SC1859

PAPUA NEW GUINEA
[IN THE SUPREME COURT OF JUSTICE]

SCA No. 126 OF 2011

BETWEEN:
RIMBUNAN HIJAU (PNG) LIMITED
Applicant

AND:
INA ENEI AS ADMINISTRATOR OF THE ESTATE OF IBI ENEI DECEASED ON HIS OWN BEHALF AND ON BEHALF OF MOGA CLAN OF LOUPOM ISLAND, ABAU DISTRICT, CENTRAL PROVINCE
Respondent

Waigani: Salika CJ, Kandakasi DCJ & Toliken J.
2019: 27th June
29th October

PRACTICE & PROCEDURE –Slip Rule Application - Principles governing slip rule application - Basis for claiming slip - No slip by Court - Application for leave dismissed - O.11, 32(1) Supreme Court Rules.

COSTS – Slip Rule applications – Applications without any merit – Effect of – Waste of judicial time and imposition of costs unnecessarily – Court to impose costs on own solicitor and client or full indemnity bases.

Cases Cited:

Andrew Trawen and Anor v. Stephen Pirika Kama and Ors (2010) SC1063
Moses Manwau v. Andrew Trawen (2011) SC1159
Francis Kunai &n Ors v. Papua New Guinea Forest Authority & Ors (2018) N7570

Counsel:

Mr. I. Molloy and W. Frizzell, for the Applicant
Mr. L. Yandeken, for the Respondent

29th October, 2019

1. BY THE COURT: The Appellant, Rimbunan Hijau (PNG) Limited (RH)

is claiming this Court made certain slips on 25th September 2017 when it came to its final decision on its appeal. The alleged slips are listed in the grounds for the slip rule application at paragraph 2 of the application. The Respondent, Ina Enei for and on behalf of the Moga Clan (the Moga Clan) in response says, the Court made no slips and RH's application is an attempt at having its appeal rehashed.

Issue for determination

2. The issue for the Court to determine therefore is, whether the Court made the alleged slips in its judgment and they warrant a revisit and correction?

Background facts

3. This matter initially came to the Supreme Court by way of an appeal from the National Court which ordered judgment against RH in the sum of K6, 198,599.38 with costs and interests. That was for trespass and continued trespass and illegal use of Moga Clan's customary land by RH. Having heard the parties fully on the appeal, this Court reserved and eventually on 25th September 2017, handed down a detailed written judgment dismissing the appeal. That should have been the end of the matter.

The Principles Governing on Slip Rule

4. However, recognising the fact that judges are humans and as humans they are susceptible to making mistakes, the law does allow for parties to return to the Court to seek correction of any errors under what has in time become known as the "slip rule". The principles governing slip rule applications are well settled in our jurisdiction. In the five-member Supreme Court decision in *Andrew Trawen and Anor v. Stephen Pirika Kama and Ors*, the Court after a review of the various authorities on point, settled the following as the principles that govern all slip rule applications:

(a) There is a substantial public interest in the finality of litigation.

(b) On the other hand, any injustice should be corrected.

(c) The Court must have proceeded on a misapprehension of fact or law.

(d) The misapprehension must not be of the applicant's making.

(e) The purpose is not to allow rehashing of arguments already raised.

(f) The purpose is not to allow new arguments that could have been put to the Court below.

(g) The Court must, before setting aside its previous decision, be

satisfied that it made a clear and manifest, not an arguable, error of law or fact on a critical issue.

5. These principles have been consistently applied in many earlier and subsequent decisions of the Supreme Court, such as the decision in *Moses Manwau v. Andrew Trawen* with followings in the National Court as demonstrated by the decision in *Francis Kunai & Ors v. Papua New Guinea Forest Authority & Ors*.

Present Case

6. With these principles in mind we turn to a consideration of each of the claims of slip.

(i) Ground (a)

7. The first of the claim reads:

> "(a)
> i. Slip – at page 9 (paragraph 10) of its reasons for judgement the Court found that the Parties agreed upon the issues for trial and the issues raised in appeal grounds, inter alia, 7, 8, 9, 10 and 18 were not the issues agreed upon and therefore, inter alia, the Appellant was raising those issues for the first time on appeal meaning those grounds must be dismissed according to law.
>
> ii. Finding Contended For – the appeal ought to have been upheld in respect of grounds 7, 8, 9, 10 and 18. The statement of agreed and disputed facts and legal issues for trial was agreed and filed in the National Court proceedings on 08.05.2006 ("the statement").
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> Grounds 7, 8 and 18 concerned the affidavit of Ibi Enei sworn 26 November 2007 and its annexures "A" and "B" (pages 286-298 appeal book) which were filed 18 months after the statement, relied upon at trial and to which objection was taken. Therefore, they could not be dismissed.
>
> Grounds 9 and 10 concerned the affidavit of Ibi Enei sworn 28 June 2006 and its annexures "F" and "G" which was filed after the statement, relied upon at trial and to which objection were taken. Therefore, they could not be dismissed."

8. As can be seen, RH claims that it did raise the issues raised in its appeal grounds 7 – 10 and 18 at the trial and as such they were entitled to raise them on appeal as of right. Hence, it argues this Court wrongly arrived at the view that it failed to raise the issues at the trial and was therefore precluded from raising them on appeal. That decision, it argues, prevented this Court from considering the issues raised by these grounds of its appeal.

9. As we noted at paragraph 2 of the main judgment, RH failed to present its appeal grounds in a way that was easier to understand and follow through. We therefore had them rearranged to enable better understanding and a proper dealing with each of the grounds of appeal. Then, relevantly we summed up the grounds of appeal as follows:

> "(4) admitting into evidence, hearsay, newspaper cuttings and other documentary evidence and acting on inadmissible evidence (grounds 7, 8, 9, 10, 17);
> (5) made certain findings of fact and made the award (grounds 13, 14) without the support of any evidence (grounds 11, 12, 15, 16, 29);
> (6) basing the award of damages upon the total economic benefits it had obtained from log exports and not calculating the respondents loss by reference to deprivation of their use of and diminishing the value of the lands by the alleged trespass and illegal use resulting in deprivation of their use of the land and (grounds 1, 3, 18, 19, 20, 28)…"

10. Moga Clan, argued against appeal grounds, 7-10 and 18 on two main foundations. Firstly, these issues were not included in the parties agreed statement of facts and issues for trial. Secondly, RH did not take any serious issue against the National Court accepting into evidence and acting on the basis of the documentary and other evidence that were before the Court. The Court therefore, correctly proceeded to assess damages in the way it did. Given that, RH was at no liberty to raise the issues on appeal. At paragraph 10 of our main judgment here is how we came to our decision on the issue:

> *"10. In the present case, we note that the parties agreed upon the issues they were going to trial for. The issues raised in appeal grounds 7, 8, 9, 10, 18, 23, 33, 34, 35 and 36 were not on the list of issues agreed upon. Additionally, the record of the trial per the transcript of proceedings in the National Court bears no witness of RH raising any of these issues in the National Court. No doubt RH is raising these issues for the first time in this appeal without first raising them in the Court below. This, it cannot do for reasons outlined above. Additionally, for ground 23, RH offers no arguments or submission. Accordingly, we order grounds 7, 8, 9, 10, 18, 23, 33, 34, 35 and 36 be dismissed."*

11. In its slip rule application, RH claims its appeal grounds 7-10 and 18 were raised in issue 3.3 in the parties agreed statement of facts and issues. Given that, it argues this Court wrongly arrived at its decision that, these issues were not included in the issues at the trial.

12. Issue 3.3 in the statement of facts and issues reads:

> "3.3 Whether the defendant should pay any damages to the plaintiff and if so, what should be the amount payable"

13. Clearly, this issue as stated does not raise the issue of admitting into evidence, hearsay, newspaper cuttings and other documentary evidence and the trial Court acting on inadmissible evidence, which are the subject of RH's appeal grounds 7, 8, 9, 10, 17 and 18. These issues, as admitted by RH, if raised at all, that would have been during the trial and in the parties' submissions after the trial. Pages 374 and 375 of the appeal book records learned counsel for RH expressly entering no contest on the evidence called by Moga Clan. In grounds 7 – 10 and 18, RH effectively made a complete change and was taking issue on a matter it chose not to enter any contest.

14. At the hearing of the appeal, the Court had regard to RH's conduct at the trial on these issues. If RH did raise these issues, it was incumbent upon its counsel to draw to this Court's attention specifically to the relevant part of the transcript or their submissions raising these issues. This Court considered the statement of facts and issues, the record of proceedings in the National Court and the submissions of the parties and the learned trial judge's judgment. Having regard to all of that, this Court in its deliberate judgment came to the decision that, RH failed to raise the issues under consideration at the trial. As such, it was precluded from raising them for the first time in this Court.

15. In any case, we note that we have in fact gone into the merits of what the various appeal grounds sought to raise. What we said at paragraphs 47 and 48 are relevant. Here is what we said in relevant parts:

> *"47. As we noted earlier, RH neither objected to the evidence adduced for Moga, nor did it adduce any evidence in rebuttal and presented the actual position on the number of log shipments and their value. No doubt, RH was in a position to adduce into evidence the correct and relevant records but it failed to do so and failed to object to the only evidence Moga was able to adduce into evidence. Now with the Courts worldwide encouraging more settlement through direct negotiations, or mediation or a form of ADR ... all parties should be dealing with each other in a fair, frank and open manner. ... [T]he days of a party putting his foot down and forcing a plaintiff to his prove are long gone now in light of the Courts ... requiring and prompting more out of Court settlement through direct negotiations, mediation or a form of ADR. This means necessarily that, a party who is in possession or is required and or expected to have in his possession any relevant information, documents or such other evidence, which hold the key to resolving a dispute, must disclose them, unless such a party is precluded by an order of the Court or any clear legislative provision from doing so. Where there is a failure to so disclose, the Court is entitled to admit into evidence whatever evidence the opposing party is able to produce and make use of such evidence in order to do justice on the substantive merits of the case.*

48. Here, RH was the party which had or should have had in its possession the relevant records or evidence of the volume of logs exported and their market value for the whole of the 8 years it was in occupation of Moga's Land. If RH did not have in its possession such evidence or record, the duty was on RH to provide a reasonably convincing explanation as to what became of the evidence. RH neither produced the relevant evidence, nor did it provide any reasonable explanation for not being able to produce them. In those circumstances, the learned trial Judge did the best he could to arrive at a decision. Now on this appeal, RH tries to do what it failed to do in the Court below in terms of taking issue with the admission into evidence and the Court making use of evidence adduced in the Court below. On Moga's objection, we decided against RH's belated attempt at raising arguments or raising issues it should have raised in the Court below. The evidence and the pleadings were thus before the learned trial Judge for him to consider, unopposed as they were. Unlike in a criminal case, all that the learned trial Judge needed to be satisfied with was the question of, did Moga as the plaintiff, establish its claim on the balance of probabilities. The learned trial Judge decided to make use of the evidence before him in the light of no objections or argument against him doing so and arrived at his decision."

16. Obviously, this Court did not make any slip of the type that warrants a revisit and correction. Instead, the Court came to a deliberate judgment on the issues in question. What RH is doing here in these circumstances, is a reagitating of its appeal hoping for a different result. The slip rule procedure is not available for such attempts. Hence, we find no merit in slip rule ground (a).

(ii) Ground (b)

17. This takes us to slip rule ground (b). RH abandoned this ground at the hearing. Hence, it requires no further consideration.

(iii) Ground (c)

18. Turning then to slip rule ground (c), this ground pleads:

"(c)

i. Slip - at paragraph 35 to 43 of the reasons for judgement the Court considered the relevant principles in accordance with the established cases concerning the award of general damages for trespass whereby those damages relate to the value of the use of the plaintiff's land by the trespasser rather than the benefit derived by the defendant/trespasser from its business as a whole. At paragraph 37 and following on from the reasons for judgement the Court

incorrectly assessed damages based on the whole benefit derived from the Appellant/defendant's business.

ii. Finding Contented For – the Court ought to have allowed the appeal on the basis that the damages should not be calculated on, inter alia, the sale of all logs by the defendant/Appellant (its whole business) but rather on the value of its use of the plaintiff/ respondent's land (and damage to it)."

19. From paragraph 35 through to paragraph 43 in our main judgment, we gave detailed consideration to the principles on assessment of damages for trespass. That discussion included a consideration of how the learned trial judge in this case dealt with the issue. We then made three important observations. Firstly, at paragraph 38 we noted that damages done to land in developed economies and more so in cities or town may not be the same for a land located in a rural setting. Hence, assessing damages for trespass to rural lands must be different for those used for city or town lands. This is because in the rural areas:

> *"... it is from the land itself in their natural setting in most cases, provide survival supplies to the people, for food, accommodation and other basic needs that sustain them. Such land support hunting, gathering and even gardening. When the original state of the land is changed with its natural habitat and vegetation and other natural properties lost, it becomes totally useless for a rural dweller. Depending on the size of the land and the nature and extend of the damage done, the landowner will no longer be able to hunt, gather, garden or otherwise use his land in the same way before. These cannot be re-established easily within a short space of time or at less cost and in any case if possible, not back to its original position. This is why we say damages for such land are immeasurable and might be continuous for many generations to come for the landowners. Given these, the way damages are calculated in the developed economies and or in cities and towns, cannot be used to assess damages done to a land situated in a rural setting."*

20. Secondly, at paragraph 40, we observed that, the assessment of damages for trespass at common law effectively allows for a trespasser to gain from his or her own illegal conduct. Here is how we reasoned:

> *"Trespass is clearly an illegal activity, which is both a criminal and a civil wrong in nature which can result in criminal prosecution and a civil claim for damages. Following the English common law or case law approach as adopted and applied in PNG already, effectively allows a trespasser to gain from his or her own criminal or unlawful conduct and get away with it save only for the small amount of damages as assessed in the past cases. We are of the view therefore that, any assessment of damages must have a clear reflection of the extent of a*

trespasser's gain out of his or her illegal entry and use of another's land, and not the rate that applies to rental of city and town land areas or indeed any such rate in terms of price per square meters. Both fairness and equity demand that the damages that ultimately get assessed against a trespasser should indeed reflect the gains the trespasser has made out of his or her illegally using another's land as in this case, which may far exceed the price per square meter."

21. Thirdly, we observed at paragraph 41 that, a landowner may be hard placed to produce evidence going into the trespasser's use and gain from the land. Such information or evidence could be and should be expected to be with the trespasser. Hence, the trespasser has the onus to produce the relevant evidence or information. This is necessary to allow for fair litigation and most importantly for the prompt resolution of disputes. A failure to provide such information or evidence by the trespasser should, allow for the use of any secondary or tertiary evidence produced by a landowner to be admitted into evidence and form the basis for an assessment of damages.

22. Then having regard to the observations, we made, we concluded at paragraph 43:

"Having regard to all of these, we are of the view that the amount to be awarded in damages in the case of trespass and illegal use of another person's land, it would depend on the extent of damages caused to the land and gains made by the trespasser. This could be measured against the degree and value added to the trespasser's business or gain against the total gross income and not on the profit figures and before deducting the trespassers expenses to produce the income or gain before tax. Such an approach is dictated by the fact that, damages to the land would have already occurred as the trespasser incurs expenses for businesses conducted on the land. There is also the risk of a trespasser inflating his or her expenses to produce no profits or negative profit figures and the landowner not being compensated at all."

23. As can be seen, we gave careful consideration to all of the arguments the parties put forward. Then in our deliberate judgement made critical observations and made a deliberate decision to depart from the traditional approach to assessment of damages for trespass. We believe we gave good reasons for that. By no means, this amounts to a slip or a decision arrived at lightly. Also, it was not a decision arrived at through a misapprehension of the relevant facts or the law on the part of the Court. Further, this was not a decision that was arrived at in a clear error of law or fact on a critical issue. What RH is in effect doing here is rehashing the arguments it already put before us at the hearing of the appeal, which we considered and come to a deliberate judgment against it. Thus, this ground of the slip rule fails to come within the ambit of slip rule applications.

(vi) Ground (d)

24. The next slip rule ground for us to consider than is ground (d). This ground pleads:

> "(d)
> i. Slip - at paragraph 44 of the reasons for judgment the Court accepted an assessment of damages from Partners with Melanesia and Environmental Science and Community Development Foundation.
>
> ii. Finding Contented For - grounds 7, 8 and 9 of the appeal should have been upheld (as to which see paragraph (a)) and as the person who made these "assessments" did not give "any evidence regarding the nature and the extent of the damage caused to those areas". The evidence was inadmissible hearsay or assertion and the Court ought to have rejected it or found it had no probative value."

25. In our view, this ground flows on from ground (a). We repeat the observations and comments we made in respect of slip rule application grounds (a) and (c) which sufficiently cover this ground. Proceeding on that basis, we find no merit in this ground.

(v) Ground (e)

26. The next ground for the slip rule application we turn to is the second last of the grounds namely, (e). This ground pleads:

> (e)
> "i. Slip – at paragraph 51 to 61 of the reasons for judgment, the Court found there should be an award of exemplary damages.
>
> ii. Finding Contented For - ground 36 of the appeal ought to have been allowed on the basis that the name plaintiff was deceased and section 34(3)(a) of the Wrongs (Miscellaneous Provisions) Act Ch. 297 precluded exemplary damages for the benefit of a deceased estate."

27. A perusal of the main judgment does not reveal any specific mention of the original Plaintiff in the National Court and Respondent in the appeal having died. It would therefore, appear that the Court could have slipped on this point. This calls for a close examination of the judgment and determine if the court did not address this issue and if the Court did not address the issue, was it detrimental and warrants correction.

28. A close reading of the whole of the judgment and in particular paragraphs, 18, 25 – 32 and 54 – 59 of the judgment makes it clear that, the judgment brings out the point that customary land is owned by clans in PNG. In this case, the two competing customary landowners were the Warata and Moga clans, in the Abau District of the Central Province. The main judgement through the paragraphs mentioned above makes it clear that, RH had the duty to carry out proper land owner identifications, have the correct land owning clan or clans confirmed and organise them into incorporated land groups (ILGs) and contract with them before entering the land and conducting its business on it. If RH did that, the issue of the original plaintiff or respondent having died could be none issue. Besides, unless there was a genocide or such an adverse eventuality which wipes out a clan, they live on. That was and is no doubt the case here. In any case, there has been a substitution of the original plaintiff and respondent to Ina Enei for an on behalf of the Moga Clan. The continuation of the proceedings in the National Court and responding to this appeal for the Moga Clan bears testimony to the fact that, this is a matter in which the Moga Clan as an interest and that the action has been and for the clan and its members. Finally, we also note that, the demise of the original plaintiff and respondent came after the judgment of the National Court. Having regard to all these, we are of the view that, the issue of the original plaintiff and respondent having deceased is of no consequence, and was bound to fail. Consequently, we find the slip was of no consequence to the outcome of the appeal and any of main foundations for the main judgment. Accordingly, we find this ground of the slip rule application is also without merit.

(v) Ground (f)

29. The remaining and final ground for the slip rule concerns an award of K5, 000.00 in special damages. This ground is pleaded as follows:

> "(f)
> "i. Slip - at paragraph 62 to 65 of the reasons for judgement the Court affirmed on appeal an award of K5, 000 on special damages.
>
> ii. Finding Contended For - grounds 33 and 34 of the appeal ought to have been allowed on the basis that those grounds ought not to have been dismissed (see paragraph (a) herein) and that the supposed special damages were in fact costs or expenses in connection with the litigation and not special damages."

30. We gave careful consideration to the issue raised in this ground of the slip rule application in our main judgment. Essentially, this Court was of the view that there was some merit in this ground of the appeal. However, at the end, it did not matter because RH still had an obligation to meet an order for costs which could include the amounts awarded in special damages. In its deliberate judgment this Court concluded:

> *"Strictly speaking, the damages the learned trial Judge awarded would have been costs of the proceedings. His honour's order*

for costs could cover these (sic) expenditure. However, it makes no difference in the end result. The liability remains for RH to discharge. At the trial, RH neither produced any evidence nor did it present any argument in rebuttal. Additionally, we do not consider the award excessive or totally inappropriate. On the taxation of Moga's costs, under the costs order, the items allowed under the special damages should be excluded."

31. Obviously, this Court made no slip such that, it calls for correction. Instead, the Court arrived at a deliberate decision with good reason. Hence, we see no merit in this ground for the slip rule application.

Decision on the Slip Rule Application

32. Ultimately, we find each of the grounds for the slip rule application before us, has not been made out. Each of the grounds fail to come within the kind of grounds that would warrant a proper slip rule application. Instead, this is an attempt at RH rehashing its appeal which was properly dealt with on its merits and a final decision correctly arrived at. Accordingly, we order a dismissal of the application with costs to the Respondent to be taxed, if not agreed.

Inappropriate use of slip rule process

33. We have given some serious thought to ordering costs on the higher rate of solicitor and own client or full indemnity basis. We have done so, in view of many people resorting to the slip rule procedure as a matter of course instead of giving serious and careful thoughts to such applications before utilizing that process only in appropriate cases. In this case, the application clearly had no merit. Yet it took three judicial officer's time going through a matter that was properly concluded. The time thus taken could have been better utilized to hear and dispose of other matters. No doubt, the Court's time has been unnecessarily taken up and costs unnecessarily forced upon the Respondent and the Court. RH's application has also kept the Respondent out of the fruits of the judgment in their favour. We warn that, in future, the Court should on its own motion order costs on a solicitor and own client or full indemnity basis to deter unnecessary and baseless applications coming to the Court under the slip rule application process. That will in turn enable only cases with clear slips which seriously affect the outcome of an appeal or review or any proceeding before the Supreme Court coming back to the Court under the slip rule process.

Formal orders

34. We make the following formal orders:

(1) The Appellant's slip rule application filed on 30th May 2019 is dismissed.

(2) Judgment and orders of the Court dated 25th September 2017 are affirmed.

(3) Costs to the Respondents to be taxed, if not agreed.

Warner Shand Lawyers:	*Lawyers for the Applicant*
Yandeken Lawyers:	*Lawyers for the First Respondent*