the agreement or the timber Licence. They cited *Gandy Simbe-v-East Choiseul Area Council and others*⁷ to support their contention.

In that case, the Court of Appeal did not say that a person must be armed with a judicial decision vesting title or ownership of customary land on him as a prerequisite to challenge the validity of a timber rights agreement or a timber licence. Rather, the requirement is that a person must show an arguably sufficient interest on the land to entitle him to challenge the validity of a timber rights agreement⁸. Such interest may be in the form of possession of the land, ownership or interest in the subject land.

Mr. Alick Savo, a defence witness in this case, deposed that Land rights and the authority to use land vest with the sub-clans. This entitles the Plaintiffs John Mahane a member of the Wa'animori sub-clan to have land rights in Wa'animori Land, Romeo Toisuta a member of the Iramou sub-clan to have land interests in Iramou land, and Francis Hasi'au, Joseph Pa'asi and Stephen Tahunimake to have land rights in Perahau land. These three parcels of land are part of the Hanuaraua Customary Land which is covered by the timber Licence issued to the Second Defendants. The land interests in which the Plaintiffs have in Wa'animori, Iramou and Perahau lands, being part and parcel of Hanuaraua Customary covered by the licence, confer locus standi upon the Plaintiffs to challenge the validity of both the agreement and timber licence.

The Plaintiffs deposed that the Hanuaraua tribe owns the Hanuaraua Customary Land. This fact was confirmed by Messrs. Alick Savo and George Oroho who were witnesses for the Defendants. The Plaintiffs deposed that they are members of the Hanuaraua tribe. The Defendants did not dispute this fact. The Plaintiffs are members of the land owning groups, that is to say, Iramou, Wa'animori and Perahau sub-clans which have land interests within the Hanuaraua Customary Land. Being members of the sub-clans which constitute Hanuaraua tribe which owns Hanuaraua

⁶ *Gandy Simbe-v-East Choiseul Area Council & Others - Appeal Case No. 8 of 1977 C/- Amon-v-Raphael & Sons [1957] 1QB 357.*

⁷ *Gandy Simbe-v-East Choiseul Area Council and others - Civil Appeal No. 8 of 1997.*

⁸ *Gandy Simbe-v-East Choiseul Area Council and others - Civil appeal No. 8 of 1997 at p.15.*

Customary Land, also confers locus standi upon the Plaintiffs to challenge the validity of the agreement⁹ and the licence.¹⁰

The Second and the Third Defendants landed their logging machines at Huro Customary Land on or about 5th August 2004. Huro Land is next to Hanuaraua Customary Land. They marked trees on Hanuaraua Customary Land with red paint to show the path of the road to be constructed on Hanuaraua Customary Land. They then constructed a road towards Hanuaraua Customary Land. On seeing that the Plaintiffs referred their Land dispute with the First Defendant to the Council on 14th September 2004. On 20th October 2004 they filled their action against the Defendants. The Plaintiffs referred a further dispute to the Council on 11th January 2005. This evidence clearly demonstrated that the Plaintiffs have not been guilty of any delay in asserting their rights over Hanuaraua Customary Land as claimed by the First and Second Defendants.

Action frivolous and vexatious

The First and the Second Defendants claim that the Plaintiffs action is frivolous and vexatious. This claim is based on the ground that the Plaintiffs have accepted the First Defendant's membership and the chieftainship of the Hanuaraua tribe.

But the Plaintiffs say that their acceptance of the First Defendant's membership and chieftainship of the Hanuaraua tribe, and the authority of the First Defendant to deal with tribal land without the approval of the members of the tribe are two different issues.

The Plaintiffs say, while they may have accepted that the First Defendant is a member and Head Chief of the Hanuaraua tribe, it does not necessarily follow that they have also accepted that the First Defendant has the power and authority to deal with Hanuaraua Customary Land without approval from members of the tribe. They referred to the letters by Joseph Pa'asi and Stephen Tahunimake dated 14th September 2004 and 11th January 2005 to the Council as evidence of the fact that the authority and power of the First Defendant to deal with these issues without the approval of the tribal members is very much in dispute.

The action by the Plaintiffs does not merely raise issues regarding the power and authority of the First Defendant to include the Hanuaraua tribe a member of ALT and to deal with Hanuaraua Customary Land without the approval of the tribal members; it also raised allegations about the invalidity of both the agreement and the timber licence. In view of these allegations, the claim by the Defendants that the Plaintiffs' action is frivolous and vexatious is misconceived.

⁹ *Louisa Bako and others-v-the Mines and Minerals Board and others* – Civil Case No. 227 of 1997 – judgment 30th July 1998.

¹⁰ *Gandly Simbe-v-East Choiseul Area Council and others* – Civil Appeal No. 8 of 1997 at p.13.

4 **Costs be on Solicitor and Client basis.**

The Defendants seek costs on Solicitor and Client basis because the Plaintiffs were reluctant to follow the request by the leaders of the Hanuaraua tribe to have their disputes resolved internally by their own Hanuaraua tribe.

Solicitor and Client costs are awarded where the costs are payable not by an adverse party, but out of a common fund, such as a trust fund.

It would not be proper to order costs on Solicitor and Client basis for the reason advanced by the Defendants. The Plaintiffs are entitled to refer their disputes to the Chiefs for determination as they have done in this case.

Conclusion

The Plaintiffs claim discloses reasonable cause of action. The Plaintiffs have standing to challenge the validity of the agreement and the timber licence. The Plaintiffs' action is not frivolous and vexatious. There are disputes regarding Hanuaraua Customary Land pending determination by the Council. The Plaintiffs' action has to be stayed for this reason under *Order 63 Rule 5 of the Rules with leave to apply*. I order accordingly. The application by the First and Second Defendants to strike out the Plaintiffs' action is refused. The Plaintiffs' costs in this application are to be paid by the First and Second Defendants.

**F. Mwanasalua
Puisne Judge**