PAPUA NEW GUINEA

NATIONAL COURT OF JUSTICE

OS (JR) NO. 259 2006

BETWEEN

KEN NORAE MONDIAI
First Plaintiff

AND:

PNG ECHO FORESTRY FORUM INC
Second Plaintiff

AND:

JOHN DANAIYA
Third Plaintiff

AND:

WAWOI GUAVI TIMBER COMPANY LIMITED
First Defendant

AND:

PAPUA NEW GUINEA FOREST AUTHORITY
Second Defendant

Lay J.

WAIGANI

19 May 2006, March 2007

Facts

The Plaintiffs seek leave for judicial review, inter alia, of a decision the Second Defendant's Board took on the 20th of December 2005 to settle, in favour of the First Defendant, proceeding brought by the First Defendant for mandamus to force the Second Defendant to grant to it a Timber Resource Area known as Kamula Doso, as an extension to the First Defendant's existing Timber Permit.

Held:

1. There was no delay in bringing the application in respect of the 20th December 2005 decision;
2. There was no other administrative remedy available to the plaintiffs;
3. On the evidence there was an arguable case that it was unlawful for the Second Defendant to proceed with the decision of the 20th December 2005, prima face in the absence of a National Forest Plan which provided for Kamula Doso and the annual permissible cut of timber. It is also arguable the decisions to extend the period to which the National Forest Plan relates without addition of further data required by s47 are *ultra vires* the powers of the Board of the Second Defendant;
4. To test for "sufficient interest" in O16 r 3(5) of the National Court Rules it is necessary to examine the relationship of the Plaintiffs to the nature of the breaches of law alleged;
5. The nature of the breaches of law alleged failure by the Board of the Second Defendant to fulfil its duty to produce a National Forest Plan based on a National Forest Inventory and deal with it as required by s48 of the *Forestry Act*, and the allocation of forest resources not in accordance with the plan contrary to Section 54 of the *Forestry Act*;
6. Each of the plaintiffs has sufficient interest in the lawful allocation of forest resources and thus sufficient interest for the purposes of *National Court Rules* O16 r3(5) as the First Plaintiff is a director of the Second Defendant with statutory duties; the Second Plaintiff was recognised in s.10 of the *Forestry Act* and the Third Plaintiff is an owner of land in the Timber Permit area sought to be joined with Kamula Doso.
7. Leave to proceed granted.

Cases Cited

Inland Revenue commissioners and National Federation of Self Employed and Anor [1982] 1 AC 617

N1595 *Steamships Trading Co Ltd v Garamut Enterprises Ltd*

Papua New Guinea Pilots Association v Director of Civil Aviation and National Airline Commission trading as Air Niugini [1983] PNGLR 1

NTN Pty Ltd v Board of the PTC, PTC and Media Niugini Pty Limited [1987] PNGLR 70

Diro v Ombudsman Commission of Papua New Guinea [1991] PNGLR 153,

Ombudsman Commission v Dohonue [1985] PNGLR 348

Ila Geno, Paul Lawton and Florian Mambu v Independent State of Papua New Guinea [1993] PNGLR 22

Application of Demas Gigimat [1992] PNGLR 322

Council of Civil Services Unions v Minister for the Civil Service [1984] 3 ALL ER 935

Kekedo v Burns Philip (PNG) Limited [1988-89] PNGLR 122

Ombudsman Commission v Dohonue [1985] PNGLR 348

N856 Ex parte application of Eric Gurupa,

N1226 *Mark Kove v Secretary Department of West New Britain Province,*

In the matter of the Ex Parte application of Poka Biki, [1995] PNGLR 336

Application of Evangelical Lutheran Church of Papua New Guinea by Evangelical Lutheran Church of Papua New Guinea Superannuation Fund [1995] PNGLR 276

N1895 *Silas Mareha v The Chairman – Redundancy Monitoring Committee & Ors,*

Counsel
T. Nonngor for the First and Second Plaintiffs
N. Kopunye for the Third Plaintiff

1. **LAY J.**: The plaintiffs, ex parte, seek leave to proceed with an application for judicial review of some seven steps and four decisions taken by the Second Defendant in the allocation of a timber rights purchase area (TRP) known as Kamula Doso in the Western Province. Principally what the plaintiff seeks to have reviewed is a decision of the Second Defendant's Board made on the 20th of December 2005 to settled proceedings OS 557/2006 which are proceedings between the First and Second defendants. The translation of that settlement into an order of the Court is the subject of a separate appeal in the Supreme Court (SCM No. 3 of 2006).

2. The matter first came before me on the 19th of May 2006. Then the application of John Danaiya to be joined as a party was allowed and the application of the defendants to be heard on the leave application refused.

Subsequently on the 4th of July 2006 in the application of the Ombudsman Commission to be joined as a party was refused.

3. The plaintiff's case is supported by the affidavit of Ken Norae Mondiai sworn 18 April 2006.

4. A great deal of the contents of this affidavit is inadmissible, being based on reports of which the deponent is not the author or on information and belief, i.e. hearsay. One of the reports purports to be a report of the Ombudsman Commission but there is no provision in the Organic Law on the Ombudsman or the *Evidence Act* authorising me to take judicial notice of such reports.

5. Confining myself then to the areas in which the deponent appears to have personal knowledge as to the facts strictly relevant, from the material filed by the plaintiffs I note the facts as follows.

6. The Second Defendant published a document entitled "National Forest Plan". This document was sent to the Minister who tabled it in Parliament in accordance with s48 of the *Forestry Act*. A copy of that document is filed in the Parliamentary Library. It does not contain any reference to Kamula Doso. This document I later refer to as the NFP

7. Other documents also entitled National Forest Plan have been prepared and published by the Second Defendant which do refer to Kamula Doso. These documents have not been tabled in the National Parliament.

8. No National Forest Inventory, within the meaning ascribed by the *Forestry Act* has ever been prepared. The National Forest Plan is to be based on the National Forest Inventory. The NFP is confined to events and circumstances up to 2001. It contains no information, such as maximum allowable cut, for any year after that date.

9. The NFP was expressed by its terms to apply to the period 1996 to 2001. On the 9th of December 2002 the Board of the Second Defendant resolved "*that the Board approves the currency of the National Forest Plan for 12 months subject to extensive consultation with Area Managers and Provincial Forest Officers on the finalisation of Provincial Forest Plans.*"

10. In 1997 the Second Defendant entered into a Forest Management Agreement (FMA) with persons purporting to represent the traditional landowners. A large number of the traditional landowners had formed incorporated land groups (ILG's). Subsequent examination of the FMA and comparison with the authorised signatures of the ILG's showed some 38 ILG's consents had been endorsed by unauthorised persons. This required rectification which was attended to in 1999. The rectified document has not been approved by the Minister.

11. On the 20th of December 2005 the Second Defendant by its Board resolved as follows:

> " *(i) Pursuant to the resolution of Board Meeting No. 54 of 4th February 1999 Wawoi Guavi Timber Co. Ltd (WGTC) was "invited" to submit Project Proposals under Section 64 (3) (amended) of the Act.*
>
> *(ii) the Board represented its intentions to grant extension to Kamula Doso FMA in correspondences subsequent to 4th February 1999 resolution notice as confirming the invitation to the Developer.*

(iii) WGTC submitted its application on account of Forestry Regulation Form 92 on the 23rd of March 1999 pursuant to Section 64 (3) (amended) of the Act.

(iv) Resolved that by operation of or in accordance with Section 63 (1) of Interpretation Act Ch. No.2, the Board shall and does hereby determine and approve Wawoi Guavi Timber Company's (WGTC) application pursuant to Section 64 (3) (amended) and not Forestry Amendment Act, 2000.

(V) Resolve that the Forestry Management Agreement (FMA) of October 1997 is valid and subsisting. However, the FMA has been rectified by the parties. The Minister for Forests shall be advised to sign the rectified FMA document.

(VI) The legal proceedings numbered OS No. 557 of 2004;-

a) Be settled out of Court (in the light of the overwhelming legal advice not in favour of success); and

b) That an appropriate Deed of Settlement and Release with an appropriate court order in the form of duly agreed terms be executed; and

c) No order as to costs; and

d) That the PNGFA lawyers be instructed accordingly.

(VI) that the Board directs the Acting Managing Director to negotiate and executes the terms of the Deed of Settlement & Release pursuant to Resolution (VI) above".

12. On 9th of March 2006 the second defendant by its managing director executed a deed of settlement which *inter alia* provided that the First and Second Defendants would:

> *"make no objections to an Order being made by the National Court of Justice of Papua New Guinea in terms of the draft order which is annexed hereto marked "A"".*

13. The same day that the deed of settlement was signed the second and third defendants came before Injia DCJ who, on the application of the first defendant and without objection from the second defendant ordered:

> *"An order in the nature of mandamus is hereby granted requiring the Defendant to forthwith implement and give effect to the decision of the National Forest Board made at meeting No: 54 on 4 February 1999 that the*

Plaintiff be granted Forestry Management Area in the Western Province Kamula Doso as an extension to the Plaintiffs existing Timber Rights Permit.

14. The plaintiff seeks to have the NFP and the FMA 1997 declared invalid and decisions taken on them declared void. They seek a declaration that the TRP 1-7 saved by *Forestry Act* Section 137 and 143 cannot be geographically extended. They seek that the resolutions passed on the 20th of December 2005 and the deed executed on the 9th of March 2006 be quashed and consequential prohibition, and interim injunctions.

The Law

15. The purpose of a leave application is to:

> *"...prevent the time of the court being wasted by busybodies with misguided or trivial complaints of administrative error, and to remove the uncertainty in which public officers and authorities might be left as to whether they could safely proceed with administrative action while proceedings for judicial review of it were actually pending even though misconceived"*: per Lord Diplock, and is there a:
>
> *"genuine grievance reasonably asserted"*: Lord Scarman".

16. Both quotations are from the House of Lords decision in *Inland Revenue commissioners and National Federation of Self Employed and Anor* [1982] 1 AC 617 .

17. The role of the Court on an application for leave to seek judicial review is simply to express a view as to whether or not the case might be arguable based on a quick review of the Plaintiff's material. If the judge forms the view that on a closer examination it may turn out that there is an arguable case for granting the relief then leave should be granted: See *Inland Revenue Commissioners v National Federation of Self Employed*

and Small Business Limited [1982] AC 617 at 644 applied in *NTN Pty Ltd v Board of the PTC, PTC and Media Niugini Pty Limited* [1987] PNGLR 70 Wilson, J. *Diro v Ombudsman Commission of Papua New Guinea* [1991] PNGLR 153, Sheehan, J. The Court need only be satisfied with the requirements of O16 r2, 3, & 5. The Court is not required to address the matters in O16 1(2). Substantive issues should be considered at the substantive hearing: See *Ombudsman Commission v Dohonue* [1985] PNGLR 348 at 361 applied in *Ila Geno, Paul Lawton and Florian Mambu v Independent State of Papua New Guinea* [1993] PNGLR 22.

18. The Court is not concerned with the merits of the decision but with the decision making process: See *Application of Demas Gigimat* [1992] PNGLR 322 Woods, J. Judicial review may be available where there is a lack of power, there is an error of law on the face of the record, there is a breach of the rules of natural justice, or in breach of the Wednesbury principles a power is exercised in an unreasonable manner, or a decision is made which no reasonable tribunal could have reached: See *Council of Civil Services Unions v Minister for the Civil Service* [1984] 3 ALL ER 935 per Roskil LJ; *Kekedo v Burns Philip (PNG) Ltd* (infra) at 124 per Kapi DCJ.

19. It is impossible to give a complete definition of what amounts to an error of law, however:

> *"It includes the giving reasons that are bad in law or (where there is a duty to give reasons) inconsistent, unintelligible or substantially inadequate. It includes also the application of a wrong legal test to the facts found, taking irrelevant considerations into account, exercising discretion on the basis on any other incorrect legal principles, misdirection as to the burden of proof, and wrongful admission or exclusion of evidence, as well as arriving at a conclusion without any supporting evidence. Error of law also includes decisions which are unreasonably burdensome or oppressive: Judicial Review of Administrative Action, De Smith, Woolf and Jowell, 5th Ed. Para 5-90 (5).*

20. Judicial review is not available to review decisions which fall into the area of managerial or administrative discretion: *Inland Revenue commissioners and National Federation of Self Employed and Anor* [1982] 1 AC 617

21. On an application for leave the Court must be satisfied that the applicant has sufficient interest in the subject matter of the application: See O16 r3(5). Only questions of standing which are obvious should be resolved at the leave stage. Sufficient interest might be demonstrated by interests of property, legal or financial nature but can include civic (community) environmental, cultural interests and areas of special expertise: See *Judicial Review of Administrative Action,* de Smith, Woolf and Jowell 5th Ed 127 cited in N1595 *Steamships Trading Co Ltd v Garamut Enterprises Ltd,* Sheehan, J. and *Papua New Guinea Pilots Association v Director of Civil Aviation and National Airline Commission trading as Air Niugini* [1983] PNGLR 1 at 3, Sakora, J.

22. To determine if the Plaintiff has sufficient interest, I must look at the whole of the evidence and ask (1) what is the public duty owed by the Second Defendant of which it is alleged to be in breach and (2) what is the nature of the breaches of that duty that are relied upon by the Plaintiffs and the relationship of the plaintiff to those breaches? Those questions are a paraphrase of what Lord Diplock said in *Inland Revenue Commissioners and National Federation of Self Employed and Anor* [1982] 1 AC 617 where all the Lords were agreed that those were relevant matters to the question of *sufficient interest,* along with the nature and closeness of the relationship of the plaintiffs to the matter in question.

And of course I can consider those issues with the issues which arise from the purpose of a leave application explained above in paragraph 15.

23. Also in *Inland Revenue commissioners and National Federation of Self Employed and Anor* [1982] 1 AC 617 Lord Fraser said

> *"I recognize that in some cases, perhaps in many, it may be impracticable to decide whether an applicant has a sufficient interest or not, without having evidence from both parties as to the matter to which the application relates, and that, in such cases, the court before whom the matter comes in the first instance cannot refuse leave to the applicant at the ex parte stage, under rule 3(5)."*

24. It is a fundamental rule that the judicial review remedy is not available where the Plaintiff has not exhausted other remedies which may be available, such as statutory rights of appeal: *State v Kapal* [1987] PNGLR 417 at 421 Kidu CJ and Woods J, except in the most exceptional circumstances: See *Kekedo v Burns Philip (PNG) Limited* [1988-89] PNGLR 122 per Kapi DCJ at 124 Amet J at 127, where facts and circumstances show that judicial review is more appropriate or convenient to do justice. That judicial review may be quicker is not such a circumstance.

25. And the Court may refuse to grant leave if there has been delay and the grant of relief would prejudice the rights of any person or be detrimental to good administration: See O16 r4, *N856 Ex parte application of Eric Gurupa,* Doherty J.; N1226 *Mark Kove v Secretary Department of West New Britain Province,* Injia AJ. The Court must consider the facts of delay in each case: See *In the matter of the Ex Parte application of Poka Biki,* [1995] PNGLR 336, Doherty J. Delay should be satisfactorily explained: see *Application of Evangelical*

Lutheran Church of Papua New Guinea by Evangelical Lutheran Church of Papua New Guinea Superannuation Fund [1995] PNGLR 276, Sevua J; N1895 *Silas Mareha v The Chairman – Redundancy Monitoring Committee & Ors,* Kirriwom J.

26. An understanding of some relevant sections of the *Forestry Act* will also assist in applying the principles discussed to the facts of this case. Section 6 provides:

> *"In carrying out its functions under this Act, the Authority shall pursue the following objectives:-*
>
> *(a) the management, development and protection of the Nation's forest resources and environment in such a way as to conserve and renew them as an asset for succeeding generations; and*
>
> *(b) the maximisation of Papua New Guinea participation in the wise use and development of the forest resources as a renewable asset;*
>
> *(c)...*
>
> *(d)...*
>
> *(e)...*
>
> *(f)...*

27. One of the functions of the authority in obtaining the objectives is (Section 7 (1) (b):

> *"to prepare and review the National Forest Plan and recommend it to the National Executive Council for approval."*

28. Details of what the National Forest Plan is to contain are set out in Section 47 of the Act is as follows:

> *(1) The Authority shall cause to be drawn up a National Forest Plan to provide a detailed statement of how the National and provincial governments intend to manage and utilise the country's forest resources.*
>
> *(2) The National Forest Plan shall-*

(a) be consistent with the National Forest policy and relevant Government policies; and

(b) be based on a certified National Forest Inventory which shall include particulars as prescribed; and

(c) consist of-

(i) National Forestry Development Guidelines prepared by the Minister in consultation with the Board and endorsed by the National Executive Council; and

(ii) the National Forest Development Programme; and

(iii) a statement, prepared annually by the Board, of allowable cut volumes, being the amount of allowable cut for each Province for the next succeeding year which will ensure that the areas of forest resource set out in the Provincial Forest Plan, for present or future production, are harvested on a sustained yield basis.

(3) for the purposes of Subsection (2) (c) (iii), "allowable cut" means the amount of timber which may be cut annually.

S54 provides:

Forest resources shall only be developed in accordance with the National Forest Plan.

This Application

29. For the purposes of this application it does not appear to me that there are any administrative steps or appeal processes which the plaintiffs could have adopted to resolve the issues brought before the court. There is therefore no issue of failing to exhaust other remedies.

30. On the question of delay the proceedings have been filed within four months of the 20th of December 2005 when the resolution was passed, the period referred to in O16 r4(2). There has been no relevant delay in making the application insofar as it seeks to review that resolution.

31. The principal leg in the Plaintiffs arguable case is the alleged non existence of a lawfully existing Forest Management Plan on the 20th of December 2005. Nothing in the Act specifies what timeframe a National Forest Plan should cover. There is a reference to the allowable cut volume statement to be prepared annually by the Board. The allowable annual cut is a very important figure, because it is the figure by which the Act ensures that the forest resources will be harvested on a sustainable yield basis. If that figure is exceeded then the owners of the resource are likely to suffer economic harm. The forest could be 'logged out' resulting in no income for many years.

32. On the evidence so far, it appears that the document tabled in the National Parliament by the Minister, as the National Forest Plan:

(a) does not contain any reference to Kamula Doso;

(b) is not based on a certified National Forest Inventory;

(c) does not contain any information in respect of the management of forests after 2001, and in particular there is no statement of annual cut volume, which is required by Section 47 (1) (iii).

33. I considered that it is therefore at least arguable that the Second Defendant could not lawfully, on the 20th of December 2005, bind itself to allocate Kamula Doso to the First Defendant, because it could not do so in accordance with the National Forest Plan as required by Section 54 of the *National Forest Act;* there being no such plan containing relevant information on which to take the decision. Further, it is arguable that any purported extension of the period to which the National Forest Plan relates, without adding to it the data required by s47 for that additional period, is *ultra vires* the power of the Board of the Second Respondent.

34. I come lastly to the question of sufficient interest. From the provisions of the *Forestry Act* Section 7, 47 and 54 one can see that the National Forest Plan is the key and foundation to the whole process of allocation of forest resources. I would therefore classify those provisions of the Act as mandatory provisions. There are areas of administrative and managerial judgment to be exercised in formulating some of the elements which make up the National Forest Plan. But the duty to prepare the plan with the specified content and to allocate resources in accordance with that content, are mandatory legal obligations.

35. There is no doubt that the Second Defendant is a public body with public duties to perform. The requirement for the National Forest Plan to be tabled in Parliament and for the certified National Forest Inventory to be available on sale to the public emphasise the public nature of the duties and the public interest in those duties.

36. The nature then of the breaches alleged by the plaintiffs, is the failure of the Second Defendant by its Board to perform a mandatory legal obligation. A further allegation is that the Second Defendant has taken decisions which cannot be taken until those mandatory legal obligations have been fulfilled.

37. The First Plaintiff's relationship to those breaches is obviously quite close, he is a Board member of the Second Defendant and charged with the other Board members with the responsibility of implementing the requirements of the Act: See section 9 *Forestry Act*. He must have sufficient interest when his allegations amount to abandonment by the Board of its statutory responsibilities.

38. The Second Plaintiff was recognised in Section 10 of the *Forestry Act*. That gives it a close connection with the Act. I consider I should recognise it too has sufficient interest in the lawful allocation of forest resources, which is the real issue in these proceedings.

39. The Third Plaintiff is a representative of the owners of adjoining land to Kamula Doso, which is the subject of the First Defendant's existing Timber Permit. He also, to my mind has sufficient interest in ensuring that any proposal to join to land in which he has an interest, other land, for the purposes of allocation of forest resources, is lawfully done.

40. I find each of the Plaintiffs has sufficient interest.

41. I grant leave to proceed.

ORDERS

1. Leave to proceed granted;
2. The Plaintiffs are to file and serve their motion for substantive relief together with this order and any further affidavits on which they seek to rely on all parties to the proceedings within 21 days of order ;

3. Each respondent is to file and serve any affidavit on which that respondent seeks to rely within 21 days of service upon them of this order;

4. The Plaintiffs are to file and serve any affidavit in response to the Respondents affidavits within seven days of service of the Respondents affidavits on them;

5. If the Plaintiffs do not intend to file an affidavit in response to a Respondent's affidavit they shall serve that respondent with a letter to that effect within the same seven days referred to in order 4;

6. Each of the parties shall file and serve their written extract of argument within seven days of receipt of the Plaintiffs affidavit in response or letter that no affidavit will be filed, in accordance with orders 4 and 5, within seven days of receipt of that document;

7. The Plaintiffs shall prepare the Review Book and serve the draft on the Respondents within seven days of the expiry of the time referred to in order 6. The Review Book shall contain a facing page with reference to any affidavit exceeding 20 pages, but not the actual document, which shall be served separately;

8. The Plaintiffs shall set the matter down for further directions on the first Listings day occurring after service of the draft Review Book.

9. Liberty to any party to apply on 3 days written notice to the other parties.

10. Costs of this application shall be costs in the cause.

Lawyer for the First and Second Plaintiffs - Gadens Lawyers

Lawyers for the Third Plaintiff - Public Interest Environmental Lawyers