

IN THE HIGH COURT OF SOLOMON ISLANDS

CIVIL JURISDICTION

Civil Case Number 453 of 2017

BETWEEN: BILLY GINA ZINIHITE, SHEALLY ZINIHITE, - Claimant
MILTON TALASASA & OTHERS
(Representing themselves and members of
Kazukuru left Hand Land Primary Right Owners)

AND: SOLOMON ISLANDS PORTS AUTHORITY - Defendant

Date of Hearing: 1st November 2022 (Last written submission).

Date of Ruling: 25th November 2022.

Mr. N. Laurere for Claimants/Respondents.

Mr. G. Suri for Defendant/Applicant.

KENIAPISIA; PJ:

**RULING ON APPLICATION FOR LEAVE TO FILE THIRD PARTY
NOTICE AGAINST MR AQORAU**

Introduction

1. In **February 2018**, claimants obtained default judgment against defendant. Then on **8th March 2019**, claimants applied for assessment of damages on the said judgment. On **23rd April 2019**, defendant applied to set aside the default judgment.
2. I gave “stay order” on hearing the application to set aside default judgment. Claimants appealed against my “stay orders”. Defendant also made a cross appeal. Court of Appeal allowed claimants appeal. And rejected defendant’s cross appeal. The application for assessment of damages is still pending. So I should now resume the assessment of damages as per directives contained in the Court of Appeal decision delivered on **12th August 2022**.
3. Instead, Mr Suri is applying for leave to file third party notice, against Mr Milton Aqorau – by application filed **15th September 2022**. This is because Mr Aqorau was the person, who permitted defendant to extract gravel from the disputed land herein, under a written agreement dated **13/06/2017**. And defendant may have paid some monies to Mr. Aqorau.

*Application for leave to issue third party notice must be decided consistent with the
Court of Appeal Decision*

4. I must decide this application for leave in view of the principles and the spirit set out in the decision of the Court of Appeal. The first and important principle is: “*The default*

judgment will stand and the matter is referred to the High Court for the assessment of damages.”¹

5. So I am obliged to proceed to assess damages, as per claimants’ application pending since 8th March 2019. Should assessment be delayed, by defendant’s application for leave to issue third party notice against Mr Aqorau, as Mr. Suri’s application seeks to do, saying the Court of Appeal decision did not stop Mr Aqorau from being added by way of third party proceeding to the assessment proceeding?
6. To answer this question, I should return to the principles set out in the Court of Appeal decision. The Court of Appeal decision made it plain clear that there is no possible defence available to the defendant, in this claim, for trespass and consequently damages. That is why the default judgment was not set-aside. Court of Appeal relevantly stated as follows:-

“Aside from the question of delay, a court when considering the setting aside of a default judgment should consider the merit of any proposed defence. The respondent alone cannot maintain a defence but must rely upon the intervention of others who claim to be custom landowners of the land in question. That, in turn brings into play earlier decisions made by the appropriate authorities on the question of customary ownership.”²

“Kazukuru land had been elsewhere described as the most litigated piece of land in the Solomon Islands. Following a 1970 decision declaring Edwin Biku the landowner, a successful appeal in 1971 in Native Land appeal Case 9 of 1971 was followed by various decision in, inter alia, High Court Land Appeal Case 23 of 1984, the High Court case reported at [2013] SBHC 149 and Court of Appeal case Talasasa –v- Bea [2016]SBHC 3. The decisions concerning this land made over the years are most helpfully contained in the appellants/cross respondent’s book of authorities on this appeal.”³

“As the appellants submits on this appeal, the evidence of Milton Aqorau will not assist them even were he joined as a party to these proceedings at this late stage. Rakutu Hill is still within Kazukuru Left Hand Land.”⁴

“We therefore conclude, on the question of merit to the proposed defence, and the prospects of success, are not such that an order should be made setting aside the default judgment. Too much time was allowed to pass after the default judgment was entered for which no acceptable explanation has been offered, no step was taken until after the application for assessment of damages was filed and the prospects of success of the defence are themselves limited.”⁵ (My underlining)

7. So really the defendant has no defence to this claim for trespass with or without Mr Aqorau’s presence in this proceeding – whether as defendant party direct or defendant through third party notice proceeding. The reason is, the Court of Appeal found that the land from which defendant extracted gravel, was mostly contested in the Courts over the years and now ownership rests with the claimants (See paragraph 14 – Court of Appeal decision). And that defendant has trespassed into that land (See paragraph 3 – Court of Appeal decision). Court of Appeal also rejected Mr. Suri’s submissions to bring in Aqorau into this proceeding (See also paragraphs 9 - 16). Court of Appeal

¹ See paragraph 18 of Court of Appeal decision dated 12th August 2022 (“COA”) – *Billy Gina Zinihite & Others – v- Solomon Islands Ports Authority [2022] SBHC; SICOA-CAC 11 of 2020 (12th August 2022)*.

² Paragraph 13 of COA.

³ Paragraph 14 of COA.

⁴ Paragraph 15 of COA.

⁵ Paragraph 16 of COA.

found against those submissions by Mr. Suri and consequently rejected Mr. Suri's cross appeal.

8. So for this claim, the defendant cannot rely on Aqorau, to escape from trespass liability and damages (neither indemnity nor contribution), because, Aqorau is not the owner of this land from which defendant extracted gravel. Both defendant and Aqorau were trespassers. It is clear that defendant dealt with the wrong person at its own peril, from the very beginning. Defendant must suffer the consequences for its lack of foresight. Defendant may even sue Aqorau in a separate claim to recover monies, it paid to Aqorau – or other remedies (contribution, indemnity) arising from alleged breach of the contract it had with Mr. Aqorau. But that should not delay the conclusion of this claim any further – not at this late stage of the proceeding⁶.

Conclusion and Orders

9. By bringing in Mr. Aqorau through third party notice proceeding, Mr Suri submits, defendant will become claimant and Aqorau will become defendant. Mr Suri also submit it will not require any pleadings to come from claimants. If that is so, then why bring Aqorau into claimants' assessment of damages, the result of which, is likely to delay claimants' assessment even further? The appropriate thing to do now is for defendant to sue Aqorau in a totally new claim on the basis of the contract it had with Mr. Aqorau. Doing this it will not prolong assessment of damages any longer. That is why the Court of Appeal quashed my "stay orders" and directed that I hear assessment of damages. There should not be any delay with assessment, at this late stage of this proceeding, now that claimants have a standing judgment, from which they should enjoy the fruits of their litigation. This much is clear from the spirit of the Court of Appeal decision.
10. **Accordingly, Court will decline the application for leave and will proceed to hear assessment of damages. Court will mention this matter with a view to listing a suitable date to hear assessment of damages on 29th November 2022, at 9:30 am. Cost against defendant on standard basis.**


THE COURT


JUSTICE JOHN A. KENIAPISIA
PUISNE JUDGE

⁶ Court of Appeal concluding in favor of Mr. Laurere's submissions; noted this at paragraph 15 of COA.

