SC1126

PAPUA NEW GUINEA
[IN THE SUPREME COURT OF JUSTICE]

SCA 32 & 33 OF 2009

BETWEEN:

PNG DEEP SEA FISHING LIMITED
Appellant

AND:

HON. LUKE CRITTEN, Governor for Milne Bay
First Respondent

AND:

HON.CHARLES ABEL, Minister for Culture and Tourism and Member for Alotau
Second Respondent

AND:

MILNE BAY PROVINCIAL GOVERNMENT
Third Respondent

AND:

MILNE BAY PROVINCIAL PHYSICAL PLANNING BOARD
Fourth Respondent

AND:

HON. PUKA TEMU, Minister for Lands and Physical Planning
Sixth Respondent

Waigani: Kandakasi, Hartshorn &Sawong, JJ.
2010: 31st August10th December

PRACTICE & PROCEDURE – Adjournments – Application for – Must be made at the earliest opportunity when the need for an adjournment is known – Applicant must

demonstrate refusal to adjourn with result in prejudice - Must be supported by evidence of steps taken to proceed with the hearing or set event but for circumstances beyond the applicant''s control - Court has discretion to either grant or refuse an adjournment – Discretion must be exercised on proper factual and legal basis.

PARTIES & CAUSES OF ACTION – Application to join parties – Relevant tests – Party sought or seeking to be joined has sufficient interest in the proceedings and joinder is necessary for an effective determination of issues raised – Regard must be had to cause of action – Pleadings or supporting affidavit material must connect the party sought or seeking to be joined as having an interest in the proceedings - Joining or seeking to join departmental heads or managers and directors of corporations without any personal cause of action for or against them disclosed is an abuse of process.

INJUNCTIONS – Application for interim injunctions – Court has discretion whether or not to grant - Before grant of injunctions, there must be a serious question to be tried, balance of convenience favour grant of, damages not adequate compensation and what is sought to be injuncted is not speculative.

LAWYERS – Employed lawyers and partners – Partners in charge and control of employed lawyers attendance to cases – Employed lawyer leaving employment after having secured dates for hearing of matters – Partner duty bound to take steps to attend to the hearings or promptly apply for adjournments - Failure of partner to do so – No basis to adjourn – Court must proceed with hearing.

Cases Cited:

Melina Limited trading as CN Mercantile v. Fred Martens (2001) N2183
OK Tedi Mining Limited v. Niugini Insurance Corporation and Ors (1) [1988 – 1989] PNGLR 35
AGC (Pacific) Limited v Sir Albert Kipalan & 4 Ors (24/02/00) N1944
Umapi Luna Pakomeyu v. James Siai Wamo (2004) N2718
Eki Investments Limited v. Era Dorina Limited; Era Dorina Limited v. Eki Investments Limited (2006) N3176.
Konze Kara v. Public Curator of PNG (2010) N4048
Ken Norae Mondiai v Wawoi Guavi Timber Company Limited (2006) N3061
Jimm Trading Limited v. John Maddison (2006) N3174
Chief Collector of Taxes v Bougainville Copper Ltd; Bougainville Copper Ltd v. Chief Collector of Taxes (2007) SC853
Golobadana No 35 Ltd v. Bank of South Pacific Limited (formerly Papua New Guinea Banking Corporation), (2002) N2309
Mt. Hagen Airport v. Gibbs [1976] PNGLR 216
Public Employees Association v. Public Service Commission [1988-89] PNGLR 585
Markcal Limited & Robert Needham v. Mineral Resources Development Co. Pty Ltd (1996) N1472
AGK Pacific (NG) Ltd v. William Brad Anderson Karson Construction (PNG) Ltd & Downer Construction (PNG) Ltd (1999/2000) N2062
William Duma v. Yehiura Hriehwazi (2004) N2526
Emas Estate Development Pty Ltd v. John Mea & Ors [1993] PNGLR 215
Mudge v. Secretary for Lands [1985] PNGLR 387

Koitachi Ltd v. Walter Schnaubelt (2007) SC870
Steamships Trading Company Ltd v. Garamut Enterprises Ltd (2000) N1959
Hi-Lift Company Pty Ltd v. Miri Setae [2000] PNGLR 80
Ramu Nickel Ltd v. Temu (2007) N3252
Fly River Provincial Government v. Pioneer Health Services Ltd (2003) SC 705

Counsel:

S. Ketan, for the Appellant
D. Liosi, for the First to the Fifth Respondents

18th November, 2010

1. **KANDAKASI & SAWONG JJ:** By two separate appeals, PNG Deep Sea Fishing Limited, (the Appellant) is appealing against two separate decisions of the National Court. The first decision declined an application to join parties and the second declined an application for interim injunctions. Following orders at directions hearing, we heard both appeals as one and reserved our decision.

Application to Adjourn

2. Before we could hear the appeals, Mr. Ketan of counsel for the Appellant, applied for an adjournment. He sought the adjournment on the basis that, counsel having carriage and conduct of the appeals on behalf of his client ceased employment with his firm, Ketan Lawyers, and that he was in no position to argue the appeals. The Court declined Mr. Ketan"s application because:

> (a) The counsel who had the prior carriage of the matter was his employed lawyer. Hence, Mr. Ketan was under an obligation to supervise and know what matters his employed lawyer was handling, when any of those matters were coming before what court and ensure amongst others that, the lawyer was adequately and properly attending to the matter;
>
> (b) If he discharged his obligations as noted above, Mr. Ketan could have known the date set for the hearing of the appeals in this matter and ensured that someone within his firm or himself was attending to this matter;
>
> (c) When counsel having carriage of the matter ceased his employment with Ketan Lawyers, Mr. Ketan was under an obligation to ensure that someone was attending to the matter in sufficient time to ensure the hearing of the appeal did proceed on the dates set or otherwise apply earlier for an adjournment. Mr. Ketan did neither and merely turned up in Court and asked for an adjournment without any supporting affidavit setting out facts disclosing steps he had taken toward the hearing of the appeal but for say circumstances beyond his control.
>
> (d) There is already case law in our jurisdiction on adjournments such as the decision in *Melina Limited trading as CN Mercantile v. Fred Martens*, where the Court endorsed the decision of Kapi DCJ (as he then was) in *OK Tedi Mining Limited*

v. Niugini Insurance Corporation and Ors (1) and said:

> *""In this case, without having undertaken and complied with the requirements for actually getting the case ready for trial and proceed with the trial on the date set for the trial, the plaintiff came into Court on the day of the trial and asked for an adjournment to cover for its own failure. It has been held that the Court does have the power to grant or to refuse an application for adjournment of proceedings set down for trial. An applicant for an adjournment bears the onus of showing why a refusal to adjourn would result in injustice to him or her. He or she also has the obligation to make the application promptly and must prove actual prejudice and not a mere speculation of prejudice. When considering such an application, the Court is required to also consider the interest of the respondent to such an application. That is to say the Court should consider whether an adjournment would result in injustice to the respondent.""*

(e) In the case before us as we already observed, Mr. Ketan did not place before us any affidavit material or evidence of the steps the counsel than having the carriage of the matter, Mr. Ketan, anyone in his firm or the Appellant taking any step toward getting the Appeal ready for hearing on the set date. Consequently, Mr. Ketan and his client did not demonstrate to our satisfaction of their giving their best efforts to proceeding with the hearing of the appeals but for circumstances beyond (such circumstances properly identified) their control, they were not able to do that.

3. Following the refusal of the Appellant"s application for adjournment, we heard the appeals, which as we noted earlier, concerns dismissing an application for joinder of parties and an application for injunction.

Joinder of Parties

4. Dealing firstly with the issue of joinder of parties, we note that, the law in relation to joinder of parties is clear. Division 1 of Order 5 of the *National Court Rules* codifies the relevant principles on joinder of parties and or causes of action. Relevantly, r. 8 states that:

> *""(1) Where a person who is not a party—*
>
> *(a) ought to have been joined as a party; or*
>
> *(b) is a person whose joinder as a party is necessary to ensure that all matters in dispute in the proceedings may be effectually and completely determined and adjudicated on, the Court, on application by him or by any party or of its own motion, may, on terms, order that he be added as a party and make orders for the further conduct of the proceedings.""*

5. The rational for having these principles were brought out clearly by Sakora J., in *AGC (Pacific) Limited v Sir Albert Kipalan, & 4 Ors* where His Honour said:

> *""It is a fact of life that often a case will involve more than one plaintiff or defendant,*

and more than one cause of action. Thus, the foregoing rules …have been developed as to the appropriateness of joining various parties and causes of action so as to ensure that all proper and necessary parties are able to be joined…[I]t is useful to note for our present purposes (and assistance) the impact of the Australia High Court decision in Port of Melbourne Authority v. Anshun Pty Ltd (1981) HCA, which is that: a party will be estopped from bringing any further action that arises out of the same subject matter as an earlier action. This decision emphasizes the importance of the doctrine of res judicata, as operating to prevent prejudice and unfairness to a party, more particularly a defendant, being burdened and saddled with multiplicity of allegations and claims to answer. The doctrine also operates to confirm the twin doctrines of finality and certainty in judicial decision-making process.

In all cases of joinder, whether simply of causes of action or also parties, the Court retains the discretion to join or sever (if already joined) if the interests of justice demand so.

…

There is generally much merit in joining all possible defendants to avoid bringing separate proceedings against each and failing against each. On a tactical level, if all possible defendants are joined, often each will tend to run a case designed to show that another defendant is liable. The rules also provide for alternative plaintiffs if there is some issue as to proper plaintiff. For example, in some commercial litigation it may not be certain which legal entity actually entered into a transaction.""

6. The principles enunciated by Sakora J., have been adopted with approval and applied in many subsequent decisions of the National Court, as in *Umapi Luna Pakomeyu v. James Siai Wamo* and *Eki Investments Limited v. Era Dorina Limited; Era Dorina Limited v. Eki Investments Limited*, by Kandakasi J. Hartshorn J., did likewise in his decision in the matter of *Konze Kara v. Public Curator of PNG*, by reference amongst others to decision of Kandakasi J., in *Umapi Luna Pakomeyu v. James Siai Wamo* (supra). There are other decisions like the one in the matter of *Ken Norae Mondiai v. Wawoi Guavi Timber Company Limited* by Lay J., (as he then was) also doing the same.

7. Having considered these authorities, we are of the view that the most important test for joinder of parties are:

(a) whether the applicant has sufficient interest in the proceedings; and
(b) whether the applicant"s joinder as a party is necessary to ensure that all matters in dispute in the proceedings can be effectively and completely adjudicated upon.

8. In considering whether a proposed party has met the above tests, it is necessary and important to have regard to the cause of action pleaded. For it is the pleadings that disclose the matters in dispute and who are the correct plaintiffs and defendants. If the pleadings disclose a cause of action against more than one person and only one of them has been named and an application is made to join the other party or parties who have not yet been named in the proceedings, that party or parties may be joinded. Conversely, if the cause of action pleaded discloses or suggests that the pleaded cause of action is vested in common or jointly with another party who has not been named and an application is made to join that party, the application may be granted. Where however, the pleadings either deliberately or inadvertently

omit to plead all of the relevant facts or there is a lack thereof, there must be a close examination of the facts and or the basis on which the application for joinder is made. Provide the applicant is able to demonstrate a real interest in the proceedings and it is necessary that he be joinded for an effective resolution of the matters in dispute such a party may be joined as a party.

9. Unlike a few years back, a practice has recently developed in which there are ready naming of parties without there being a real cause of action being pleaded for or against the persons named in the pleadings or proceedings. The kinds of parties that have been named are officials of companies and other corporate entities merely on account of them being officers of the companies or corporations concerned. Similarly, there is ready naming of government departments and agencies and or their respective heads when there is no real cause of action against them. Very good examples of these are the ready naming of the Registrar of Titles, without disclosing any reasonable cause of action against them. Such joinder of parties amounts to nothing short of abusing the process of the Court. For the courts often make orders against persons who have no real interest in the cause of action pleaded but have to take certain steps for the benefit of a party who has a cause of action and against a person who is correctly named as a defendant, as in the case of freezing a bank account or the updating or otherwise varying records kept in a company or government office by for example the Registrar of Companies or the Registrar of Titles.

10. In this case, the Appellant sought to join the Registrar of Titles and another third party, Massim Cultural Foundation. As the proceedings were commenced by Originating Summons, there is no pleading to assist so careful regard therefore had to be had to the affidavits filed in support of the application. The affidavits provided no factual foundation for the application. All there was, was a belief held by Mr. Jimmy Maladina the owner and proprietor of the Appellant that, the Registrar of Titles ""was an appropriate and proper Defendant to be added"". He did not provide any foundation for his belief.

11. In relation to the application to join Massim Cultural Foundation, there were some material provided of some proposal to bring on a substantial land development but that was on Allotment 3, Section 59, Alotau, which was different from Allotment 5, Section 59, Alotau. Assuming that, the proposal by Massim Cultural Foundation was for the same piece of land as that of the Appellant"s, we note, it was only a proposal.

12. Hence, in respect of the application to join, the Registrar of Titles and Massim Cultural Foundation, the Appellants provided no evidence of anything being done to defeat the Appellant"s interest in Allotment 5, Section 59, Alotau. In other words, nothing has materialized to undermine the Appellant"s interest in respect of the land, the subject of the proceedings, which granted the Appellant a cause of action to join the parties it sought to add as parties to its proceedings.

13. Having due regard to this and the relevant principles of law as we set out above, and the kind of material or evidence placed before the learned trial judge, we cannot see how the trial judge could have made an error in deciding against the application to join parties. Accordingly, we find no merit in the appeal against the National Court"s decision and would therefore dismiss that appeal.

Interim Injunction

14. Turning now to the issue of refusal of the Appellant"s application for an interim injunction, we consider it also important that we should start with a consideration of the relevant principles governing applications for interim injunctions. The Supreme Court decision in *Chief Collector of Taxes v Bougainville Copper Ltd; Bougainville Copper Ltd v. Chief Collector of Taxes*, restated and reaffirmed the relevant principles governing applications for interim injunctions. In so doing, the Supreme Court endorsed the following summation of the relevant principles by Kandakasi J., in *Golobadana No 35 Ltd v. Bank of South Pacific Limited (formerly Papua New Guinea Banking Corporation),*:

> *""A reading of these authorities shows consistency or agreement in all of the authorities that the grant of an injunctive relief is an equitable remedy and it is a discretionary matter. The authorities also agree that before there can be a grant of such a relief, the Court must be satisfied that there is a serious question to be determined on the substantive proceedings. This is to ensure that such a relief is granted only in cases where the Court is satisfied that there is a serious question of law or fact raised in the substantive claim. The authorities also agree that the balance of convenience must favour a grant or continuity of such a relief to maintain the status quo. Further, the authorities agree that, if damages could adequately compensate the applicant, then an injunctive order should not be granted.""*

15. In addition to the principles enunciated there, the Supreme Court further pointed out that, before there can be any grant of an interim injunction, there must be an undertaking as to damages given by the applicant. Where it is a company that is undertaking must be given under seal of the company by the managing director.

16. Applying these principles to the case before us, we note firstly that, there was no evidence of some serious step being taken against the Appellant"s interest in the property, the subject of the proceedings, by any or all of the named Respondents or anybody else. The Appellants applied for interim injunctive orders against the Respondents only because the first to the 4th Respondents raised issues regarding the validity of the purported grant of State Lease over the property to the Appellant. The Respondents and indeed any concerned citizen or resident in the country is entitled to take issue with any purported vesting of title or otherwise ownership in another person of property such as State Leases, as in this case, if in the considered view of such a person, the required process under the *Lands Act* and all other relevant and applicable legislation have not been fully followed and or complied with or came about as a result of fraud or other illegal means. Against such, there can be no injunction, interim or permanent because it is in the public interest that such concerns and or issues be properly inquired into and satisfactorily resolved either administratively or by a formal court hearing and determination.

17. What we have just observed leads to the second point we wish to make and that is this. In order to obtain the interim relief sought, the Appellants were under an obligation to demonstrate to the satisfaction of the Court that, there was a serious question or issue to be tried which had to be disclosed in the pleadings (if the proceedings were by pleadings) or in the originating summons and supporting affidavit. In this case, the Appellants took out an originating summons and moved by motion for interim injunctive orders. The originating summons pleaded only the relief sought. The affidavits filed in support alleged that the first

to the fourth Respondents were interfering with the Appellant"s title and interest without the factual foundation for it. The law is trite. The decision of the National Court in *William Duma v Yehiura Hriehwazi*reiterates the law in these terms:

> *""The law on what must be set out in an affidavit is clear. An affidavit must set out facts to the exclusion of any submissions on the law and or other arguments. For the whole purpose of using affidavits is to put relevant facts in a matter before the Court. This is restated in s. 34(1)(a) of the Evidence Act… in these terms:*
>
> *"(1) Subject to this section, in any legal proceedings before a tribunal to which this Division applies the tribunal may at any time order that—*
>
> *(a) a particular fact or facts may be proved by affidavit; …"*
>
> *This is not surprising because only facts is what the Court is interested in and nothing else except where a person is called to give evidence as an expert, in which case he may be permitted to express an opinion. It is the function of the Court to draw such inferences and conclusions and to determine what is in issue between the parties based on the evidence or facts before it and not a party or a witness. Given this opinions, arguments and or the submissions amounting to a determination on the issue before the Court by [a] witness are inadmissible evidence… and are certainly not facts on which a Court can act.""*

18. In response to what the Appellant put forward before the National Court, the Respondents brought in affidavit material setting out a number of facts. One of the most important revelations by the facts was a purport Lands Board meeting which purportedly decided in favour of a grant of a State Lease to the Appellants. But that was in respect of a property that was also in Alotau but it was for Allotment 5 Section 56 as opposed to Allotment 5, Section 59. Further, the evidence adduced by the Respondents also disclosed that, the Milne Bay Provincial Physical Planning Board made a decision against the Appellant"s application for development because of question marks over the purported grant of the State Lease. None of these facts were disclosed by the Appellant and when the Respondents disclosed them, the Appellant merely denied them and did not file any affidavit material in rebuttal that set out evidence disclosing facts demonstrating the Appellant following all set procedures under the *Lands Act* and all other relevant and applying legislation and that title over the land, the subject of the proceedings, was properly vested in the Appellant.

19. There is a line of authority led by the decision of the Supreme Court in *Emas Estate Development Pty Ltd v. John Mea & Ors* that says, failure to properly follow set procedures for the grant of a State Lease under the *Lands Act* and all other relevant and applying legislation can result in the nullification of the title. In the case cited, the majority, Amet and Salika JJ., (as they then were) with Brown J. dissenting, held that if a title has been forfeited or issued in circumstances that are so unsatisfactory, irregular or unlawful, that amounts to fraud, warranting the setting aside of registration of title.

20. That decision widened the view taken in the earlier case of *Mudge v. Secretary for Lands*, which stands for the proposition that, actual fraud, must be brought home to the

person who eventually acquired the title. That follows the Torrens Title System, which provides for indefeasibility of title upon registration, regardless of how that came about. Only fraud or any of the exceptions listed under s.33 of the *Land Registration Act* can undo the indefeasibility of title.

21. Subsequently, the Supreme Court in *Koitachi Ltd v. Walter Schnaubelt*, reaffirmed the decision in *Mudge* (supra). The Court did take into account, the decision in *Emas* case, but had it distinguished. The distinguishing factor was, the fact that, in the *Emas* case, ownership vested in one person got forfeiture and vested in another.

22. A careful reading of these authorities make it clear that the Supreme Court in *Koitachi* distinguished the decision in *Emas* merely by reference to the difference in the facts, namely the fact of forfeiture of title vested in one person and being vested in another rather than the principles enunciated in that case. The Supreme Court in *Emas*, took into account the process leading to the decision to forfeit title in one person and vesting it in another and said, if forfeiture and transfer of title takes place in circumstances that are so unsatisfactory, irregular or unlawful, that amounts to fraud then title ought to be upset. Hence, in our view, the principle enunciated in *Emas* stands.

23. The wider view per *Emas* has been adopted and followed in the National Court decisions in *Steamships Trading Company Ltd v. Garamut Enterprises Ltd*, by per Sheehan J(as he then was), *Hi-Lift Company Pty Ltd v Miri Setae*, by Sevua J., Ramu Nickel Ltd v. Temu, by Injia DCJ (as he then was).

24. In our view, sense can be made out of the decision in *Mudge* and *Kotachi* on the one side and *Emas* on the other. The decision in *Mudge* and *Kotachi* could work well with one complimenting the other. Where title in certain property has passed a number of hands and or a considerable period of time has passed and is hard to trace back what has happened, the need to bring fraud home to the eventual title holder is sensible and could apply. However, where title in a property has not passed hands or the circumstances leading to either grant or transfer of title can easily be traced and established, the requirement to bring fraud as determined by *Mudge* and *Koitachi* home to the eventual title holder may be inappropriate. The title holder knowing this position of the law may well have deliberately or by his conduct facilitated a breach or otherwise a failure to follow all relevant processes and requirements for a proper, fair, and transparent grant or transfer of title over State Leases, which may fall short of fraud as held by *Mudge* and *Koitachi* to gain from his own illegal, improper, unfair and questionable conduct. This would no doubt run into conflict with well established principles of law which say that, no one can be permitted to gain from his or her own illegal conduct. Against such possibilities, *Emas* does make sense.

25. In our view, the principle enunciated in *Emas* is a necessary safe guard against the abuse of the process prescribed for the proper, fair, transparent and legal allocation of State Leases. In a jurisdiction like PNG where there is ready abused of legislatively prescribed process particularly over a much sought after resources like land, and other regulatory requirements for safety and well fare of the nation, the decision in *Emas* becomes very important. The situation in PNG is not the same as in England, Australia or elsewhere, where the state owns most of the land and there is a large supply of land. Also, unlike Australia and England, there is in PNG, a ready resort to abusing legislatively prescribed process particularly in relation to land as much as other important resources. Under *Mudge*, people

who either deliberately or by their own conduct chose not to follow the proper process laid for applying for and being granted State Leases and eventual registration to gain from their own illegal and improper conduct or failures, which cannot be allowed. Hence it makes sense to qualify the application of the decision in *Mudge* and those following.

26. In this case, an issue has been raised as to following the proper process and meeting of requirements for a proper, fair and transparent legal grant of State Leases. This seriously questioned the Appellant"s claim of clear title over the land, the subject of the Appellant"s proceedings. The Appellant was the very first person to whom the State Lease over the land in question was purportedly granted not so long ago. By failing to address the evidence brought into court by the Respondents, the Appellant failed to put into issue the facts supported by those evidence. The evidence adduced by the Respondents showed that:

> (1) the Provincial Physical and Planning Board did make a decision against the Appellant"s application for approval of its developmental plans; and
> (2) the Land Board did not make any decision to grant the lease/land in question to the Appellant;
> (3) the Appellant, its servants or agents facilitated a grant of the lease outside the process and procedure prescribed by the *Lands Act*;
> (4) there was investigations into how the Appellant secured its title; and
> (5) the actions alleged against the first to the fourth Respondents, concerns land other than the one the Appellants say it was granted a State Lease over and was seeking to develop.

27. These facts remained uncontested. Consequently, the Appellant, failed to put into issue and thus demonstrate a serious question to be tried.

28. It follows abundantly from the foregoing that, the Appellant failed to establish a case for the grant of interim restraining orders. The learned trial Judge therefore correctly refused the Appellant"s application. It follows that, we find no merit in the Appellant"s appeal. Accordingly, we would dismiss the appeal.

29. HARTSHORN J: I have had the opportunity of reading the draft decision of my learned brothers Kandakasi J. and Sawong J. and agree with their reasoning and conclusions concerning the appeal against the refusal to add parties.

30. As to the appeal against the refusal to grant injunctive relief, I respectfully agree with my learned brothers that the Appellant failed to demonstrate before the trial judge that it has a serious question to be tried. Further, the Appellant, in my view, failed to demonstrate that damages would not be an adequate remedy if indeed, it had demonstrated that it has a serious question to be tried.

31. I am not satisfied that the trial judge made any error as such that the appeals should be upheld.
32. Given the above, both appeals should be dismissed with the First and Fifth Respondents entitled to their costs.

Decision of the Court

33. Having regard to what we have said and found in respect of both of the Appellant"s appeal, we make the following orders:

1. Appeals SCA 32 and 33 of 2009 are dismissed as having no merit.
2. The Appellant shall pay the First to the Fourth Respondents" costs, which shall be agreed if not taxed.

Ketan Lawyers: *Lawyers for the Appellant*
Liosi Lawyers: *Lawyers for the First to the Fourth Respondents*