

N8298

PAPUA NEW GUINEA
[IN THE NATIONAL COURT OF JUSTICE]

OS (JR) NO. 648 OF 2017

BETWEEN
TST HOLDINGS LIMITED
Plaintiff

AND
RUSSELL WAVIK
First Defendant

AND
SIMON WAVIK & FAMILY (WGATAP) PTY LTD
Second Defendant

AND
HENRY WASA as the REGISTRAR OF TITLES
Third Defendant

AND
**TIRI WANGA as the ACTING SECRETARY FOR THE DEPARTMENT
OF LANDS & PHYSICAL PLANNING**
Fourth Defendant

AND
THE INDEPENDENT STATE OF PAPUA NEW GUINEA
Fifth Defendant

Waigani: Makail, J

2019: 15th May

2020: 28th April

JUDICIAL REVIEW – Review of Registrar of Title’s decision to issue replacement titles – State leases – Exercise of power – Reasonableness of exercise of power – Duty to publish notice – Duty to act reasonably and fairly – Breach of natural justice – Right to be heard – Prior interest – Registered proprietor – Constitution – Section 59 – Land Registration Act – Sections 33(1)(a)&(c) & 162(4)

Cases Cited:

TST Holdings Limited v. Russell Wavik & Ors: OS (JR) No 160 of 2014
(Unnumbered & Unreported Judgment of 6th October 2016)
Henry Fragili v. Gabriel Karup (2011) N4200

Counsel:

Mr. M. Goodwin with Mr. B. Nutley, for Plaintiff
Mr. H. Kevau, for First & Second Defendants
No appearance, for Third, Fourth & Fifth Defendants

JUDGMENT

28th April, 2020

1. **MAKAIL, J:** On 16th October 2016 the National Court upheld the plaintiff's application for judicial review in OS (JR) No 160 of 2014 and quashed the decision of the Registrar of Titles (Registrar) to issue a replacement titles to the second defendant for Allotments 16, 17, 18, 19, 20, 21, 22, 23, 24, 25, 26 and 27 Section 39, Hohola, National Capital District. Further, it ordered the second defendant's application for replacement of titles to be remitted to the Registrar for rehearing on a date and time to be fixed for publication of notice pursuant to Section 162(4) of the *Land Registration Act*. Conversely, the order sought by the plaintiff that as the previous title holder its titles be upheld and restored was refused: see full judgment of the Court in *TST Holdings Limited v. Russell Wavik & Ors*: OS (JR) No 160 of 2014 (Unnumbered & Unreported Judgment of 6th October 2016).

2. The reason was that there was no evidence to prove that the Registrar had complied with the requirement to publish the notice in the National Gazette and Newspaper prior to issuing the replacement titles to the second defendant under Section 162(4) of the *Land Registration Act*. Section 162(4) states:

“(4) When an application under this section relates to a lost or destroyed instrument of title the Registrar shall give at least 14 days' notice of his intention to make a new instrument of title or official copy by advertisement in the National Gazette and in at least one newspaper circulating in the country”.

3. The Court's difficulty in finding that the Registrar complied with this requirement was compounded by the Department of Lands and Physical Planning (Lands Department's) file which contained all of the documents for the substantive hearing was lost and the plaintiff was not given the opportunity

to produce documents from the Lands Department to prove its claim as title holder to the subject land.

4. It is significant to mention this at the outset because after the Court decision, the lost file was fortuitously located by the plaintiff with the assistance of an officer at the Lands Department. The file included the stamped Contracts of Sale of Land for each parcel of land and also with Ministerial approval, together with registered transfer instruments and documents confirming registration of the purchase to the plaintiff. These documents are now available to the current Registrar to thoroughly consider and are annexed to the affidavit of Leonard Kwong Yew Tan sworn 28th July 2017.

5. The plaintiff submits that its subsequent discovery of the Lands Department's lost file which contained all the relevant and requisite documents for the transfer of titles for the parcels of land to it infer that the registration of the second defendant's titles was procured by fraud. The inference is made much stronger and the Court can safely conclude that the second defendant colluded with the Registrar to procure the titles by fraud because there is further uncontroverted evidence by Richter Habuka, the lawyer who acted for both parties on the conveyance in his affidavit filed 8th August 2017 that the documents annexed to the affidavit of Mr Tan are correct conveyance documents.

6. Added to that, after the Court decision on 15th December 2016 the Registrar published in the National Gazette a notice purported to be pursuant to Section 162(4) of the *Land Registration Act* and/or pursuant to the Court decision. The Registrar also published a notice in the National Newspaper on 20th December 2016.

7. The plaintiff says that it had no notice of the publication of the notice in the National Gazette or the National Newspaper. Unbeknown to it, it had written to the Registrar on 21st December 2016 lodging an objection and requesting the Court order of 6th October 2016, petition notice and conducts a rehearing. The plaintiff's agent Mrs Sallyanne Mokis, was not able to deliver the letter to the Registrar and until 4th January 2017, as the office was closed from 8th December 2016 until this date for Christmas and New Year's holidays. Her first attempts at service of the letter were 23rd and 24th December 2016, as noted from Mrs Mokis' affidavit filed 8th August 2017 and Public Notice by the Registrar's Office.

8. The Registrar failed to reply to the plaintiff's letter of 21st December 2017. Furthermore, despite the plaintiff's officers and agents continuous attendance at the Registrar's Office to enquire on the status of the matter. Even the Registrar's Office officers did not assist or respond.

9. On 7th April 2017, the plaintiff sent another letter to the Registrar, from its lawyers, O'Briens Lawyers, but the Registrar failed to respond and ignored the letter. This letter is important because it referred to documents from the Lands Department's own file which had been deposited with the Registrar by the plaintiff's agent Mrs Mokis on 4th January 2017. These documents included copies of the signed Contracts of Sale of Land, duly stamped and endorsed with Ministerial approval, on which the plaintiff was registered as proprietor of the subject land, which were not available at the substantive hearing in OS (JR) No 160 of 2014.

10. On 22nd May 2017 a meeting was held between Mrs Mokis, Mr Bobby Nutley of O'Briens Lawyers with Ms Shirley Pohei, a Legal Manager at the Lands Department at the Office of the Registrar to discuss the progress of the rehearing and find out why there was no response to the plaintiff's letters to the Registrar. They were informed that the notices under Section 162(4) of the *Land Registration Act* had been published and that on 9th January 2017, replacement titles were issued to the second defendant. The Register had also been updated to remove the plaintiff as the registered proprietor of the subject land.

11. No explanation was provided as to why no reply was given to the plaintiff's letters and no rehearing was conducted in accordance with the Court order of 6th October 2016. Even after this proceeding was filed, the Registrar has not provided an explanation for this.

12. Furthermore, the Registrar or an officer from the Registrar's Office well versed with the matter did not file an affidavit in response to the factual matters deposed to by the plaintiff's witnesses. What this means is that, there is no evidence from the Registrar to deny the existence or dispute the authenticity of the documents found in the Lands Department's lost file which included the stamped Contracts of Sale of Land for each parcel of land and also with Ministerial approval, together with registered transfer instruments and documents confirming registration of the purchase to the plaintiff.

13. The first defendant Mr Russell Wavik deposes to two affidavits, one filed 21st November 2018 and the other, 28th March 2019. With the exception of

one or two assertions, much of what he deposed in the first affidavit is irrelevant or a restatement of facts in the previous proceeding OS (JR) No160 of 2014. He confirms that after the Court decision of 6th October 2016, fourteen days after the date of publication of notice in the National Newspaper on 20th December 2016 excluding 25th and 26th December 2016 and 1st January 2017 as being public holidays, and after receiving no objections from any interested parties including the plaintiff, the Registrar Ms Shirley Pohei issued to the second defendant twelve titles for the parcels of land on 9th January 2017.

14. In his second affidavit, he restates the facts of the previous proceeding for the second time. What is relevant is that, his lawyers sent two letters to the Solicitor General as lawyers for the Registrar, one on 14th October 2016 and the other on 1st November 2016 to get the Registrar to get the rehearing going and received no response and one letter to the Registrar on 15th November 2016 urging him to do likewise.

15. However, Mr Wavik does not specifically refer to and deny or dispute the existence of the letter from the plaintiff's lawyers dated 21st December 2016. He also does not refer to and deny or dispute the existence or authenticity of the stamped Contracts of Sale of Land for each parcel of land and also with Ministerial approval, together with registered transfer instruments and documents confirming registration of the purchase to the plaintiff.

16. It is noted from his lawyers' letter to the Registrar dated 15th November 2016 that they made it clear to him that *"the publications are made and subsequent rehearing (ifs any, in the light of any legitimate objections that may arise) at the earliest so that the relevant physical certificate titles can be lawfully replaced and/or the relevant allotments can be correlated to the proper and lawful registered proprietor respectively"*.

Proof of Fraud

17. Proving fraud can be broken down to four different grounds.

Discovery of lost Lands Department file

18. First, I uphold that the plaintiff's submission that the Lands Department's file or otherwise the relevant and requisite documents such as the stamped Contracts of Sale of Land for each parcel of land and also with Ministerial approval with registered transfer instruments should have been produced at the substantive hearing on OS (JR) No 160 of 2014. Its subsequent discovery with

all the relevant and requisite documents for the transfer of titles for the parcels of land infers that the registration of the second defendant's titles was procured by fraud.

Evidence of lawyer Richter Habuka

19. Second, I uphold the plaintiff's submission that an inference can be drawn that the first and second defendants procured the titles by fraud because there is further uncontroverted evidence by Richter Habuka, the lawyer who acted for both parties on the conveyance in his affidavit filed 8th August 2017 that the documents annexed to the affidavit of Mr Tan are correct conveyance documents.

Publication of Notice

20. Third, the written judgment and orders of the Court of 6th October 2016 are unequivocally clear in relation to the rehearing before the Registrar under Section 162(4) of the *Land Registration Act*. First, the Registrar must publish a notice in the National Gazette and another in the Newspaper. There is no dispute that he has attended to them. I find as a fact that the Registrar has published a notice in the National Gazette on 15th December 2016 and another in the National Newspaper on 20th December 2016.

21. The period of fourteen days stated in the notice is consistent with Section 162(4) (supra) and the National Court decision in *Henry Fragili v. Gabriel Karup* (2011) N4200 which stated:

“Section 162 prescribes what must be done if a certificate of title has been lost, destroyed or defaced.....It was necessary for an application to be made to the Registrar for a replacement certificate of title. It was also necessary for the Registrar to give at least 14 days notice of his intention to make a new instrument of title or official copy by advertisement in the National Gazette and in at least one newspaper circulating in the country”.

22. However, the plaintiff submits that the actions by the Registrar to publish a notice during the holiday period when the Office was closed for the Christmas and New Year's holidays was unreasonable because it deprived it of the opportunity to respond to the notice. It was also in breach of the Court order of 6th October 2016.

23. I uphold this submission. I find as a fact that the Office of the Registrar was closed between December 2016 and 4th January 2017. Further, I find that the timing of the publication of the notices was not right. It is unreasonable and unfair to expect the plaintiff to respond or object to the application for replacement of titles when the Registrar closed his office for Christmas and New Year's holidays. Furthermore, I find that the plaintiff was adversely prejudiced and denied a right to be heard under Section 162(4) of the *Land Registration Act* and Section 59 of the *Constitution* when he was unable to deliver its letter dated 21st December 2016 to the Registrar due to its office closure.

24. I also find that this letter was sent to the Registrar without the plaintiff being aware of the notice published in the National Gazette on 15th December 2016 and the other in the National Newspaper on 20th December 2016. This is apparent from its content which reads in part:

“We enclose a copy of the decision of His Honour Makail J, dated 6 October 2016 concerning the above proceeding.

You will note that Order No. 5 states:

‘4. The Second Defendant’s application for replacement of titles is remitted for re-hearing before the Fifth Defendant on a date and time to be fixed following publication of notice pursuant to section 162 (4) of the Land Registration Act’.

Pursuant to His Honour’s decision, we now request the Registrar to do the following:

- 1. issue a Notice for Issue of Official Copy in respect of the properties the subject of application for replacement titles.*
- 2. arrange publication of the Notice in one of the daily newspapers and the National Gazette.*
- 3. pursuant to the individual Contract of Sale of Land dated 20 February 1995 for each of the Allotments 16-27 Section 39, Hohola, NCD, and the previous journals entries made in September 1999, the Registrar forthwith restore titles in respect of each of the allotments to TST Holdings Limited*

4. *issue a letter to the applicant Simon Wavik & Family (Wgatap Ltd) advising that the titles for each of the Allotments 16-27 have been restored in favour of TST Holdings Limited on the basis that the Allotments were sold to TST pursuant to valid contracts for sale of land dated 20th February 1995 and the transfers for each of the allotments were registered on 23 September 1999*

Please keep us informed of developments”.

25. In addition, the letter can be viewed as an exhortation by the plaintiff to the Registrar to take steps to organise a rehearing of the application for replacement of titles after a delay of more than two months since the Court decision of 6th October 2016. Furthermore, at item no. 3 of the letter, the plaintiff drew the Registrar’s attention to the individual Contract of Sale of Land dated 20th February 1995 for each allotment from 16 to 27 Section 39 and requested him to restore its titles to these parcels of land. There is no evidence from the Registrar that he gave consideration to this submission by the plaintiff. In the absence of this evidence, I am satisfied that the plaintiff did what was required of it to comply with Section 162(4) of the *Land Registration Act* and the Court order of 6th October 2016 but was denied a right to be heard when it did not receive a response to its letter. Equally, the decision to issue replacement titles to the second defendant was illogical and unreasonable because it was contrary to the overwhelming evidence supporting the plaintiff’s claim, a consideration which will be touched on a little later.

26. For now, I discuss the circumstances after the Court decision on 6th October 2016 to date of the first notice in the National Gazette on 15th December 2016. The conduct and manner in which the Registrar applied his duty between these dates, in my view, is unsatisfactory, but not sufficient to establish fraud against the first and second defendants. I reach this conclusion because I am not satisfied that the first and second defendant had a hand in delaying the publication of the notice in that, they colluded with the Registrar to get the Registrar disregard or ignore the requirement to publish the notice or not to inform the plaintiff of his intention to proceed with the rehearing.

27. On the other hand, the evidence from the first and second defendants’ lawyers show that they have done what was required of them by writing to the Solicitor General on two occasions and received no response and on the third occasion, to the Registrar to get him to conduct a rehearing. Before doing so, he must publish a notice in the National Gazette and the Newspaper. At the highest, I find that the failure was on the part of the Registrar, and in the absence of an explanation from him, his conduct can be best described as

dilatory of his duty and criticised as being unsatisfactory and appalling.

Relevant and Requisite Documents for Registration of Titles

28. I return to the question of reasonableness of the Registrar's decision. When there is uncontroverted and overwhelming evidence in relation to stamped Contracts of Sale of Land for each parcel of land and also with Ministerial approval, together with registered transfer instruments and documents confirming registration of the purchase to the plaintiff in 1995, it is illogical and suspicious that any reasonable decision-maker or a public official vested with a decision-making power will arrive at the decision to issue replacement titles to the second defendant.

29. It is quite extraordinary to say the least. Add the Lands Department lost file and the uncontroverted evidence of Mr Habuka, the conveyance lawyer for the plaintiff at that time, I must agree with the plaintiff's submission that there is a strong case of fraud being perpetrated by the first and second defendants. It is inferred from the file being lost deliberately in collusion between the first and second defendants and the Registrar to conceal the evidence in order to destroy the plaintiff's case in the previous proceeding. When the file was found and despite the strong evidence favouring the plaintiff, the Registrar ruled to the contrary. It does not make sense at all.

30. What the Registrar had done was effectively given an instrument of title to a vendor (second defendant) who has already disposed of its interest in the subject land by transfer to the plaintiff under a Contract of Sale for valuable consideration. The second defendant has been paid for the land he sold and now is attempting to get a double benefit by fraudulently stealing the subject land back, relying on a previous lack of records at the Lands Department. The location of the documents has uncovered the lie and the theft of the land and it is in the interests of justice that the plaintiff now has its registered indefeasible titles under Section 33(1)(a) of the *Land Registration Act* restored.

31. I am further satisfied that Section 33(1)(c) of the *Land Registration Act* has been established.....*"The estate or interest of a proprietor claiming the same land under a prior instrument of title"*. That is, the plaintiff has established that it has a prior interest in the subject land and the title to each parcel of land must be restored to it.

Conclusion

32. The application for judicial review will be upheld on the grounds of fraud and plaintiff's prior interest under Section 33(1)(a)&(c) of the *Land Registration Act* but not all the relief sought in the Notice of Motion filed

pursuant to Order 16, rule 5 of the *National Court Rules* will be granted. This is because not all of them have been proved or are relevant. For avoidance of doubt, where they are not stated in the final order, they are not granted.

Order

33. The orders are:

1. Fraud is proven and the application for judicial review is upheld.
2. The plaintiff has a prior interest as the registered proprietor of the subject land and the application for judicial review is upheld.
3. An order in the nature of Declaration that the third defendant's decision to publish a Notice under Section 162(4) of the *Land Registration Act* in the National Gazette on 15th December 2016, and in the National Newspaper on 20th December 2016, when the government offices including the third defendant's office were closing for Christmas and New Year's holidays and no objection or response could be lodged until 4th January 2017 was a breach of natural justice under Section 59 of the *Constitution* and was unreasonable and unfair under the Wednesbury principle, and constituted a decision which no reasonable person in that capacity would have made.
4. An order in the nature of Declaration that the third defendant's decision in failing to consider a respond to the plaintiff's letters of 21st December 2016 through Wariniki Lawyers and 7th April 2017 through O'Briens Lawyers was a breach of legal duty, and a breach of natural justice under Section 59 of the *Constitution* and was unreasonable and unfair under the Wednesbury principle, and constituted a decision which no reasonable person in that capacity would have made.
5. An order in the nature of Declaration that the third defendant's decision not to comply with the order of the National Court dated 6th October 2016 requiring the third defendant to conduct a rehearing into the issue of any replacement of instrument of title was unlawful and in breach of the Court order

of 6th October 2016, a breach of legal duty, and a breach of natural justice under Section 59 of the *Constitution* and was unreasonable and unfair under the Wednesbury principle, and constituted a decision which no reasonable person in that capacity would have made.

6. An order in the nature of Declaration that the third defendant's decision on 9th January 2017, to cancel and remove the entries in the Register of Lands rescoring the plaintiff as the proprietor of the subject land was unlawful and in breach of the Court order of 6th October 2016, and a breach of his legal duty, and a breach of natural justice under Section 59 of the *Constitution* and was unreasonable and unfair under the Wednesbury principle, and constituted a decision which no reasonable person in that capacity would have made.
7. An order in the nature of Declaration that the third defendant's decision on 9th January 2017, to replace and issue a new title deed instrument to each parcels of the subject land to the second defendant without giving any opportunity to the plaintiff to be heard or to conduct a rehearing was unlawful and in breach of the Court order of 6th October 2016, a breach of his legal duty, and a breach of natural justice under Section 59 of the *Constitution* and was unreasonable and unfair under the Wednesbury principle, and constituted a decision which no reasonable person in that capacity would have made.
8. An order in the nature of Certiorari to remove into this Court and quash the decision of the third defendant of 9th January 2017 to issue replacement titles to the second defendant for parcels of land identified as Allotments 16, 17, 18, 19, 20, 21, 22, 23, 24, 25, 26 and 27 Section 39, Hohola, National Capital District forthwith.
9. An order in the nature of Certiorari to remove into this Court and quash the decision of the third defendant of 9th January 2017 to cancel and remove the entries in the Register of Lands recording the second defendant as the proprietor at the subject land forthwith.
10. An order in the nature of Mandamus to cancel and remove

the entries in the Register of Lands recording the second defendant as the proprietor at the subject land forthwith.

11. An order that the defendants pay the plaintiff's costs of the proceeding, to be taxed, if not agreed.
12. Time for entry of these orders shall be abridged to the date of settlement by the Registrar, which shall take place, forthwith.

O'Briens Lawyers: *Lawyers for Plaintiff*

Rageau Manua & Kikira Lawyers: *Lawyers for First and Second Defendants*

Solicitor General: *Lawyers for Third, Fourth and Fifth Defendants*