

**IN THE COURT OF APPEAL, MALAYSIA
PUTRAJAYA**

[APPELLATE JURISDICTION]

CIVIL APPEAL NO. Q-01-783-2010

Between

- 1. SUPERINTENDENT OF LANDS AND SURVEYS
KUCHING DIVISION**
- 2. STATE GOVERNMENT OF SARAWAK - APPELLANTS**

And

MOHAMAD RAMBLI BIN KAWI - RESPONDENT

**[In the matter of High Court at Kuching,
Suit No. 22-88-2002]**

Between

Mohamad Rambli Bin Kawi - Plaintiff

And

- 1. Superintendent of Lands and Surveys
Kuching Division**
- 2. State Government of Sarawak - Defendants**

CORAM:

**Abdul Wahab Patail, JCA
Balia Yusof Haji Wahi, JCA
Tengku Maimun Tuan Mat, JCA**

Date of Judgment: 7th July 2014

**DISSENTING JUDGMENT OF
ABDUL WAHAB PATAIL, JCA**

[1] The Appellants, the Superintendent of Lands and Survey Kuching Division (1st Appellant) and the State Government of Sarawak (2nd Appellant) were, together with a 3rd Defendant, the Federal Land Commissioner who did not appeal, named as Defendants respectively in a civil suit commenced by a Plaintiff Mohamad Rambli bin Kawi (the Respondent herein) seeking a declaration that he had acquired native customary rights over 65 parcels of land totalling about 1010 acres at Loba Rambungan (the said Lands) transferred from the villagers of Kampong Loba under Surat Perjanjian Menyerah Tanah Temuda.

[2] Sometime on 12 August 1997, the Appellants alienated the whole of these lands, described as Lot 300, Block 4 Salak Land District, to the Federal Land Commissioner under a 99-year Provisional Lease.

[3] In addition to the declaration, the Respondent sought other ancillary declarations and reliefs generally as follows:

- (a) The original owners and the Respondent had acquired native customary rights over the said Lands;
- (b) This right precludes the Appellants from impairing the Respondent's rights;
- (c) The issuance of the Provisional Lease infringes or impairs the Respondent's rights;
- (d) The issuance of the Provisional Lease is null and void;
- (e) General, aggravated and exemplary damages to be assessed;

- (f) Interest at 8% from the date of issuance of the Provisional Lease on 12 August 1997 to the date of judgement to date of realisation;
- (g) Any other orders or reliefs this Court deems fit and just; and
- (h) Costs.

[4] On conclusion of the trial, the Respondent's claim was allowed. The High Court -

- (a) declared that the Plaintiff had validly acquired native customary rights over the 65 parcels of land;
- (b) declared that the issuance of the Provisional Lease extinguished the Plaintiff's Native Customary rights to the 65 parcels of land;

- (c) ordered that the Appellants pay the Plaintiff compensation to be assessed in accordance with the relevant provisions of the Land Code concerning the extinguishment of native customary rights and Appellants to pay costs to the Plaintiff, which sum is to be taxed unless agreed.

[5] The following broad issues were pursued before us in the appeal:

- (a) Whether, between 1943 and 1948, the original claimants had lawfully acquired native customary rights over the subject land or any part thereof;
- (b) Whether, having regard to Section 5(1) and (2) of the Sarawak Land Code 1958, the Respondent could lawfully acquire native

customary rights over the said land though sale and purchase agreements;

- (c) Whether the Courts can depart from authority on native customs such as the Native Court of Appeal of Sarawak and followed by the civil courts, relating to sale or transfer of untitled land held under native customary tenure that declared that native customary rights can only be transacted between natives in the same community.

[6] I address these in order of appearance.

Whether, between 1943 and 1948, the original claimants had lawfully acquired native customary rights over the subject land or any part thereof

[7] PW2, one Halim bin Bujang testified that he is the son of the late village headman and he inherited the land from his late father, and that it was first occupied by his grand-uncle. Likewise, PW3 testified that he inherited the land as Tanah

Pesaka from his late father. Similarly, PW4, who like PW2 and PW3, transferred their rights to the native customary land under the respective Surat Perjanjian Menyerah Tanah Temuda.

[8] The High Court considered the evidence of a Penghulu (village headman) from 1995 to 2002, one Mahlee @ Mahli bin Salam (PW5) whose father and grandfather were Penghulu before him. In my view, he was well qualified to testify on the native customs and their ancestral lands at Kampong Loba.

[9] One Sebi bin Masran (PW6) was also a Penghulu, who testified on the manner how a person transfers his or her native customary rights land to another by the use of Surat Perjanjian Menyerah Tanah Temuda.

[10] Section 101 of the Evidence Act 1950 provides that whoever desires any court to give judgment as to any legal right or liability, dependent on the existence of facts which he asserts, must prove that those facts exist, and the burden of

proof is said to lie upon that person. Section 102 provides that the burden of proof in a suit or proceeding lies on that person who would fail if no evidence at all were given on either side. It is clear that the burden of proof lies upon the Respondent herein that the native customary rights to the said land had been acquired by the original owners whose descendants transferred their rights to the Respondent by Surat Perjanjian Menyerah Tanah Temuda.

[11] The standard of proof in civil cases is upon a balance of probabilities. This balance of probabilities is not the proof beyond reasonable doubt required in criminal cases. This balance of probabilities may be visualised as a scale with the plaintiff placing his evidence on one side and the defendant likewise on the other. The Court evaluates the evidence as to the weight it carries. Of course incredible evidence carries no weight. Denials without evidence to justify the denial likewise can carry no weight, and hence the term "bare denial". At the end of the case, the Court determines who, between the plaintiff and the defendant, has placed such evidence that the

scale tilts in his favour. Sections 101 and 102 mean that to succeed, the scale must tilt in his favour. This visualisation also demonstrates that in the course of a trial, if the plaintiff succeeds to call evidence worth any weight, the scale may first tilt in his favour, in which case it behoves the defendant to adduce some evidence to return the scale to at least a state of balance, in which case the plaintiff would be said to have failed to discharge the burden that is upon him. This process is sometimes described somewhat inaccurately as a shifting of the burden. Be that as it may, if the defendant provides no evidence to be placed on his side of the scale the plaintiff who had done so, regardless how much or how little evidence he has put on his side of the scale. It is understandable in the nature of things that an ordinary defendant would profess to be dissatisfied with the evidence adduced by the plaintiff, but that is not the measure of whether the plaintiff had succeeded or not. If the defendant has no evidence, it is important for the defendant to show that the evidence adduced by the plaintiff is worth no weight. That it is self-serving is no ground for rejection as no law prohibits a witness from giving evidence

on his own behalf. It merely goes to the caution in the examination and the weight to be accorded.

[12] In this case, the High Court having heard the testimony of the Respondent's witnesses concluded that the original claimants to the land had acquired native customary rights to the land prior to 1.1.1958, i.e. before the Land Code of Sarawak (Cap 81) came into effect. Their fathers and grandfathers were adults before 1958 and it is not incredible that they had the capacity to acquire the claimed native customary rights then. The cross-examination did not reduce their testimony to no weight at all. There is no evidence to show those claims are false. I find no error in the process of and the finding that the original owners of native customary rights to the said lands acquired those rights prior to 1958.

Whether, having regard to Section 5(1) and (2) of the Sarawak Land Code 1958, the Respondent could lawfully acquire native customary rights over the said land through sale and purchase agreements

[13] Given that the native customary rights were acquired before 1.1.1958, sections 5(1) and 5(2) are of no useful application to the facts of this case.

Whether the Courts can depart from authority on native customs such as the Native Court of Appeal of Sarawak and followed by the civil courts, relating to sale or transfer of untitled land held under native customary tenure that declared that native customary rights can only be transacted between natives in the same community

[14] This very issue has been dealt with in **Bisi Jinggot v. Superintendent of Lands and Surveys Kuching Division & Ors. [2013] 6 CLJ 805 FC**, hereinafter referred to as ***Bisi Jinggot***. A distinction was drawn between alienated and unalienated native customary land, where the former is held transferable and the latter not transferable. In his concurring judgment, Richard Malanjum CJ (Sabah & Sarawak) described the native customary rights obtained before 1.1.1958, and bought by Bisi Jinggot between 1984 (5 Lots), 1990 (2 Lots)

and 1991 (1 Lot) as held under a license and as mere licensee, the holder has no title to sell. Suriyadi Halim Omar FCJ, delivering the judgment of the Federal Court, considered the Fruit Trees Order 1889 and culminating in the Sarawak Land Code 1958 (Cap 81), when control on acquisition of native customary rights over land are further restricted under sections 5(1) and 5(2), for the view that native customary land remained as State Land but native customary land held under individual right may be inherited or passed temporarily by the owner until his return by *tungkus asi*, but not sold, particularly to another not from the same community. But as evident in the judgment of Suriyadi Halim Omar FCJ, the fundamental basis of the case was not there, since the appellant's case rested upon conditional sale and purchase agreements with the express conditions never having been fulfilled. Further, while it was pleaded the 8 Lots were located in native area land, the question pertained to native communal land. Strictly there was no basis for leave for the questions sought to be answered.

[15] Nevertheless, *Bisi Jinggot*, in my view, represents the correct law that the starting point in any claim of native customary right over land is not merely where it is located, but when it was first acquired. Then the time when that right was acquired determines the relevant order or law in force which prescribes the terms upon which the right, if any, was acquired over State Land under the Brooke administration to the present day.

[16] In this case, though the witnesses have testified to the practice of Surat Perjanjian Menyerah Tanah Temuda, and therefore such transfer by sale is accepted by the ethnic Malay community of Sarawak, it remains law that in respect of rights acquired before 1.1.1958 and the Fruit Trees Order 1889 applied, by section 2 thereof, the only land that may be transferred is alienated land where title has been issued.

[17] In the circumstances, I allow the appeal and set aside the order of the High Court except in respect of the Lots where title has been issued.

[18] This appeal was scheduled to be heard together with another related appeal No. Q-01-105-2010 between Superintendent of Lands and Surveys Department Kuching Division & Anor v. Mohamad Rambli bin Kawi, originating from Kuching High Court No. 22-84-2002. It was agreed by parties that the decision in the present appeal will bind the other above-mentioned appeal.

signed

(DATUK ABDUL WAHAB BIN PATAIL)

Judge

Court of Appeal, Malaysia

Putrajaya

Dated: 7th July 2014

Counsels/Solicitors

For the Appellants:

Datuk J.C. Fong, Mr. Joseph Chioh & Mr. Mohd. Adzul

State Attorney General's Chambers

15th & 16th Floors, Wisma Bapa Malaysia

Petra Jaya, 93502 Kuching

SARAWAK

For the Respondent:

Mr. Baru Bian & Mr. Desmond Kho

Messrs Baru Bian Advocates

No. 6, 2nd Floor, Lot 5430, Block G, RH Plaza

Jalan Lapangan Terbang

93350 Kuching,

SARAWAK