

PAPUA NEW GUINEA
[IN THE NATIONAL COURT OF JUSTICE]

OS (JR) NO. 704 OF 2013

BETWEEN
MAPAI TRANSPORT LTD
First Plaintiff

AND
MOROBE PROVINCIAL GOVERNMENT
Second Plaintiff

AND
**ROMILLY KILA PAT – SECRETARY FOR LANDS & PHYSICAL
PLANNING**
First Defendant

AND
**HON. BENNY ALLEN, MINISTER FOR LANDS & PHYSICAL
PLANNING**
Second Defendant

AND
THE INDEPENDENT STATE OF PAPUA NEW GUINEA
Third Defendant

AND
SANAMO CONSTRUCTIONS LTD
Fourth Defendant

AND
SUPER SERVICES LTD
Fifth Defendant

Waigani: Makail, J
2017: 12th April & 15th August

***JUDICIAL REVIEW – Application for judicial review – Review of grant of
title – State lease – Allegation of fraud – Title granted in breach of established***

***procedure – Fraud inferred from breaches and irregularities – Title set aside
– Land Registration Act – Section 33 (1) (a)***

Cases cited:

Maryanne Mosoro v. The State & Kingswell Limited (2011) N4450
Sulawei Limited v. Luther Sipison, & The State (2017) N6640
Mudge v. Secretary for Lands [1985] PNGLR 387
Koitachi Limited v. Zhang (2007) SC870
Eric Kiso v. Bennie Otoa & Ken Wutnalom (2013) SC1222
Emas Estate Development Pty Ltd v. John Mea & Ors [1993] PNGLR 215
Steamship Trading Company Limited v. Garamut Enterprises Limited (2000) N1959
HiLift Co Pty Limited v. Miri Setae & Ors [2000] PNGLR 08; (2000) N2004
Rosemary John v. James Nomenda (2009) N3851
Tau Kamuta v. David Sode (2006) N3067
Joseph Mondolame v. The State (2015) N5878
Port Moresby Gun Club Inc v. Hon. Benny Allen & The State (2016) N6500

Counsel:

Mr. P. Mawa & Ms. D. Culligen, for First Plaintiff
Mr. D. Levy, for Second Plaintiff
Mr. M. Wangatau, for First, Second & Third Defendants
Mr. D. Dusal, for Fourth Defendant
Ms. V. Geroro, for Fifth Defendant

JUDGMENT

15th August, 2017

1. **MAKAIL, J:** This is an application for judicial review. It concerns a dispute in relation to a portion of land described as Allotment 2, Section 111, situated in Lae, Morobe Province (“*Subject Land*”).
2. Parties relied on the following affidavits which were tendered by consent:
 - Affidavit of Jacob Luke sworn on 31st July 2013 and filed 2nd October 2013 – Exhibit “P1”.
 - Affidavit of Daisy Culligan sworn on 12th December and filed 22nd December 2016 – Exhibit “P2”.

- Affidavit of Ann Marie Tomain sworn and filed 22nd December 2016 – Exhibit “P3”.
- Affidavit of Terah Baloiloi sworn on 22nd September and filed 23rd September 2016 – Exhibit “P4”.
- Affidavit of Joseph Kopol sworn and filed 24th November 2013 – Exhibit “D1”.
- Affidavit of Joseph Kopol sworn and filed 9th September 2016 – Exhibit “D2”.
- Affidavit of Joseph Kopol sworn 21st September and filed 22nd September 2016 – Exhibit “D3”.
- Affidavit of Joseph Kopol sworn 2nd February and filed 3rd February 2017 – Exhibit “D4”.
- Affidavit of Wanju Hanafi sworn 21st February and filed 27th February 2014 – Exhibit “D5”.

Uncontested Facts

3. From these affidavits the uncontested facts are:

- Between 20th and 26th November 2009, three events occurred. First the Second Plaintiff’s Land Program Advisor sought special consideration from the Second Defendant to “free up” the subject land and make a direct grant to the First Plaintiff for the purpose of expanding the First Plaintiff’s business operation and assisting disabled people residing on the subject land under the care and support of the Second Plaintiff.
- Secondly, the Governor for Morobe Province recommended to the Second Defendant supporting the proposal for the First Plaintiff to be granted a State lease for the subject land. Finally, a temporary occupancy licence was issued to the first plaintiff to occupy the subject land for a period of one year.
- In 2010 a series of events took place:

- 27th January, the Fourth Defendant was incorporated and operating in its head office in Mendi, Southern Highlands Province.
 - 19th October, the State lease of the subject land was forfeited.
 - 22nd September, an exemption from advertisement of the subject land was granted by the First Defendant as delegate of the Second Defendant. The reason for that was to enable the First Plaintiff to expand its transport business.
 - 23rd September, the First Plaintiff and Fourth Defendant were the only applicants considered for the subject land by the Land Board despite the exemption notice.
 - 18th October, the First Plaintiff's application was rejected by the Land Board. The Fourth Defendant was recommended the grant of State lease subject to a number of conditions and restrictive covenants, one of them being the lease to be used for a Business (Light/Industrial) purpose.
 - 26th November, the temporary occupancy licence issued to the First Plaintiff for the subject land expired.
- On 3rd February 2011, a State lease for residential purpose for 99 years was granted to the Fourth Defendant by the Second Defendant.
- In 2012 three significant events occurred:

- 18th April, the Fourth Defendant proceeded to rezone, reclassify and subdivide the subject land without complying with the development conditions.
- 30th May, the Fourth Defendant sold part of the sub-divided land described as Allotment 22, Section 111 to Polraven No. 48 Limited.
- 22th September, the Fourth Defendant sold part of the sub-divided land described as Allotment 24, Section 111 to Polraven No. 48 Limited.
- On 12th April 2013 the Fourth Defendant executed contracts of sale to transfer Allotments 21 and 24, Section 111 from it to the Fifth Defendant. On behalf of the Polraven No. 48 Limited the Managing Director of the Fourth Defendant Joseph Kopol executed the contracts of sale to transfer Allotments 22 and 23, Section 111 to the Fifth Defendant.

Contested Facts

4. The contested facts are, according to the First Plaintiff:
 - On 15th November 2016, a search was conducted at Government Printing Office of National Gazettal Publications from November 2011 to December 2012.
 - On 6th December 2016, a further search was conducted at Government Printing Office by Senior Typesetter Officer of National Gazettal Publications from November 2011 to December 2012.
5. As for the Fourth Defendant, the gazettal notice was published twice. First was in the National Gazette No. G307 dated 20th December 2010 which established that the Fourth Defendant was recommended the successful applicant. The reference to “LJ/111/001 is a typographical error and the correct reference should be “LJ/111/002 for the grant of Allotment 2, Section 111, Lae

where an appeal was lodged against the Land Board recommendation.

6. Secondly, the appeal by the First Plaintiff to the Second Defendant was unsuccessful and the recommendation of the Land Board was upheld by the Second Defendant. A notice of gazettal was published in the National Gazette No. G21 dated 26th January 2011.

Exemption of land from being advertised

7. It was the exemption notice under Section 69 of the *Land Act* that the First Plaintiff supported by the Second Plaintiff relied on as the first ground to have the title of the Fourth Defendant set aside.

8. It was contended that the notice of exemption conferred on it an exclusive right to be the sole applicant to the Land Board for a grant of a State lease.

9. However, it was not to be, that at the Land Board meeting, the Fourth Defendant's application was somehow included and considered. The Fourth Defendant was recommended as the successful applicant to be granted a Business (Light/Industrial) Purpose lease.

10. It was strongly argued that this is not some mal administrative error, but rather a subversion of the statutory process by the Land Board. It was a gross abuse of power whereby the decision of the Land Board and the Second Defendant must be set aside.

11. Furthermore, the Land Board did not give reasons for its decision to recommend the Fourth Defendant ahead of it, and where there are no reasons, the Land Board's decision/recommendation is unreasonable.

12. First, the Fourth Defendant contended that under Section 70 of the *Land Act*, it is open to the Land Board to consider its application because "all applications for State lease" does not exclude any person or entity from applying.

13. This submission is untenable and must be rejected because it is contrary to the express intention of Section 69 of the *Land Act*. Once a State lease is exempted from being advertised, it means that it is not to be advertised. The person or entity granted the exemption has an entitlement to being a sole applicant for the State lease to the exclusion of others.

14. Secondly, it contended that the exemption notice is void and the First Plaintiff is not entitled to rely on it because there is no written agreement between the First Plaintiff and the Third Defendant to develop the subject land for the expansion of the First Plaintiff's business operation as required by

Section 69 of the *Land Act*. It relied on the case of *Maryanne Mosoro v. The State & Kingswell Limited* (2011) N4450 to support its submission.

15. In my view, the decision of the Land Board is more or less similar to the case of *Sulawei Limited v. Luther Sipison, & The State* (2017) N6640. In that case, the Plaintiff's judicial review application to have the decision of the Land Board to 're-advertise' a land as being available for leasing despite a Ministerial exemption from being advertised was refused.

16. In that case, it was contended that the Minister's power to grant an exemption was irrevocable and on that ground the Land Board acted beyond its powers to recommend to the Minister to 're-advertise' the land and allow other applicants to apply for it.

17. It was held that the Ministerial exemption is part of the decision-making process by which the Minister may grant a State lease on the land. The Land Board's function is to consider and recommend a grant of State lease to the Minister. However, ultimately it is the Minister who is conferred the discretion to make a grant. Given this, there was no substantive decision for the Court to review and the judicial review application was dismissed.

18. In this case, I accept the Plaintiffs' submission that the exemption conferred on the First Plaintiff an exclusive right to be the sole applicant for subject land. When the Land Board included and considered and furthermore, recommended the grant of a State lease to the Fourth Defendant, it not only acted beyond its powers but contrary to the Ministerial exemption.

19. The difference between this case and *Sulawei* case (supra) is that in this case, the Land Board made a recommendation of a grant to the Minister while in *Sulawei*, it did not. Finally, the Land Board undermined the Minister's decision, especially where it gave no reasons for allowing the Fourth Defendant to come into consideration.

20. The Fourth Defendant's submission that the exemption notice is void and incapable of supporting the Plaintiffs' case must fail for two reasons. First, the validity of the exemption notice is not the subject of the judicial review application in this case. Thus, it must be taken on face value that it is valid for all intent and purposes.

21. In any event, the Court is not bound by the *Mosoro* decision (supra). While there is no written agreement between the First Plaintiff and the Third Defendant, the overwhelming uncontested evidence is that the subject land is needed for significant business and public interests project. The First Plaintiff intended to use the land for the expansion of its trucking business and at the same time assist and support the Second Plaintiff to house and pay for utilities

for disabled people residing on the subject land. Is that not a project or undertaking that satisfies one of the conditions for a grant of an exemption under Section 69 (2) (d) of the *Land Act*? Surely, it does.

22. The application for judicial review will be upheld on this ground. As to the grant of relief sought, I am of the view that such ground is not sufficient to set aside the title of the Fourth Defendant under Section 33 of the *Land Registration Act*. For it must be established that one of the grounds in Section 33 exists for the title to be set aside, fraud being one of them and a common one: *Mudge v. Secretary for Lands* [1985] PNGLR 387, adopted and applied in *Koitachi Limited v. Zhang* (2007) SC870 and *Eric Kiso v. Bennie Otoa & Ken Wutnalom* (2013) SC1222.

Fraud

23. The second ground is based on fraud. In this jurisdiction, case law established that fraud can be actual or inferred: *Mudge* (supra), *Koitachi Limited* (supra) and *Eric Kiso* (supra) for actual fraud and for the latter, see *Emas Estate Development Pty Ltd v. John Mea & Ors* [1993] PNGLR 215 adopted and applied in *Steamship Trading Company Limited v. Garamut Enterprises Limited* (2000) N1959; *HiLift Co Pty Limited v. Miri Setae & Ors* [2000] PNGLR 08; (2000) N2004 and *Rosemary John v. James Nomenda* (2009) N3851.

24. In this case, the First Plaintiff relied on breaches and irregularities in the process of a grant of State lease to establish fraud. It submitted that fraud can be inferred and such is sufficient for the Court to set aside the Fourth Defendant's title. It is supported by the Second Plaintiff.

25. They submitted that fraud can be inferred from the following breaches and irregularities:

- Breach of the exemption notice under Section 69 of the *Land Act*, in that the Fourth Defendant was included, considered and recommended for a grant of State lease contrary to the exemption notice.
- There is no explanation given by the Land Board for the inclusion and participation of the Fourth Defendant at its meeting.
- There is no evidence of the Fourth Defendant applying in the prescribed form and payment of the prescribed fee under Section 70 of the *Land Act*.

- No gazettal notice of the Fourth Defendant as the successful applicant for a grant of State lease for residence purpose.
- On or about 18th April 2012, two or so years after the grant of the State lease for residential purposes, the Fourth Defendant proceeded to rezone, reclassify and sub-divide the subject land without complying with the restrictive covenants for development with the intention of selling the subject land contrary to Section 67 of the *Land Act*.
- On 20th May 2012 the Fourth Defendant sold part of the subdivided land described as Allotment 22, Section 111 to Polraven No. 48 Limited in breach of the restrictive covenants.
- On 11th September 2012 the Fourth Defendant sold a further part of the subdivided land described as Allotment 24, Section 111 to Polraven No. 48 Limited in breach of the restrictive covenants.
- On or about 12th April 2013 the Fourth Defendant executed contracts of sale to transfer to Allotments 21 and 24, Section 111 from the Fourth Defendant to the Fifth Defendant. The contracts were executed by the Managing Director of the Fourth Defendant Mr. Joseph Kopol on behalf of the Fourth Defendant.
- There is no decision by the Physical Planning Board in relation to planning permission to subdivide and sell the subject land within two years of the grant of the State lease for residential purpose.
- The original intention of the Second Plaintiff to give up or surrender its title by way of the forfeiture and have a title granted to the First Defendant for the purpose of its business expansion with the view of also housing and supporting disabled people residing on it was completely

ignored by the Land Board.

26. The Fourth Defendant supported by the Fifth Defendant denied any fraud and submitted that events have overtaken the challenge to its title because the subject land no longer exists. The land has been subdivided and it is the current registered proprietor of different portions of land described as:

- Allotment 21, Section 111, Lae,
- Allotment 22, Section 111, Lae,
- Allotment 23, Section 111, Lae, and
- Allotment 24, Section 111, Lae.

27. Coupled with that, delay is against the Plaintiffs because when the Plaintiffs commenced the proceeding on 1st October 2013, a period of 13 months had lapsed and the delay is inordinate and unexplained. The Plaintiffs have not come to Court with clean hands to be entitled to relief: *Tau Kamuta v. David Sode* (2006) N3067.

28. Even if the Plaintiffs are successful and the judicial review application is upheld, the Court should not grant the relief sought because substantial prejudice will be suffered by the Fourth and Fifth Defendants. There, the subject land has been sold to the Fifth Defendant and money has been expended to purchase and develop it. Reliance was placed on the case of *Joseph Mondolame v. The State* (2015) N5878 for this proposition.

29. There was no submission made by the First to Third Defendants even though at the heart of the dispute is the exemption notice issued by the First Defendant as delegate of the Second Defendant and secondly, the Land Board's recommendation for a grant of State lease in favour of the Fourth Defendant.

Proof of Fraud

30. The process of acquiring a State lease (title) in relation to Government land is prescribed in the *Land Act*. In *Port Moresby Gun Club Inc v. Hon. Benny Allen & The State* (2016) N6500 the National Court summarised the process at [12] of its judgment. I adopt them. And from the uncontested facts, I find that this is a case where the subject land was identified by the First and

Second Plaintiffs to establish and foster a partnership for business activities and social services for the disabled under the public/private partnership arrangement. The First Plaintiff was to use the land to expand its trucking business. For the Second Plaintiff, the First Plaintiff was to take the responsibility of providing and supporting the disabled people residing on the subject land by providing accommodation and paying for utilities. In my view, it was an excellent initiative, a project worth investing in and land should have been readily made available by the Third Defendant to realise it.

31. Despite the exemption notice by the First Defendant as delegate of the Second Defendant, the Land Board permitted the Fourth Defendant to be included and considered at its meeting where it ended up recommending it to the Second Defendant to be granted a State lease which the Second Defendant did. The recommendation was for a State lease for business (light/industrial) lease and not residence purpose.

32. There is no evidence from the First to Fourth Defendants as to how the Fourth Defendant was permitted to apply for the State lease. There is no reason given by the Land Board for including the Fourth Defendant in its meeting and subsequent recommendation to the Second Defendant for grant of State lease.

33. Furthermore, there is no evidence of the Fourth Defendant's application in a prescribed form and payment of the prescribed fee to verify that it applied for the State lease in the prescribed manner under Section 70 of the *Land Act*. This is another glaring irregularity.

34. Nonetheless, the Fourth Defendant was entertained by the Land Board contrary to the exemption notice. It is title law under Section 69 (1) of the *Land Act* that a State lease shall not be granted unless it is advertised. For reason obvious to all, it is to allow interested applicants/persons/entities with the capacity to develop it to apply and for the State to fairly distribute the limited available land to those who meet the criteria. Equally, for good reasons it may exempt land from being advertised if it is satisfied that one or more of the conditions under Section 69 (2) of the *Land Act* exists.

35. In this case, for good reason, the subject land was exempted from being

advertised. Yet it turned out that the Fourth Defendant was a rival applicant before the Land Board and eventual successful applicant, despite being incorporated a year earlier on 27th January 2010, its head office located somewhere in Mendi and having no business track record compared to the First Plaintiff. In my view, this is highly questionable and suspicious.

36. An appeal by the First Plaintiff to the Second Defendant proved unsuccessful. While there is conflicting evidence in relation to the publication of the gazettal notice of the successful applicant, it does not significantly alter the position that the Fourth Defendant emerged the winner and successful applicant to the detriment of the Plaintiffs.

37. Despite the recommendation of the Land Board for a State lease for business (light/industrial) purpose to be granted to the Fourth Defendant, the grant by the Second Defendant was for State lease for residence purpose for 99 years. This is a significant inconsistency in the type of State lease granted to the Fourth Defendant. This is yet another glaring irregularity which renders the transaction questionable and suspicious.

38. With already a growing number of glaring irregularities, a further glaring irregularity is that the State lease had conditions and restrictive covenants in terms of improvement or development of the subject land by the Fourth Defendant. While the Fourth Defendant subdivided the subject land, there is no evidence that it put up improvements or did any development on it other than subdivision.

39. For instance, the value of the improvement the Fourth Defendant must put up is K300,000.00. The restrictive covenant is that it must not sell the subject land prior to complying with this improvement condition.

40. In breach of these covenant and condition, within a space of two or more years, the subject land was subdivided. And the Fourth Defendant's submission that the subject land no longer exists is, with respect, superfluous. Obviously, and in reality, it exists but it has been given different descriptions given that it has been subdivided at the request of the Fourth Defendant.

41. Notwithstanding the evidence of a catalogue plan produced by the Fourth Defendant to verify the subdivision of the subject land, there is no evidence that the subdivision complied with planning requirements before it was subdivided. There is no evidence of subdivision plan proposal and approvals being obtained from the relevant authority to support the Fourth Defendant's claim that the subdivision of the land is in order. This is a further questionable and suspicious glaring irregularity.

42. Then two portions of the subdivided land have been sold to the Fifth Defendant. Contracts of sale executed between the Managing Director Mr. Kopol for the Fourth Defendant and the Fifth Defendant and transfer instruments were lodged for formalising the transfer but for this judicial review application.

43. I accept the Plaintiffs' submission that these events and particularly, the sale of the portions of the subdivided land in a short period of time strongly suggest that the Fourth Defendant intent to part with the subject land by selling it for profit rather than developing it. This inference is further supported by the lack or absence of the Fourth Defendant's business track record coupled with it having being registered a year earlier with its registered head office somewhere in Mendi.

44. All these events establish that the Fourth Defendant had one thing in mind and that is to acquire the subject land and to sell it for a windfall gain. There was never an intention to develop it. As a result, the Plaintiffs lost out big time.

45. I am satisfied that the Plaintiffs have established fraud on the balance of probabilities. Fraud has been committed by the Fourth Defendant in the process of acquiring title to the subject land. Pursuant to Section 33 (1) (a) of the *Land Registration Act*, the title of the Fourth Defendant in the State lease described as Allotment 2, Section 111 must be set aside. Any subsequent grant must follow suit because the Fourth Defendant never had good title to pass in the first place.

46. As to the assertion by the Fourth and Fifth Defendants that the Plaintiffs

have been guilty of delay and that the Fourth and Fifth Defendants will suffer substantial prejudice if the Court sets aside the title, the Latin maxim “equity follows the law” must apply here. Fraud has been proven and the Fourth Defendant must not enrich itself of this illegal act. As to the Fifth Defendant, it has recourse to a refund of the purchase price for each allotment it has purchased or claim for damages against the Fourth Defendant.

Conclusion

47. For the foregoing reasons, the application for judicial review will be upheld.

Order

48. The Plaintiffs have detailed the orders sought in the Amended Notice of Motion filed on 13th December 2016 which included declaration, certiorari and mandamus. Rather than setting them out in full here, orders will be granted in terms of paras. 1, 2, 3, 4, 5 and 7 of the Amended Notice of Motion. A further order that the Fourth and Fifth Defendants surrender copies of the registered State Leases for Allotments 21, 22 and 24, Section 111, Lae, Morobe Province to the Registrar of Titles who shall thereupon cancel the leases. Order sought in para. 6 of the Amended Notice of Motion is refused.

Melanesian Legal Services:	<i>Lawyers for First Plaintiff</i>
Manase & Co Lawyers:	<i>Lawyers for Second Plaintiff</i>
Solicitor General:	<i>Lawyers for First, Second & Third Defendants</i>
Dusal & Associates Lawyers:	<i>Lawyers for Fourth Defendant</i>
Twivey Lawyers:	<i>Lawyers for Fifth Defendant</i>