

<p>IN THE NATIONAL COURT OF JUSTICE PAPUA NEW GUINEA</p> <p>OS 755 of 2019</p> <p>BETWEEN:</p> <p>NAMBAWAN SUPER LIMITED <i>Plaintiff</i></p> <p>V</p> <p>THE OCCUPANTS, PORTION 2157 MILINCH GRANVILLE FOURMIL PORT MORESBY, NCD including NICHOLAS WAUMA, BEHORI INCORPORATED LAND GROUP and LEMENT ROVA, RUEBEN SAKA for and on behalf of Dubara Idibana Incorporated Land Group, and JOHANNES HAPA <i>Defendants</i></p>	<p>PAPUA NEW GUINEA IN THE NATIONAL COURT OF JUSTICE</p> <p>OS 757 of 2019</p> <p>BETWEEN:</p> <p>NAMBAWAN SUPER LIMITED <i>Plaintiff</i></p> <p>V</p> <p>THE OCCUPANTS PORTION 2156 MILINCH GRANVILLE FOURMIL PORT MORESBY NCD, including NICHOLAS WAUMA, BEHORI INCORPORATED LAND GROUP and LEMENT ROVA, CATHERINE KAEAKA, LUKE TENGDUI, ROMBA JERRY KONTS, WILLIAM KANSOL and STEVEN WANI and RUEBEN SAKA for and on behalf of Dubara Idibana Incorporated Land Group <i>Defendants</i></p>	<p>PAPUA NEW GUINEA IN THE NATIONAL COURT OF JUSTICE</p> <p>OS 758 of 2019</p> <p>BETWEEN:</p> <p>NAMBAWAN SUPER LIMITED <i>Plaintiff</i></p> <p>V</p> <p>THE OCCUPANTS PORTION 2159 MILINCH GRANVILLE FOURMIL PORT MORESBY NCD, including NICHOLAS WAUMA, BEHORI INCORPORATED LAND GROUP and LEMENT ROVA, CATHERINE KAEAKA LUKE TENGDUI, ROMBA JERRY KONTS, WILLIAM KANSOL and STEVEN WANI, and RUEBEN SAKA for and on behalf of Dubara Idibana Incorporated Land Group <i>Defendants</i></p>
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Waigani: Anis J
2020: 20 October, 4 & 16 November

ORIGINATING SUMMONSES – Seeking protection and enforcement of primary right over land – indefeasibility of titles – 3 portions of land occupied by settlers, squatters and persons

and organisations claiming ownership – claims of freehold or outright purchase and under custom – legal interests over the 3 portions of lands opposed by these other purported rights – state leases namely agricultural leases for 99 years - no valid challenges raised to the legal ownership or status of the titles that is held over the 3 portions of lands by the registered proprietor – equitable interests – not expressly pleaded – considerations on suitable time frame for the settlers to vacate the lands and give vacant possessions to the registered proprietor – equitable interest limited to the period of notice to vacate – consideration of s. 41 of the Constitution, that is, whether harsh and oppressive would be a valuable consideration for determining what would amount to a reasonable period of notice to vacate

Domestic cases cited:

Keimun Keindip v. The Independent State of Papua New Guinea [1993] PNGLR 28 and
Mudge v. Secretary for Lands [1985] PNGLR 387
Paul Kamang v. Namba Tumu (2011) N4313
WNB Provincial Government v. Pepi S Kimas (2009) N3834
Pius Tikili v. Home Base Real Estate Ltd (2017) SC1563
Maso v. Pat (2016) N6550
Amos Bai v. Morobe Provincial Government and the State [1992] PNGLR 15
Jivetuo v The Independent State of Papua New Guinea [1984] PNGLR 174

Overseas case:

Breskvar v Wall (1971) 126 CLR 376

Counsel:

I Shepherd, for the plaintiffs in the 3 proceedings
I Minoga, for respondents Catherine Kaeaka, Luke Tengdui, Romba Jerry Konts, William Kansol and Steven Wani in proceedings OS 757 of 2019 and OS 758 of 2019.
N Wauma, for himself and on behalf the occupants of lands in the 3 proceedings
R Saka, as the representative of the respondent Dubara Idibana Incorporated Land Group in the 3 proceedings.
Mr Hapa, for himself in proceeding OS 755 of 2019
No appearance, by the respondents Behori Incorporated Land Ground and Lement Rova in the 3 proceedings

JUDGMENT

16th November 2020

1. **ANIS J:** The 3 matters were trialed on 20 October 2020. Presentation of submissions hearing was heard on 4 November 2020 before I reserved my ruling to a date to be advised.

2. Parties have been notified so I will rule on them now.

OPENING OBSERVATIONS

3. I observe that on 13 November 2019, leave was granted to the plaintiff to effect substituted service of the originating summonses for proceeding OS 755 of 2019, OS 757 of 2019 and OS 758 of 2019 (**the 3 proceedings**). Service was effected as per the Court's Order. Evidence of that may be seen at exhibits P2, PP2 and PPP3, that is, the affidavits of Mr Shepherd.

4. I also observe that not all the parties named herein have appeared at the various direction hearings, status conferences and at the trial. The Public Solicitor who acts for a group called the Behori Incorporated Land Group, Lement Rova and others, did not make appearances on various occasions, including on 20 October 2020 when the matters were trialed. Mr Hapa is one of the defendants in proceeding OS 755 of 2019. He appeared at trial on 20 October 2020 and presented his evidence. He, however, did not appear to present his closing submissions on 4 November 2020. Instead, Mr Wauma, who is a defendant in the 3 proceedings, notified the Court that Mr Hapa had instructed him to make closing submissions on his behalf, and I note that that was how Mr Wauma proceeded with his submissions on 4 November 2020.

5. My final opening observation is this. Mr Saka, who acts for the Dubara Idibana Incorporated Land Group, complains at the opening of his written submission that he did not receive all the evidence from some of the defendants. I note that Mr Saka raised his complaint at the start of the trial on 20 October 2020. Based on that, Mr Saka requested for adjournment of the trial. I recall that I refused to grant Mr Saka his request, and I would refer to the transcript of proceedings for my full reasonings. From recollection, the reasons for refusing request for adjournment included the following: Prolonged delays in the matter; more than sufficient time had been given to defendants to file and serve their affidavits; final adjournment had been granted at the last status conference hearing with an order or direction that there would be no further adjournments; failure by Mr Saka to liaise and request for the affidavits from those defendants that he claimed had not served him; and the fact that the plaintiff in all the 3 matters had served all its evidence upon Mr Saka and his group.

BACKGROUND

6. The plaintiff's claim relates to 3 portions of land outside Port Moresby (i.e., inward after the 9 Mile cemetery towards Bautama).

7. In proceeding OS 755 of 2019, the land area is described as State Lease (Agriculture Lease), Volume 73 Folio 237, Portion 2157 Milinch Granville Fourmil Moresby, National Capital District (**Portion 2157**). The plaintiff claims that the lease was issued to it for a period of 99 years from 1 July 2016 to 1 July 2115. In proceeding OS 757 of 2019, the land area is described as State Lease (Agriculture Lease), Volume 75 Folio 20, Portion 2156 Milinch Granville Fourmil Moresby, National Capital District (**Portion 2156**). The plaintiff claims that the lease was issued to it for a period of 99 years from 1 July 2016 to 1 July 2115. And in proceeding OS 758 of 2019, the land area is described as State Lease (Agriculture Lease), Volume 28 Folio 222, Portion 2159 Milinch Granville Fourmil Moresby, National

Capital District (**Portion 2159**). The plaintiff claims that the lease was issued to it for a period of 99 years from 24 August 1995 to 23 August 2094.

8. The plaintiff claims that it is the registered proprietor of Portions 2157, 2156 and 2159. In the 3 proceedings, it seeks similar main relief, that is, (i), orders for vacant possession over Portions 2157, 2156 and 2159, (ii), leave pursuant to Order 13 Rule 3 of the *National Court Rules* to issue writs of possession over the 3 portions of land within 45 days from the date of the Court's Order and (iii), costs of the proceedings.

9. The defendants oppose the granting of the relief sought in the 3 proceedings. They claim that the 3 portions of land are not State land or leases. They (except for Mr Saka) claim that these were customary land which they had purchased from the customary owners where they now say they own as freeholds. As for Rueben Saka, his claim or defence is different from the rest. He claims that he and his group, the Dubara Idibana Incorporated Land Group, are the traditional landowners of Portions 2157, 2156 and 2159. He claims that these lands were never purchased from them and that as far as he and his ILG are concerned, they remain customary land.

EVIDENCE

10. All the evidence have been tendered by the consent of the parties without the benefit of cross-examinations. The evidence were tendered on 20 October 2020 and marked as exhibits.

ISSUES

11. The main issues, in my view, are (i), whether the plaintiff has titles to Portion 2157, Portion 2156 and Portion 2159, (ii), if so, whether there are any valid defence adduced by the defendants that may override or precede the plaintiff's titles according to law, (iii), whether the defendants have equitable interests over the 3 portions of land, (iv) if so or regardless, how much time may be considered reasonable, not harsh and oppressive, and which should be allowed to the defendants to vacate Portion 2157, Portion 2156 and Portion 2159?

REGISTERED PROPRIETOR

12. I firstly refer to the plaintiff's claim that it is the registered proprietor of Portion 2157, Portion 2156 and Portion 2159 (**the 3 portions of land**).

13. In so doing, I refer to its evidence adduced in the 3 proceedings. Its primary evidence are marked as Exhibits P1, P2, P3, PP1, PP2, PP3, PPP1, PPP2 and PPP3. The deponents of these affidavits are George Koi, Ian Shephard and Brin Aldrich respectively. Each deponent gives similar depositions and attaches the same documents to his affidavits in the 3 proceedings.

14. As to the titles for the 3 portions of land, they are attached as annexure A to Mr Koi's affidavits in the 3 proceedings. I have considered them. In my view, the titles for the 3 portions of land are authentic, and on the balance of probabilities, they confirm that the plaintiff is the registered proprietor to Portion 2157, Portion 2156 and Portion 2159. I note that no requests were made by the defendants to produce the original owners' copies of the

titles in Court. Mr Wauma had attempted to discredit the veracities of the titles and allege fraud, but I note that the documents he makes references to are not the titles to the 3 portions of land. The pleadings also do not raise allegations of fraud, and I note that I had mentioned to Mr Wauma that if that was his intention (i.e., to claim fraud), then there were processes such as judicial review or proceeding by way of writ of summons and statement of claim, that he could file to properly raise such a claim.

15. With that, let me turn to the evidence of the defendants. I have considered their evidence in detail. In my view, there is no evidence adduced by the defendants that challenges the titles of the plaintiff over the 3 portions of the land. Mr Minoga, Mr Wauna and Mr Hapa who was represented by Mr Wauma, submit that they are of the view that the land was customary land; that their clients' or they themselves had purchased the land from the alleged customary landowners and that they have occupied the land over a period of time. As for Rueben Saka, he strongly contends that his ILG is the customary landowner of the land where the 3 portions of land are situated. He also disputes the purchase of land by the other defendants from persons whom they claimed were landowners. He said that as far as he and his ILG are concerned, they are the rightful customary landowners of the land area where Portion 2157, Portion 2156 and Portion 2159 are situated.

16. Mr Saka makes reference to his evidence. I note that in almost all his evidence, he gives both historical and traditional accounts of how he and his people have come to own the land. I find the evidence irrelevant to the issues at hand. That said, I make particular reference to Mr Saka's affidavits which were filed and which were marked as exhibits E1, EE1, and EEE1. The notable part of his submission and evidence is this. He submits that the Lands Titles Commission in 1964 had recognized his clan the Dubara Idibana Clan as the true owners of the land which included the 3 portions of land in question. He annexed as annexure B to his affidavits what he describes in his depositions as true copies of the titles to the land where the 3 portions of land are situated.

17. I have had the benefit of perusing the said evidence and in particular annexure B to Mr Saka's affidavit. The annexure consists of an old map of some kind. It has land markings or boundaries and inscribed therein includes the name Dubara Idibana. To me, the map is substantially illegible, and it does not, in my view, have any real value to an extent that one can identify it, or identify with accuracy which land it refers to, or what the drawing represents, or whether it is a duly recognized map of any kind. That said, all these appear irrelevant for this purpose. Mr Saka deposes that the map is actually the title to the land which covers or includes Portion 2157, Portion 2156 and Portion 2159. I find the said deposition false and misleading (perhaps not deliberate). Annexure Bs to Mr Saka's 3 affidavits consist of a map as I have described herein. It is not and cannot be regarded as a land title of any sort.

18. Similar allegations of customary ownership and land purchased were made by Nicholas Wauma and his group. I have considered evidence that he has adduced. It is futile to state them all here except to say that they do not show any valid challenge to the 3 titles that have been disclosed by the plaintiff over the 3 portions of land. I would also remark that the descriptions of their land boundaries appear to show that that may be referring to different land areas that may not be the subject of the 3 titles as disclosed by the plaintiff.

19. Papua New Guinea, by statute, adopts and follows the Torrens system of land registration. The enabling legislation is the *Land Registration Act Chapter No. 195 (LRA)*. As soon as the registration process of a land is complete and title is issued, the registered proprietor shall have an indefeasible title. The Torrens system *is not a system of registration of title but a system of title by registration*. See cases: *Keimun Keindip v. The Independent State of Papua New Guinea* [1993] PNGLR 28 and *Breskvar v Wall* (1971) 126 CLR 376.

20. The Supreme Court in *Mudge v. Secretary for Lands* [1985] PNGLR 387 held as follows,

- (1) *Registration of leases under the provisions of the Land Registration Act (Ch No 191) is effective to vest an indefeasible title in the registered proprietor subject only to the exceptions enumerated in s 33. Frazer v Walker [1967] 1 AC 569; Breskvar v Wall (1971) 126 CLR 376, adopted and applied.*
- (2) *Accordingly, notwithstanding that a State lease issued under the Land Act (Ch No 185) may have been issued irregularly and in breach of the provisions of that Act, registration under the Land Registration Act will confer an indefeasible title.*

21. According to the principle of indefeasibility of title, the mere existence of a valid title to a land or property, if produced, shall be or shall constitute absolute proof of ownership of the property, subject only to fraud or the exceptions that are provided under s. 33 of the LRA. See cases: *Paul Kamang v. Namba Tumu* (2011) N4313, *WNB Provincial Government v. Papi S Kimas* (2009) N3834 and *Pius Tikili v. Home Base Real Estate Ltd* (2017) SC1563.

22. It is therefore my firm view that the plaintiff is the registered proprietor and holds valid indefeasible titles over Portion 2157, Portion 2156 and Portion 2159. I also find that the defendants including any persons that are residing on the 3 portions of land, are residing there illegally or without any lawful authority or consent from the plaintiff. I find that the plaintiff is entitled to have vacant possession over its properties.

EQUITABLE INTEREST

23. The defendants also argue in the alternative that they have equitable interest over their land should the Court find otherwise or find against them.

24. I refer to the 3 originating summonses. The plaintiff pleads therein that 45 days should be granted to allow the occupants of the 3 portions of land including the defendants, to give vacant possession to the plaintiff. But in the plaintiff's written submission that was presented, Mr Shepherd submits that a total period of 60 days should be permitted to the defendants and the occupants of Portion 2157, Portion 2156 and Portion 2159, to vacate the land.

25. Submissions by the defendants to vacate the land, ranges from 1 year to 3 years. Evidence adduced by the defendants show that they have lived on the 3 portions of land from 5 years or less up to 10 years or more.

26. I will begin with this observation. There is no pleading or crossclaims for equitable interests filed by the defendants in the 3 proceedings. The defendants herein are only

responding to the plaintiff's assertion that it is the registered proprietor of the 3 portions of land in question. As such, the only relevant pleading that may impliedly (as opposed to directly) raise the question of equity and regard to the defendants' interest in the matter, would, in my view, be limited to (i.e., after the plaintiff has established its legal interest over the 3 portions of land) the notice period for vacating the land. In support, I refer to Justice Gavara-Nanu's decision in *Maso v. Pat* (2016) N6550, where His Honour held, and I quote,

23. In my view equitable interest, if any, that the plaintiffs can claim on the land can only relate to them being given sufficient time to vacate the land. Giving them "sufficient time" will entail time required for them to properly dismantle and remove any permanent fixtures such as fences, buildings, including gardens they have made or erected on the land.

27. I adopt the above as applicable herein. This includes the type of approach that I should perhaps also apply in the 3 related proceedings, that is, in terms of allowing the defendants time to remove their fixtures or chattels off from the land. I should, in my view, also be guided by Justice Doherty's decision in *Amos Bai v. Morobe Provincial Government and the State* [1992] PNGLR 150, where Her Honour held in part, and I quote,

Where squatters have been occupying State land without objections by the State, the State would be estopped from insisting on its full legal rights and the occupiers would acquire a limited equitable interest in the land.

28. In Her Honour's decision, she found that the 14 days' notice to quit issued by the State may be regarded as harsh and oppressive in observance of s. 41(1)(a) of the *Constitution*. In so considering, Her Honour adopted Bredmeyer J's decision in *Jivetuo v The Independent State of Papua New Guinea* [1984] PNGLR 174. On point, Justice Bredmeyer said (at p.178),

"Assuming then that the notices to quit are valid, on the facts before me the plaintiff has been on the land for 12 years and has a house there and many others of the class he represents have also been there for a long time and live there. It is not easy to get other land in Papua New Guinea and I can take it that many of the plaintiff's class are poor and cannot easily buy a property elsewhere. The notices to quit which were served gave about fourteen days to quit. I consider that, although done under a valid law, it is harsh and oppressive to the plaintiff to leave within two weeks and I consider that that contravenes s 41 of the Constitution. I propose to enforce and protect that fundamental right under s 57 of the Constitution.

29. The pleadings or relief that give rise to the equitable interest consideration in the present proceedings, is the 45 days period for vacating the premises. The plaintiff, as stated above, has extended the said period to 60 days. The plaintiff submits that 60 days is sufficient for the defendants and any persons who are squatters or illegal occupants on the 3 portions of land, to give vacant possession. So on that basis, the issue is properly before me for consideration. It is also, in my view, prudent to also have regard to s. 41 of the *Constitution*, namely, to ask myself whether the 60 days period that is requested by the plaintiff in the 3 proceedings, for the defendants to give vacant possession, is reasonable and not harsh and oppressive.

30. Given my findings that the plaintiff in the 3 proceedings, is the registered proprietor of Portion 2157, Portion 2156 and Portion 2159, I am of the view that I should allow a single period or timeline, that is, for all the occupants including the defendants who are residing illegally or without the consent of the plaintiff, to vacate the land and give vacant possession to the plaintiff.

31. I note all the submissions on point and the case authorities that have been relied upon. In my view, the appropriate vacation period should be ordered at 120 days from the date of the Court's order. This would amount to a 4-month period. I believe that the said timeframe is reasonable under the circumstances of the 3 proceedings. Some of the defendants have erected houses or made improvements to their blocks which they must now remove. It may seem that a period of 2 months or less may not be sufficient to enable the defendants to vacate the land. The 4-month period also takes into account the time within which the defendants could use to find new locations to settle. I also consider that if I am minded order a lesser vacating period, it may be considered as a harsh and oppressive treatment against these defendants by the registered proprietor who nevertheless has lawful rights over the land. For clarity, all the occupants including the defendants, of Portion 2157, Portion 2156 and Portion 2159, shall give vacant portion of these 3 portions of land to the plaintiff before or by 16 March 2021.

CLOSING REMARKS

32. I observe from the evidence filed that some of the defendants may have been led to believe that the 3 portions of land were customary land. They had or have spent monies on their blocks of land thinking that they were buying land from the customary landowners, only to find out later and confirmed now that they will have to be evicted or leave because the land is State land which has leases and that the registered proprietor is the plaintiff.

33. I will say is this. Buying of land appears to be a growing trend outside the city belts and towns in Papua New Guinea. This decision hopefully should sound a warning to anyone who is thinking of buying land outside of our cities and towns that you must follow the due processes that are available, or that you must exhaust the process of land identification first. Of most importance is that you should firstly conduct land searches with the office of the Department of Lands and Physical Planning or seek proper legal assistance. Land cannot be sold like a chattel or a loaf of bread or at arms-length, and nor can anyone just occupy it and try to claim rights over it without proper legal basis.

SUMMARY

34. In summary, I will grant the main relief sought in the 3 proceedings with variations made to the orders that will reflect upon my findings.

COST

35. An order for cost is discretionary. In the usual way, cost should follow the event. However, this is a case or situation where I think I should rethink the question and decide. I note that all the defendants appear to be settlers who had, I have observed, struggled to get along and to assist the Court in these matters. Even for those who can afford lawyers, their evidence and testimonies show the difficult situations they are in at this juncture, and I must

say that after this decision, their future it seems will be affected either for the good or the worse.

36. Of course, it may be unfair upon the plaintiff even to use the argument that it is well-off or that it is a multi-billion super fund who can afford its cost. I find such considerations irrelevant. I say this because no matter how rich or poor a party may claim to be in a court proceeding, costs incurred are costs that are due and owing for actual services rendered, that is, costs such as legal fees. Such is a fundamental basic mechanism of how we function in a commercial or capital based society.

37. But with that or having said all that, and if I can say that on a humane consideration, I would order each party to bear their own costs.

THE ORDERS OF THE COURT

38. I make the following orders in regard to the 3 proceedings as follows:

OS 755 of 2019

1. An order for vacant possession of the land known as Portion 2157 Milinch Granville Fourmil Moresby, National Capital District being the whole of the land contained in State Lease Volume 73 Folio 237.
2. Leave, pursuant to Order 13 Rule 3 of the *National Court Rules*, is granted to issue a Writ of Possession within 120 days of the date hereof. For clarity, the defendants, occupants of, their agents, servants and whosoever shall vacate Portion 2157 completely before or by the 120th day from the date of issue of this Court Order.
3. Parties are to bear their own costs of the proceedings.
4. Time for entry of these orders is abridged to the date and time of settlement by the Registrar which shall take place forthwith.

OS 757 of 2019

1. An order for vacant possession of the land known as Portion 2156 Milinch Granville Fourmil Moresby, National Capital District being the whole of the land contained in State Lease Volume 73 Folio 237.
2. Leave, pursuant to Order 13 Rule 3 of the *National Court Rules*, is granted to issue a Writ of Possession within 120 days of the date hereof. For clarity, the defendants, occupants of, their agents, servants and whosoever shall vacate Portion 2156 completely before or by the 120th day from the date of issue of this Court Order.
3. Parties are to bear their own costs of the proceedings.

4. Time for entry of these orders is abridged to the date and time of settlement by the Registrar which shall take place forthwith.

OS 758 of 2019

1. An order for vacant possession of the land known as Portion 2159 Milinch Granville Fourmil Moresby, National Capital District being the whole of the land contained in State Lease Volume 73 Folio 237.
2. Leave, pursuant to Order 13 Rule 3 of the *National Court Rules*, is granted to issue a Writ of Possession within 120 days of the date hereof. For clarity, the defendants, occupants of, their agents, servants and whosoever shall vacate Portion 2159 completely before or by the 120th day from the date of issue of this Court Order.
3. Parties are to bear their own costs of the proceedings.
4. Time for entry of these orders is abridged to the date and time of settlement by the Registrar which shall take place forthwith.

The Court orders accordingly.

Ashurst PNG:	Lawyers for the Plaintiffs
Lakakit Lawyers:	Lawyers for respondents Catherine Kaeaka, Luke Tengdui, Romba Jerry Kots, William Kansol and Steven Wani in proceedings OS 757 and 758 of 2019