National Court of Papua New Guinea

Gire Gire Estates Ltd v Barava Ltd [2016] PGNC 281; N6473 (7 October 2016)

N6473

PAPUA NEW GUINEA
[IN THE NATIONAL COURT OF JUSTICE]

OS (JR) No. 285 OF 2008

BETWEEN:

GIRE GIRE ESTATES LTD
Plaintiff

AND:
BARAVA LIMITED
First Defendant

AND:
RAGA KAVANA as the Registrar of Titles, Department of Lands and Physical Planning
Second Defendant

AND:

HON. PUKA TEMU as the Minister for Lands and Physical Planning
Third Defendant

Kokopo: Anis AJ.
2016: 30th June, 15th July and 7th October

JUDICIAL REVIEW – Special Agriculture and Business Leases - whether land was customary land before transfer - allege breach of sections 10, 11 and 102 of the Land Act and the Land Registration Act Chapter No 191- whether there were compliances - want of relevant considerations - want of natural justice - whether breaches and actions tantamount to constructive fraud

PRACTICE AND PROCEDURE – discussing question of standing - whether it is available - whether issue properly before the Court

Cases cited

Central Provincial Government v. NCDC (2013) N5262
Doriga Mahuru v. Hon. Lucas Dekena (2013) N5305
Elizabeth Kanari v Augustine Wiakar (2009) N3589
Emas Estate Development Pty Ltd v John Mea & Ors [1993] PNGLR 215
Galem Falide v. Registrar of Titles and the State (2012) N4775
Hi-Lift Company Pty Ltd v Miri Setae [2000] PNGLR 80
Johannes Leahy v. Tom Otri (2009) N3860
Joshua Kalinoe v. Paul Paraka (2014) SC1366
Kapiura Trading Ltd v Bullen (2012) N4903
Koitachi Ltd v Walter Schnaubelt (2007) SC870
Lae Rental Homes Ltd v Viviso Seravo (2003) N2483
Madang Cocoa Growers Export Co. Ltd v. Lauatu Teairiki Tautea (2012) N4584
Martina Jimmy v. Kevemuki Clan (2010) N4101
Mosoro v Kingswell Ltd (2011) N4450
Musa Valley Management Company Ltd v. Pepi Kimas (2010) N3827
Open Bay Timber Ltd v Minister for Lands & Physical Planning (2013) N5109
Pacific Equities and Investment Ltd v. Don Sawong (2006) N3258
Ramu Nickel Ltd v Temu (2007) N3252
Steamships Trading Company Ltd v Garamut Enterprises Ltd (2000) N1959
Stephen Toimb v. Ammie Lesley (2013) N5389
The Papua Club Inc v Nusaum Holdings Ltd (No 2) (2004) N26030
The Right Honourable Sir Julius Chan v. The Ombudsman Commission of Papua New Guinea (1998) SC557
West New Britain Provincial Government v Kimas (2009) N3834
Yakananda Business Group Inc v Minister for Lands (2001) N2159

Counsel

Mr N Saroa, for the Plaintiffs
Mr E Paisat, for 1st t Defendant

JUDGMENT

7th October 2016

1. **ANIS AJ**: This is a judicial review hearing. The plaintiff challenges the decision of the third defendant (**3rd defendant**). The 3rd defendant's decision relates to him granting two (2) state leases called Special Agricultural and Business Lease (**SABL**) in 2004.

2. The 1st defendant contests the review. The other defendants have shown no interests in the matter to date and they made no representations at the hearing.

PRELIMINARY MATTER

3. During the hearing, the 1st defendant questioned the legal standing of the plaintiff as a registered company. I asked counsel why he did not raise that earlier or at the leave stage. In reply, counsel said the 1st defendant had been refused leave to appear at the time of the hearing of the leave application. Obviously, the reason I note would be that it was an ex-parte hearing as of right.

4. Nevertheless, I do not find this explanation valid. I note that leave for this judicial review was granted on 4 June 2008. The 1st defendant has waited for more than 8 years and now raises this issue on the 11th hour or during the substantive hearing of this judicial review. This to me is unacceptable. Secondly, the 1st defendant failed to exercise its right of appeal. The issue had been considered at the leave stage by His Honour Justice Lay. There is a written judgment for that which was handed down on 4 June 2008. I note that because the leave hearing was, by law, heard ex-parte as of right by the plaintiff, it cannot be set aside by an aggrieved party like the 1st defendant except of course the State who has a right of hearing at the leave stage of the proceeding. As for the 1st defendant, it should have appealed against the decision under *Order 16 Rule 11* of the *National Court Rules* and *Order 10* of the *Supreme Court Rules*. That would have been the correct step to take. (See the case of *The Right Honourable Sir Julius Chan v. The Ombudsman Commission of Papua New Guinea* (1998) SC557)

5. I note that the 1st defendant's counsel, in its written submission, has pointed to what Justice Lay had said at paragraph 24 of his judgment when His Honour granted leave to this judicial review. His Honour said and I read "*At the leave stage the test is less stringent and nothing is finally determined at that stage*". The 1st defendant used that phrase to present its submission on the issue of standing. In my opinion, I think counsel has misapprehended the point made by the Judge. The Court, in my opinion, was simply expressing its view regarding its role when hearing such matters at the leave stage. The Court simply stated, in my opinion that its role was not to determine the actual judicial review but to be satisfied of the basic requirements for judicial review to ensure for example like only meritorious judicial review proceedings are allowed to pass.

6. I note that the 1st defendant has referred to a purported breach under section 378(1) of the *Companies Act 1997 (**Companies Act**)*, to argue lack of standing. The said section states and I read:

378. Registrar may restore company to register.

(1) Subject to this section, the Registrar shall, on the application of a person referred to in Subsection (2), and may, on his own motion, restore to the register a company that has been removed from it during the previous six years where the Registrar is satisfied that, at the time the company was removed from the register—

...

7. The 1st defendant's contention based on its extract of submission filed on 18 July 2016, is that the *Registrar of Companies* did not have the discretion to restore the plaintiff after the expiry of six (6) years after the plaintiff had been de-registered. In my opinion, this is a challenge made on the exercise of power by the *Registrar of Companies* under the *Companies Act*. The 1st defendant is asking this Court to firstly make a finding on that so that based on the Court's finding, the Court should consider whether it applies to this case and if so dismiss the proceeding. This, in my opinion, is wrong. Section 378 deals with some of the powers of the *Registrar of Companies* in restoring de-registered companies. If the plaintiff had been de-registered and then restored, and if someone like the 1st defendant is unhappy about it, the question I would ask is this: What should or should have been the correct approach to take? In my opinion, the correct process should have been to file proceeding to challenge the decision of the *Registrar of Companies*. It is futile to raise the issue here because the correct party, which is the *Registrar of Companies,* is not a party to this proceeding, and this Court is dealing with a separate judicial review matter.

8. I turn to the next reason. At the trial, the plaintiff's counsel pointed out that the 1st defendant had filed a proceeding, that is, MP No. 52 of 2009. In the said proceeding, the *Registrar of Companies* was the defendant. The 1st defendant and the *Registrar of Companies* then entered into a consent order to remove the plaintiff from the company register, that is, whilst this proceeding was at that time being appealed to the Supreme Court. The plaintiff said it applied to be joined in the said MP proceeding. It said it set aside the consent order that had been entered into between the 1st defendant and the *Registrar of Companies*, and it later dismissed the said MP proceeding. Now obviously the issue of standing or the registration status of the plaintiff were or would have been issues before the said Court. If the 1st defendant still has issues on this point as it is clearly demonstrating here, it should have appealed either against the consent order or against the order that dismissed the MP proceeding, to the Supreme Court. It seems to me clearly here that the 1st defendant is attempting to abuse this Court process by raising an issue which had already been before another Court and had been dealt with. As such and in my opinion, what the 1st defendant is doing now by raising this point is a futile exercise as well as it is an attempt to mislead this Court and abuse its process.

9. Finally, I refer to the first defendant's evidence that is **Exhibit D1**. **Annexure A** is a company extract of the plaintiff that was issued on 1 March 2008. It shows the registration status of the plaintiff as "Operating". **Annexure B** of the same affidavit is another company extract copy relating to the plaintiff. It was obtained on 1 July 2014. Where it states company status of the plaintiff it reads "Registered". I also refer to **Annexure A** to **Exhibit P3**. That is the latest company extract of the plaintiff dated 19 June 2016. Where it states "Company Status" it reads "Registered". This, in my view is more than sufficient evidence for me to accept as accurate evidence before this Court. I need not even be satisfied on the balance of probability here because it is not an issue that is properly before this Court to address. The issue of whether this shareholder is dead or whether that shareholder had sold his or her share to that person or that he or she is not a landowner, should be raised properly elsewhere following due process if not already done. This is the hearing of the judicial review.

10. For these reasons, I dismiss this preliminary point.

FACTS

11. The third defendant (**3rd defendant**) being the Minister for Lands and Physical Planning at the material time, issued two SABL leases to the 1st defendant in 2004. The first SABL lease that was issued is dated 7 July 2004. It is described as State Lease, Volume 16 Folio 14, Portion 101 & 102, Milinch Kokopo, Fourmil Rabaul East New Britain Province. The second SABL lease that was issued is dated 22 October 2004. It is described as State Lease, Volume 16 Folio 44 Portion 307 Milinch Kokopo, Fourmil Rabaul East New Britain Province.

12. The land where the two (2) SABL titles were granted over is a coconut plantation. It is called Giregire Plantation. The plantation originally had three (3) portions, namely Portion 101, Portion 102 and Portion 307. Portion 307 was also earlier known as portion 225. In the colonial period, the plantation was held by the State or the Territory. Most of the plantations in East New Britain at that time were held under similar terms, that is, as state leases or freehold leases for plantations. After independence, these lands were then compulsory acquired by the State and they were later given back to the landowners to develop. The vehicle statute, which had facilitated the said exercise back then, was the *Land Acquisition (Development Purposes) Act (**LADPA**)*.

13. But as for the Giregire Plantation, the landowners decided to group themselves, raised funds and purchased the Giregire Plantation or portions 101, 102 and 307. They purchased the plantation with loan assistance from the then Papua New Guinea Banking Corporation Rabaul in 1976 for a sum of K106,434. The landowners took control of the plantation and worked on it. In 1977, the landowners set up the plaintiff company. The aim then was to transfer portions 101, 102 and 307 to the plaintiff. Unfortunately, the landowners had issues with the Department of Lands for the transfer of the plantation over to the name of the company. This did not eventuate and the position remained until in 2004 when the land was transferred by the 3rd defendant to the 1st defendant.

14. But sometime before 1987, the Department of Lands issued notices under the LADPA for the grant of the Giregire Plantation or portions 101, 102 and 307, to the Plaintiff. The actual publication or effect of the said notices are not known.

EVIDENCE

15. The parties tendered their evidence as follows:

Exhibit No.	**Description**	**Filed**
"P1"	Affidavit of Joseph Buidal	22/05/08
"P2"	Affidavit of Robert Rarap	10/0616
"P3"	Affidavit of Robert Rarap	23/06/16
"D1"	Affidavit of Benjamin M Mesmin	9/05/16

ISSUES

16. In my opinion, the real issues are as follows:

(i) Whether the 3rd defendant had:

(a) breached the provisions of;

(b) failed to follow the provisions of;

(c) exceeded his powers under,

sections 10, 11 and 102 of the *Land Act,* and the *Land Registration Act Chapter No. 191.*

(ii) Whether the plaintiff and its members were denied natural justice in the whole process when the two (2) SABL titles were granted to the 1st defendant.

(iii) Whether the 3rd defendant had taken into account irrelevant considerations as well as whether he had failed to take into account relevant considerations when he reached his decision to grant and issue the two (2) SABL titles to the 1st defendant.

(iv) Whether the circumstances in which the two (2) SABL titles were granted and registered were so unsatisfactory, dubious and irregular to be tantamount to fraud.

(v) What relief should the Court grant under the circumstances?

REVIEW GROUNDS - GERENAL

17. The grounds of this judicial review are set out in the *Amended Statement Pursuant to Order 16 Rule 3(2) of the National Court Rules* (**Amended Statement**). The plaintiff relies on eight (8) grounds of review.

18. I think the best way to begin is to look at *Order 16 Rule 13* of the *National Court Rules*. It sets out not an exhaustive but valid list of the grounds for judicial review: They are and I read:

- Ultra vires /lack of jurisdiction
- Breach of procedures prescribed by statute or sub-ordinate legislation designed to ensure procedural fairness in decision-making
- Acting under dictation
- Real or apprehended bias
- Bad faith
- Inflexible application of a government policy
- taking into account irrelevant considerations
- Extraneous (improper) purpose.
- Error of law on the face of the record
- Wednesbury principle of unreasonableness

19. Upon a quick perusal of the eight (8) grounds, I notice that ground (5) is not a ground of review. It says and I read "*As a result of (i), (ii), (iii) and (iv) above, the decision of the Third Defendant in granting the Leases is null and void and of no effect*". I find that this cannot constitute a valid ground of this judicial review. I dismiss ground five (5) of the judicial review herein.

BREACH OF PROCEDURE OR LAW SET BY STATUTE & ERROR OF LAW

20. The grounds *breach of procedures prescribed by statute* and *error of law* are captured under grounds two (2), three (3) and four (4) in the Amended Statement. Let me restate them here:

(ii) The Third Defendant in granting an Agricultural Lease on Portions 101, 102 and 307, Milinch Kokopo to the First Defendant pursuant to section 102 of the Act failed to:

> *(a) ascertain if there was an instrumental lease in the prescribed form signed by customary landowners of Giregire Plantation;*
>
> *(b) meet with the Plaintiffs and agree on the terms and conditions on which the land would be acquired by the State contrary to Section 10(2) of the Act.*
>
> *(c) acquire the said land in accordance with Sections 10 or 11 of the Act before granting a Special Agricultural and Business Lease under section 102 of the Act.*

(iii) The Third Defendant in granting an Agricultural Lease pursuant to section 102 of the Act to Barava Limited was negligent in his duties when he granted the Lease based on Statutory Declarations and failed to:

<u>Particulars</u>

Section 11 of the Act

(a) comply with Section 11(1) by acquiring the customary land and Section 11(2) in not providing an instrument of lease in the approved form, executed by or on behalf of the customary landowners;

Section 102 of the Act

(b) comply with Section 102(2) when:

(i) he failed to acquire the land under section 11 of the Act;
(ii) lawfully appointed customary landowners were not identified to obtain their consent that such a lease should be granted in accordance with subsection (2); and
(iii) a statement in the instrument of lease in the approved form referred to in Section 11(2) concerning the person, land group, business group or other incorporated body to whom a special agricultural or business lease over the land should be granted was not executed as required by subsection (3).

(iv) As the Third Defendant granted an Agricultural Lease pursuant to only section 102 of the Act without acquiring the land pursuant to section 11, a Special Agricultural Lease could not have been granted and the Third Defendant committed an error of law and fundamental breach of sections 11 and 102 of the Act.
21. Now, I note that the provisions concerning these grounds of review under the *Land Act 1996 (**Land Act**)* are express. The compliance process for grant of SABL titles are indeed sections 10, 11 and 102 of the *Land Act*. This is further simplified by observing the case law. But before I get there to discuss them, let me set out the relevant provisions under sections 10, 11 and 102 herein:

10. Acquisition of Customary Land by agreement.

(1) Subject to Section 11, customary land shall be acquired in accordance with this Section and shall be authenticated by such instruments and in such manner as are approved by the Minister.

(2) The Minister, on behalf of the State, may acquire customary land on such terms and conditions as are agreed on between him and the customary landowners.

...

11. ***Acquisition of Customary Land for the grant of special agricultural and business lease.***

(1) The Minister may lease customary land for the purpose of granting a special agricultural and business lease of the land.

(2) Where the Minister leases customary land under Subsection (1), an instrument of lease in the approved form, executed by or on behalf of the customary landowners, is conclusive evidence that the State has a good title to the lease and that all customary rights in the land, except those which are specifically reserved in the lease, are suspended for the period of the lease to the State.

...

102. Grant of special agricultural and business leases.

(1) The Minister may grant a lease for special agricultural and business purposes of land acquired under Section 11.

(2) A special agricultural and business lease shall be granted—

(a) to a person or persons; or

(b) to a land group, business group or other incorporated body,

to whom the customary landowners have agreed that such a lease should be granted.

(3) A statement in the instrument of lease in the approved form referred to in Section 11(2) concerning the person, land group, business group or other incorporated body to whom a special agricultural or business lease over the land shall be granted, is conclusive evidence of the identity of the person (whether natural or corporate) to whom the customary landowners agreed that the special agricultural and business lease should be granted.

...

(Underling is mine)

22. Having set out these provisions, the first question I ask myself is this: Was Giregire Plantation or portions 101, 102 and 307 customary land before the 3rd defendant issued the two (2) SABL titles over it to the 1st defendant? I note that the 1st defendant raised that question initially as part of its preliminary submissions during the trial. I ruled that it was not a preliminary issue but that it would be a trial issue. Counsel addressed that later as a trail issue. The 1st defendant's submission and position on this issue is that the land was not customary land before it was transferred to it by the 3rd defendant under the two (2) SABL titles. The 1st defendant relied on the historical position, that is, the fact that the land was held under leases in the colonial administration and then transferred under the LADPA. The 1st defendant tend to rely on the plaintiff's evidence namely **Exhibit P1** in regard to its submission on the historical background of Giregire Plantation or portions 101, 102 and 307. Well, in my opinion, that seems to be the only evidence, which provides in detail better insights to the historical background of the lands in question. I notice during the trial that both parties do not take issues with the material facts on point, that is, of the fact that the land in question was not customary land but were leases of some type whether freehold, agricultural or business leases. The exact type of lease is not relevant, in my view, for this purpose. What is relevant to this Court is whether the three (3) portions of land were customary or state leases before they were acquired or before they were issued with SABL titles.

23. On this point, the plaintiff's argument is this: It submits that either way, that is, regardless of whether the lands where customary or not, the 3rd defendant had failed to follow due processes as submitted under its grounds of review.

24. I uphold the submission on point by the 1st defendant and partly by the plaintiff. I am satisfied on the balance of probability and find that Giregire Plantation or portions 101, 102 and 307 were freehold lands or state leases before they were acquired under the *Land Act*, and granted with SABL titles in favour the

1st defendant. I therefore find that that amounts to serious error committed by the 3rd defendant on the face of the record and law. That is, it seems clear that the 3rd defendant had acted under a wrong assumption that portions 101, 102 and 307 were customary land. This is, in my opinion, the first fundamental error committed by the 3rd defendant.

25. Given my finding, the next question I ask is this: Did the 3rd defendant exercise his powers under sections 10, 11 and 102 of the *Land Act* and if not which sections under the *Land Act* did he apply to grant the SABL titles? At first, I thought the issue would be a complex one. But after some consideration, I think this issue can be easily settled. How is that possible? Well, the evidence is located in the two (2) SABL titles. Copies of the two (2) SABL titles are located at pages 113 and 115 of the Amended Review Book (**RB**). They are also located at **Annexure C** and **Annexure D** to **Exhibit P1**.

26. The SABL title for Portions 101 & 102 states from the start in part and I read:

A State Lease under ***Section .....102..... of the Land Act 1996*** *for a period of .....99.... years...*

(Bold lettering is mine)

27. And the SABL title for Portion 307 states from the start in part and I read:

A State Lease under ***Section .....102..... of the Land Act 1996*** *for a period of .....99.... years...*

(Bold lettering is mine)

28. I find as a matter of fact that the 3rd defendant had exercised his powers under sections 10, 11 and 102 of the *Land Act* when he granted the two (2) SABL titles to the 1st defendant.

29. Now, given that the two (2) SABL titles were issued under sections 10, 11 and 102 of the *Land Act*, the 3rd defendant, by law, was required to comply with the process for acquiring these titles. I stated above in my judgment to refer to case law regarding the process. I think that the case that neatly discusses the process for compliances under sections 10, 11, and 102 of the *Land Act* is the case of *Doriga Mahuru v. Hon. Lucas Dekena* (2013) N5305. Justice Cannings held and I read at paragraph 29 of his judgment:

30. *I maintain the approach I took in Musa Valley. To lawfully grant a Special Agricultural and Business Lease over customary land the Minister must comply with all of the requirements of Sections 10, 11 and 102, which can be summarised as follows:*

(a) the Minister must first be satisfied "after reasonable inquiry, that the land is not required or likely to be required by the customary landowners or by persons on whom the land will or may devolve by custom" (s 10(3));

(b) the customary land must then be acquired by the Minister by lease under Section 11(1);

(c) the terms and conditions of that lease must be "agreed between him and the customary landowners" (s 10(2));

(d) acquisition of the land must be "authenticated by such instruments and in such manner as are approved by the Minister" (s 10(1));

(e) the purpose of the Minister leasing the land under Section 11(1) must be for granting a Special Agricultural and Business Lease of that land (s 11(1));

(f) there must be an instrument of lease under Section 11(1) in the approved form executed by or on behalf of the customary landowners (s 11(2));

(g) the customary landowners must agree on the Special Agricultural and Business Lease being granted to the lessees (s 102(2));

(h) there must be a statement of agreement for the purposes of Section 11(2) in the instrument of the Special Agricultural and Business Lease (s 102(3)).

(See also the case: *Johannes Leahy v. Tom Otri* (2009) N3860)

31. I adopt and apply these steps herein.

32. I refer to **Exhibit D1** and **Exhibit D2** of the 1st Defendant. I find nothing in there to say that the 3rd Defendant had complied with sections 10, 11 and 102 of the *Land Act*. The plaintiff on the other hand has provided its evidence namely **Exhibit P1**, **Exhibit P2** and **Exhibit P3**. In summary, the plaintiff says due processes under sections 10, 11 and 102 of the *Land Act* were not followed by the 3rd defendant before he granted the SABL titles to the 1st defendant.

33. I ask myself this question: In a judicial review proceeding like this case where the Court is considering how a title had been acquired, whose duty is it to provide evidence of compliances, information, relevant documentations or a copy of the land's file concerned to assist the Court? The answer I believe may be found under *Order 16 Rule 13(7)(2)* of the *National Court Rules*. It states and I read:

7. Review Book.

...

(2) The Respondent or his/her lawyer is responsible for ensuring that the decision the subject of the review and other documents considered relevant for purpose of the review are included in the Review Book.

34. So it seems that the 1st defendant has failed to ensure that these documents are produced or filed into the RB. They are obviously necessary to assist the Court determine whether these mandatory steps as set out under sections 10, 11 and 102 of the *Land Act* were duly observed by the 3rd defendant before he created and granted the two (2) SABL titles over portions 101, 102 and 307, to the 1st defendant.

35. What this Court now have is uncontested evidence from the plaintiff concerning the three (3) grounds of review namely grounds 2, 3 and 4 as I have highlighted above in my judgment. I am therefore satisfied on the balance of probabilities that the 3rd defendant has failed to observe, meet and fulfil the eight (8) requirements as held in the case of *Doriga Mahuru v. Hon. Lucas Dekena* (supra), that is, in regard to compliances with section 10, section 11 and section 102 of the *Land Act* before he granted the two (2) SABL titles to the 1st defendant. I find that the 3rd defendant had breached the procedures and law that is stipulated under the *Land Act* as explained above in my judgment when the 3rd defendant proceeded to and granted the two (2) SABL titles to the 1st defendant.

36. I therefore uphold grounds 2, 3 and 4 of the judicial review.

FAILING TO TAKE INTO ACCOUNT RELEVANT CONSIDERATION

37. The judicial review ground *failing to take into account relevant consideration* is captured in the sixth and seventh grounds of this judicial review in the Amended Statement. They state and I read:

(vi) The Second and Third Defendant failed to note on the Lands file that the Plaintiff had taken out a mortgage over the Lease in favour of the Agriculture Bank of Papua New Guinea (now known as National Development Bank) approved by the then Delegate of the Minister for Land, Mr Paul Bengo on 9 August 1991 and the Mortgage was to be registered upon the release of the Leases to the Plaintiff thus the Lease was not available to the First Defendant.

(vii) The Second and Third Defendant failed to consider that:

> *(a) the First Defendant (unlike the Applicant) is not reflective of a genuine landowner company as it is owned by only two shareholders namely Benjamin Murliu (born on 26/09/75) and Livingston Kakia (born on 09/12/70) who are not eldersor landowners of Giregire Plantation;*
>
> *(b) the First Defendants do not hold shares for and on behalf of the true landowners of Giregire Plantation but for themselves unlike the Plaintiff who is the only legitimised and lawfully incorporated entity reflecting proper representative who hold in trust, James Timele, Jack Mitam and EgidiusMamareng from all three affected villages, Gunanba No. 1, Gunanba 2 and Bitabarebevillages, alltraditional landowners of Giregire Plantation.*
>
> *(c) The Plaintiff raised the money to purchase the Plantation with their 219 shareholders and not the First Defendant.*

38. Let me firstly deal with ground six (6). I refer to the plaintiff's evidence. The evidence of mortgage of Portion 101 by the plaintiff to the National Development Bank is shown at paragraphs 17 and 18 of

Exhibit P1. Also, I note that the duly signed Mortgage dated 9 August 1991 is attached as **Annexure J** to **Exhibit P1**. If the 3rd defendant had read the Land's file concerned, the register or the Mortgage and the supporting documents therein would have alerted him to the fact that the land and related lands which he was about to create new leases over were state leases which may not qualify under sections 10, 11 and 102 of the *Land Act*. The 3rd defendant as I note in this case had already created new titles and transferred them under section 102 of the *Land Act* which means or it can be reasonably concluded that the 3rd defendant had the Land's file but had failed to consider the Mortgage and related documents contained therein. Documents and information, which would have alerted him that portions 101, 102 and 307 were not customary land. I uphold this ground of review.

39. I turn to ground seven (7) of the judicial review. I note that shareholding issues between the plaintiff company and the 1st defendant company are not issues for determination before this Court. I can only say that I note that the parties do not take real issue to the historical background of how the plaintiff was set up and how the original landowners of the Giregire Plantations had tried to register the three (3) portions of land in question at the Department of Land's office. I have covered this point above in my judgment. Both parties have referred to **Exhibit P1**, which and as I have ruled above, sets out the good historical background of this matter. So the original idea was to set up a company or a registered landowner group (which was required by the Department of Lands at that time) to hold the landowners' interest over portions 101, 102 and 307. Back then, that was the primary concern or focus between the Giregire landowners and the Department of Lands. Evidence of that is located at **Annexure G** and **Annexure H** of **Exhibit P1**.

40. So in my opinion, these records were kept or ought to have been kept in the file for the matter, which was held by the Department of Lands. Evidence disclosed herein shows that the 1st defendant was incorporated on 8 March 2004 under the *Companies Act 1997*. I refer to **Annexure T** of **Exhibit P1**. The 1st defendant has two (2) issued shares. One share is issued to Albert Kakia and the other share is issued to Benjamin Murliu. These are two private individuals. There is no evidence disclosed that shows that these two (2) individuals are holding their shares in trust for or on behalf of the landowners of Giregire Plantation or portions 101, 102 and 309. To put it simply, the 1st defendant is not a trustee company compared to the plaintiff. If the 3rd defendant had read the Land's file on the history of the three (3) portions of land concerned and had compared that with the type of company the 1st defendant was at that time, he would not have proceeded in the way he had done because that would have been contrary to the records and history of portions 101, 102 and 307. It would also have been contrary to the existing understanding at that time between the plaintiff and the Department of Lands. Well, the 3rd defendant, as it is revealed, had gone ahead to create and grant the two (2) SABL titles. This, in my opinion, meant that he had failed to take into account these relevant considerations but instead took into account irrelevant considerations. I uphold ground seven (7) of the judicial review.

NATURAL JUSTICE

41. The ground *right to be afforded natural justice* is captured at ground eight (8) of this judicial review in the Amended Statement. It states and I read:

(viii) By section 59 of the Constitution, persons who interest is affected by the decision of an authority, whether quasi-judicial, judicial, or administrative are required to be accorded natural justice

Particulars

(a) the Second and Third Defendants failed to act fairly and in accordance with sections 11, 72 and 102 of the Land Act 1996 to inform the Plaintiff of its interests in Portions 101 and 102 as the Plaintiff had already been granted a direct lease under section 11 of the Lands Acquisition (Development Purposes) Act Chapter 192 by the then Minister Sir Albert Kipalan.

(b) The Second and Third Defendants failed to give the opportunity to the Plaintiffs to raise any objection (although not provided by the Act) to the First Defendants application on the grounds that the Plaintiff had an equitable interest in Portions 101 and 102 and that it had provided the purchase price for the Portions 101, 102 and 307, Milnich Kokopo.

42. I note that I have already found that the 3rd defendant and the defendants as a whole did not disclose any evidence to show compliance with sections 10, 11 and 102 of the *Land Act*. Firstly, section 10(2) states and I read "*The Minister, on behalf of the State, may acquire customary land on such terms and conditions as are agreed on between him and the customary landowners*". I am satisfied that no such agreements were reached between the 3rd defendant and Giregire landowners or between the 3rd defendant and representatives from the plaintiff.

43. Secondly, section 11(2) states and I read " *Where the Minister leases customary land under Subsection (1), an instrument of lease in the approved form, executed by or on behalf of the customary landowners, is conclusive evidence that the State has a good title to the lease and that all customary rights in the land, except those which are specifically reserved in the lease, are suspended for the period of the lease to the State*".

44. There is no utility or guidelines disclosed in the *Land Act* or by the defendants, to assist show how the Minister and the landowners could practically achieve sections 10(2) and 11(2) of the *Land Act*. But having said this, I note that Justice Cannings has already considered and addressed this point in the case of *Musa Valley Management Company Ltd v. Pepi Kimas* (2010) N3827. I note that I have already discussed the processes above in my judgement, which had been addressed in the case of *Doriga Mahuru v. Hon. Lucas Dekena* (supra).

45. I note that lack of evidence by the defendants can mean or be reasonably assumed that they and in particular the 3rd defendant had failed to meet with the landowners as required under sections 10 and 11 of the *Land Act*. I am satisfied on the balance of probabilities that the 3rd defendant did not meet with the landowners and give them the opportunity to air their views or be heard in relation to the 3rd defendant's intention to exercise his powers under section 102 of the *Land Act*. I find that there were no such meetings with the majority of the landowners or with the representatives of the plaintiff, in order to agree to and comply with the steps as required by section 10(2) and section 11(2) of the *Land Act*. This include following the process as held in the case of *Musa Valley Management Company Ltd v. Pepi Kimas (supra)*. In failing to do so, I uphold ground eight (8) of the judicial review which is that the plaintiff had been denied its right to be heard.

CONSTRUCTIIVE FRAUD - LAW

46. The term equitable or constructive fraud is now found in judicial review proceedings. It is common, as the case law shows, with judicial review proceedings particularly in cases where applicants seek as relief orders from Courts to declare titles in properties null and void.

47. Before I discuss these, let me set out ground one (1) in the Amended Statement, which pleads fraud.

(i) The Third Defendant in granting to the First Defendant and its Directors namely, Jack Meder Daniel, Livingston Albert Kakia, Kovut Waninara, Tilita Paula, Peter OswinTiop, Benjamin Murliu, Charles Ngugte, Benjamin Karl, Joseph Manikot and AisoliMetelong all non-landowners of Giregire Plantaiton who acted fraudulently and without lawful authority when they purported to act as duly appointed representatives of Giregire Plantation landowners by swearing Statutory Declarations purportedly representing the landowners of Giregire Plantation instead of an instrumental lease in the prescribed form as required by ss11(2) and 102(3) of the Act.

48. Based on submissions from the plaintiff, it says that the overall actions of the defendants have lead to constitute and the Court should hold the defendants liable, for fraud. The plaintiff is basing its allegations on the actions, inactions, failures and breaches of section 10, section 11 and section 102 of the *Land Act* by the 3rd defendant.

49. Obviously, this is not the time to argue actual fraud. The laws and court rules are clear. Actual fraud must be properly pleaded usually common in proceedings commenced under writ of summonses.

50. The plaintiff's argument is not based on actual fraud. The plaintiff's argument is based on equitable or constructive fraud. For clarity, I think it is important at the outset to point out three (3) things here. The first point to note is that case law in this jurisdiction have two separate views on fraud. The first view, which is referred to as the narrow view states that an applicant who alleges fraud is required to prove actual fraud before the Court may exercise its powers under section 33(1) of the *Land Registration Act (**LRA**)* and cancel a title over a piece of land. [See cases: *Koitachi Ltd v Walter Schnaubelt* (2007) SC870; *The Papua Club Inc v Nusaum Holdings Ltd (No 2)* (2004) N26030] The second view, which is referred to as the wide view states that if the circumstances of a grant, forfeiture or transfer of title are so unsatisfactory, irregular or unlawful, it is tantamount to fraud warranting the setting aside of registration of title. [See cases: *Emas Estate Development Pty Ltd v John Mea & Ors* [1993] PNGLR 215; *Steamships Trading Company Ltd v Garamut Enterprises Ltd* (2000) N1959; *West New Britain Provincial Government v Kimas* (2009) N3834] For this case and as I have ruled, the plaintiff herein is alleging fraud based on the wide view namely constructive fraud.

51. The second point to note is this. The doctrine of constructive fraud is not something that may be pleaded like actual fraud or can be stated as a ground of judicial review. But it available and may be raised as a valid argument in equity. I refer to the case of *Steamships Trading Company Ltd v Garamut Enterprises Ltd* (supra). Justice Sheehan stated and I read:

Where fraud is relied on as a cause of action then there must be actual fraud pleaded and strictly proved. But in equity that is not necessary so. In Blomley v Ryan [1956] HCA 81; (1955-56) 99 CLR 362 the High Court of Australia refers to the rule that equity may presume fraud equitable constructive fraud, from circumstance, in contrast to the common law requirement of strict proof. The principle has also been

followed elsewhere in the Commonwealth. Morrison v Coast Finance Ltd [1965] 55 DLR 710 and K v K 1976 2 NZLR 31 and Hart v O'Connor [1985] AC 1000 PC.

52. I also refer to Justice Cannings' ruling in the case of *Doriga Mahuru v. Hon. Lucas Dekena* (supra). His Honour stated and I read:

Paragraph (c) raises what might be a significant point about constructive fraud but it is not really a ground of review. It is more a principle of law to be considered in the event that a ground of review has been established. It is a consideration to take into account if and when the Court determines whether the plaintiffs should be granted the relief that they are seeking.

(Underlining is mine)

53. The third point to note under this sub-heading is this: To rely on constructive fraud and other judicial review relief, an applicant must firstly prove one or more of the grounds of judicial review. [see cases: *Stephen Toimb v. Ammie Lesley* (2013) N5389; *Central Provincial Government v. NCDC* (2013) N5262; *Martina Jimmy v. Kevemuki Clan* (2010) N4101]

RELIEF

54. In summary, the Court has upheld grounds 2, 3, 4, 6, 7 and 8 of this judicial review.

55. The second leg now is to consider the pleaded relief and determine whether the Court can award them. The Supreme Court in the case of *Mision Asiki v. Manasupe Zurenuoc* (supra) held and I read:

It is one thing to establish an error of law or a breach of natural justice and for the court to uphold an application for judicial review. It is another, separate, step to establish a case for a remedy. In judicial review proceedings the remedies to be granted are at the discretion of the court. As Sheehan J stated in Tohian v Geita and Mugugia (No 2) [1990] PNGLR 479, National Court:

... in judicial review, even though the court might find there has been an error, even an error affecting matters of jurisdiction, the court would not thereby be obliged automatically to quash the ... proceedings. The remedies available under judicial review remain always at the discretion of the court and will only be granted to avoid injustice.

56. I refer to the relief sought by the plaintiff in its Amended Statement. They are as follows:

(i) A Declaration that the said decision of the Second and Third Defendants was contrary to section 11 and 102 of the Land Act 1996 as no instrumental lease in the approved form was signed by the legitimate landowners of Giregire Plantation.

(ii) A Declaration that the said decision was in direct breach of sections 11 and 102 of the Land Act 1996 and natural justice as proper identification of legitimate landowners of Giregire Plantation were not identified and ascertained by the Second and Third Defendants.

(iii) An Order of Certiorari quashing the decision of the Second and Third Defendants.

(iv) An Order of Mandamus directed to the Second and Third Defendants to revoke the State Leases issued to the First Defendant on the following Portions:

(i) Volume 16, Folio 44, Portion 307, Milinch Kokopo; and

(ii) Volume 16, Folio 14, Portions 101 and 102, Milinch, Kokopo.

(v) An Order that the Second and the Third Defendants facilitate and effect transfer of the leases from the First Defendant to the Plaintiff within twenty one (21) days of service of the Order.

57. I have no issues with relief (i), (ii) and (iii). This Court has already found that the plaintiff has established the three (3) relief.

58. However, in relation to relief (iv) and (v), this Court must firstly determine whether they are valid and may be granted under the circumstances.

59. Can the Court cancel the two (2) SABL titles that have been created over portions 101, 102 and 307, and awarded to the 1st defendant? My answer to that is "yes". The National Court can cancel a title based on fraud namely constructive fraud. [for example see cases: *Emas Estate Development Pty Ltd v John Mea & Ors (supra)*; *Steamships Trading Company Ltd v Garamut Enterprises Ltd* (supra), *Hi-Lift Company Pty Ltd v Miri Setae* [2000] PNGLR 80, *Yakananda Business Group Inc v Minister for Lands* (2001) N2159, *Lae Rental Homes Ltd v Viviso Seravo* (2003) N2483, *Ramu Nickel Ltd v Temu* (2007) N3252, *Elizabeth Kanari v Augustine Wiakar* (2009) N3589, *West New Britain Provincial Government v Kimas* (supra), *Mosoro v Kingswell Ltd* (2011) N4450, *Kapiura Trading Ltd v Bullen* (2012) N4903, *Open Bay Timber Ltd v Minister for Lands & Physical Planning* (2013) N5109]

60. Cancellation of a title based on fraud and other grounds is provided under section 33(1) of the LRA. It states and I read:

3. Protection of registered proprietor.

(1) The registered proprietor of an estate or interest holds it absolutely free from all encumbrances except —

(a) in the case of fraud; and

...

61. The next question to ask is this: On what basis or circumstances can the Court be satisfied of to find or rule that constructive fraud exist herein? The answer may be found in the numerous case law cited above in my judgment. But let me summarise it herein as follows: *If the circumstances of a forfeiture or transfer of title are so unsatisfactory, irregular or unlawful, it is tantamount to fraud, warranting the setting side of registration of title.*

62. When I apply the test to the present case, I note that this Court has already found serious breaches of law under the LA by the 3rd defendant. The Court has also found breaches of natural justice and various failures by the 3rd defendant in relation to his actions when he granted the two (2) SABL titles to the 1st defendant. Let my summarise the Court's findings here:

(i) Portions 101, 102 and 307 were not customary lands before they were converted into SABL titles.

(ii) The two new leases confirmed therein with references made to section 102 of the LA, that portions 101, 102 and 307 had undergone the processes set out under sections 10, 11 and 102 of the LA.

(iii) There was no evidence of facts disclosed by the defendants that showed or explained how they had processed or facilitated the creations and grants of the two (2) SABL titles over portions 101, 102 and 307.

(iv) There was evidence disclosed which showed non-compliances of sections 10, 11 and 102 of the LA before the two (2) SABL titles were created and granted over portions 101, 102 and 307.

(v) There was evidence disclosed which showed breach of right to be heard before the two (2) SABL titles were created and granted over portions 101, 102 and 307.

(vi) There was evidence disclosed which showed that no regard was given to the status of portions 101, 102 and 307 immediately prior to the creations and grants of the two (2) SABL titles.

(vii) There was evidence disclosed which showed that no regard was given to the historical back-ground of the lands which would have revealed that portions 101, 102 and 307 were initially purchased by the landowners of the Giregire Plantations; that there had been commercial dealings including mortgages taken out over the three (3) portions of land in the past; there was evidence of grants being given by the State to the landowners over the three (3) portions of land; there was already an understanding that had existed and the parties had partly executed that understanding when the notices of grants were signed under the LADPA.

63. Given these considerations, I am satisfied on the balance of probabilities that the plaintiff has established evidence to show fraud, that is constructive fraud. To not provide any evidence to show how one had undergone the compulsory processes as set out under sections 10, 11 and 102 of the LA is, in my opinion, a clear indication or suggestion of dubious, reckless or corrupt dealings or actions by the

defendants. I note that the duty to explain the deal and bring to the Court the files or documentation to demonstrate how the transaction had unfolded is, pursuant to *Order 16 Rule 13(7)(2)* of the *National Court Rules*, upon defendants, and not the plaintiff. As it is in the present case, the 1st defendant and the others have failed on their part in that regard. I find that the circumstances of the transfers of portions 101, 102 and 307 are so unsatisfactory, irregular and unlawful. I find that the actions of the 3rd defendant are tantamount to fraud warranting the setting side of registration of titles for the two (2) leases that were granted to the 1st defendant.

64. Therefore, I am satisfied that it is a "case of fraud" for the purposes of section 33(1)(a) of the LRA. It follows that the 2004 transfers and grants of the two (2) SABL titles are ineffective at law and that they must but cancelled and not be allowed to remain.

65. Now the plaintiff wants as a relief for this Court to order a transfer the two (2) SABL titles from the 1st defendant to it. I ask myself this: Would that be the correct approach to take by the Court under the circumstances? I will answer "no" to this question. Firstly, this Court has just found that the two leases were amongst other findings unlawfully granted to the 1st defendant. For this Court to later order the transfer of the same titles to the plaintiff would be wrong. I also do not think that it is even an option that is available to the plaintiff. The difficulty though the plaintiff has is that if the two (2) leases are cancelled, the plaintiff company will be left to fall back on this uncertainty which it had been faced with since 1976. To be precise, that would amount to 40 years of waiting for clear titles to portions 101, 102 and 307 for agricultural leases. The said uncertainty, and as evidence has shown, has caused a faction of the landowners to try to take over the affairs of the plaintiff and the three (3) portions of land. The present court battle itself is evidence of that. This is a Court of justice and fairness. In my opinion, the Court must deliver justice. What justice are we talking about here? In my opinion, justice in this judicial review would be justice to the plaintiff and its shareholders. The plaintiff company was specifically set up in 1977 to represent the interest of the individual persons or group of persons who had contributed monies and taken out a loan to purchase the Giregire Plantation or portions 101, 102 and 307. This company exists today, which is the plaintiff. I note that the set up of the plaintiff is as a trustee company for the benefit of its members. I refer to **Annexure A** to **Exhibit P1**. It shows the company record of the plaintiff. The plaintiff has 219 issued shares. Those holding shares are shown as holding them on trust for their villages. In my opinion, the plaintiff has features of a trustee company. The plaintiff's structure and set up, in my opinion, matches its evidence concerning its historical background and also the background of the Giregire landowners of the plantation. As I have stated earlier in my judgment, this is not the correct forum to challenge ownership of shares or directors or company secretaries. This is a judicial review proceeding. All this Court needs to be satisfied of is that the plaintiff is operating and that it serves the interest of the landowners of the Giregire Plantation who were the original group that had purchased the plantation or portions 101, 102 and 307 in 1976.

66. I am satisfied on the balance of probabilities that the plaintiff duly represents the landowners of Giregire Plantation. I am also satisfied that the plaintiff was set up so that the landowners would transfer portions 101, 102 and 307 to it to hold on their behalf.

67. Now, the original idea of the plaintiff was to develop the plantations. That was the primary aim that motivated the Giregire landowners in the first place to purchase and run the plantation. I would like to refer to **Annexure I** of **Exhibit P1**. I set it out herein:

LAND ACQUISITION (DEVELOPMENT, PURPOSES)

ACT CHAPTER 192

NOTICE OF DIRECT LEASE UNDER SECTION 11 OF THE LANDS ACQUISITION (DVELOPMENT PURPOSES) ACT CHAPTER 192

I, ALBERT KIPALAN, CBE LLB, MP*, Minister for Lands and Physical Planning, by virtue of the powers conferred under Section 11 of the Land Acquisition (Development Purposes) Act Chapter 192 and Section 31 and 49 of the Land Act Chapter 185 and all other powers me enabling hereby grant an Agricultural Lease to GireGire Estate Pty Ltd over GireGire Planation described, in the Schedule hereto.*

S C H E D U L E

Gire Gireplantation known as Portions 101 and 102, Milinch Kokopo, Fourmil Rabaul in East New Britain Province contained an area by measurement 1.1998 hectares designated in the records of the Department of Lands and Physical Planning.

File Reference: 1817/0101 & 1817/0102

.....

[signature]
SIR ALBERT KIPALAN KBE, LLB, MP
MINISTER FOR LANDS & PHYSICAL PLANNING

68. The plaintiff was able to locate a signed copy of this notice. The plaintiff's contention is that the State had granted to the plaintiff agricultural leases over portions 101, 102 and 307. It said the above attachment is an evidence to support its argument or the facts. The plaintiff said it had been a matter of waiting for the agricultural leases to be released to it that had never eventuated, but rather was converted and granted to the 1st defendant as SABL titles or leases. These submissions, in my opinion, are consistent and I accept them as the true position of the plaintiff at the material time.

69. In the exercise of my discretion, I will make a consequential order for the defendants to take immediate steps to facilitate the acquisition and transfer portions 101, 102 and 307 as agricultural leases for a period of 99 years, to the plaintiff. Can I make such consequential orders? My answer is "yes". I refer to the Supreme Court case of *Joshua Kalinoe v. Paul Paraka* (2014) SC1366. The Supreme Court held at paragraph 46 and I read:

45. Similarly, we note in short that, the kinds of relief that can be properly sought and granted in appropriate cases is also clear. The authorities suggest that judicial reviews are available for applications for:

(1) An order in the nature of:

(a) mandamus,

(b) prohibition,

(c) certiorari, or

(d) quo warranto;

(2) A declaration or an injunction if the nature of the case or the circumstances would warrant a grant of the kind of orders under (1) above against persons or bodies against whom such orders could be made and that it would be just and convenient for such reliefs to be granted;

(3) Award of damages to the applicant if he -

(a) includes in the statement in support of his application for leave under Rule 3 a claim for damages arising from any matter to which the application relates; and

(b) the Court is satisfied that, if the claim had been made in an action begun by the applicant at the time of making his application, he could have been awarded damages.

46. It is also accepted and is clear law that, the reliefs under (2) and (3) and any other reliefs that are consequential to the grant of judicial review are capable of being granted by the Court. The point that needs to be repeated and clearly made is this, these other reliefs are dependent upon the grant of judicial review. Hence, they cannot be sought and granted on their own. It is also clear that, whether or not all or any of these reliefs should be granted in any one case is entirely in the discretion of the Court.15 This Court made that clear in its decision in Mision Asiki v Manasupe Zurenuoc (2005) SC 797 in these terms:

"It is one thing to establish an error of law or a breach of natural justice and for the court to uphold an application for judicial review. It is another, separate, step to establish a case for a remedy. In judicial review proceedings the remedies to be granted are at the discretion of the court."

70. I also refer to the case of *Pacific Equities and Investment Ltd v. Don Sawong* (2006) N3258. Deputy Chief Justice Sir Salamo Injia as he then was, held and I read:

Judicial review is not available to grant declaratory orders as a primary relief. The primary relief available under O.16 r.1 are in the "nature of mandamus, prohibition, certiorari, or quo warranto." Consequential orders in the nature of declaratory orders are available under O.16 r.(2) but they themselves are not available as primary relief.

71. I refer to the primary relief sought in this judicial review. The primary relief sought in the original Statement that was filed under *Order 16 Rule 3* of the *National Court Rules* had been amended by a recent Court Order made by His Honour Justice Higgins on 11 April 2016. Following that Court Order, the plaintiff filed the Amended Statement on 11 April 2016. The Amended Statement is contained in the RB. The Amended Statement is the one that is valid and is before this Court for consideration. The Amended Statement contains the five (5) amended relief the plaintiff is seeking, and I note that I have already set them out above in my judgement. But it is important for this purpose to point out that from the five (5) relief sought, two (2) of them are primary relief. That is relief (iii) and (iv) and I set them out herein:

(iii) An order of Certiorari quashing the decision of the Second and Third Defendants.

(iv) And Order of Mandamus directed to the Second and Third Defendants to revoke the State Leases issued to the First Defendant on the following Portions:

(i) Volume 16, Folio 44, Portion 307, Milinch Kokopo; and

(ii) Volume 16, Folio 14, Portions 101 and 102, Milinch, Kokopo.

72. I note that I have already ruled above in my judgment that I will grant the two relief as well as the other relief. I said I was satisfied that the plaintiff has established its grounds of review, which I have already addressed above as well.

73. The two cases cited above state that consequential orders may be granted by the Court after the grant of primary relief. I also note a case where His Honour Justice Cannings applied his powers under section 155(4) of the *Constitution* to grant an additional relief in a judicial review proceeding. That is the case of *Madang Cocoa Growers Export Co. Ltd v. Lauatu Teairiki Tautea* (2012) N4584. The extended relief was a declaratory order. The decision by the Court, although a different law was invoked by the Court to exercise its power which was section 155(4) of the *Constitution*, the case is consistent with the cases *Joshua Kalinoe v. Paul Paraka* (supra) and *Pacific Equities and Investment Ltd v. Don Sawong* (supra) in that His Honour Justice Cannings had firstly upheld the primary relief sought therein before he proceeded to grant the consequential order.

74. In conclusion, I note that this Court's intention to make an additional order would be consequential and therefore permitted.

ORDER 16 RULE 4

75. The 1st defendant in its written submission, raised a valid point which requires the attention of this Court. That is *Order 16 Rule 4* of the *National Court Rules*. It states and I read:

4. Delay in applying for relief. (UK. 53/4)

(1) Subject to this Rule, where in any case the Court considers that there has been undue delay in making an application for judicial review or, in a case to which Sub-rule (2) applies, the application for leave under Rule 3 is made after the relevant period has expired, the Court may refuse to grant-

(a) leave for the making of the application; or

(b) any relief sought on the application,

if, in the opinion of the Court, the granting of the relief sought would be likely to cause substantial hardship to, or substantially prejudice the rights of, any person or would be detrimental to good administration.

...
(See case of *Galem Falide v. Registrar of Titles and the State* (2012) N4775)

76. The two (2) SABL leases were granted to the 1st defendant in 2004. In support of its argument, the 1st defendant rely on **Exhibit D1**. The deponent Mr Murliu at paragraph 22 of his affidavit annexures his earlier affidavit under **Annexure F** which was filed in a related proceeding. **Annexure F** contain amongst other things photographs of various houses which Mr Murliu said were built on the two (2) SABL properties. At paragraph 23 of his affidavit he states and I read:

All the people that have settled on the blocks are continuing to develop their own blocks and they have expanded substantial amount of monies to improve their livelihood. We have also expanded a huge amount of monies to build recreational halls, two Churches and road networks within this land. I estimate that we have spent roughly between 7 million to 10 million kina in these developments between the years 2002 to 2016. We have allocated land for a Cemetery where we have our relatives now buried and resting there. We have settled approximately 3000 people between 2002 and 2016.

77. To be quite frank, reading the said deposition, one could easily be mistaken to think that the land in question was granted to the 1st defendant to conduct a re-settlement exercise. It is quite extraordinary that the 1st defendant would give such an evidence to this Court. There is no mention of any special agricultural development being carried out on the two (2) SABL properties by the 1st defendant. The photographs in my opinion do not resemble a development to the tune of K10 million kina. Even if that were the case, it would appear that it was spent in doing things on the lands that is contrary to the purpose for which they were issued. Why would the 1st defendant settled 3,000 people on the two (2) SABL leases? And why would they built churches and a cemetery? It seems obvious that the 1st defendant is perhaps dividing and selling blocks of land to these people.

78. I find that based on the 1st defendant's own evidence, the 1st defendant appears to be conducting activities on the two (2) SABL leases contrary to their terms and conditions. I therefore dismiss this argument.

79. Now, I also note that it is correct to say that the matter has been delayed for some time since 2004. I note that the plaintiff filed this proceeding in 2008. There had been earlier Court proceedings filed as well. But this judicial review has since been dragged for this long. But when I look at the history of this proceeding, I note that it is actually the 1st defendant's actions that had delayed this matter from being heard quickly. The 1st defendant filed various challenges. The judicial review was interrupted and dismissed and had to be appealed to the Supreme Court. Whilst that proceeding was pending, the 1st defendant filed a separate MP proceeding under the *Companies Act 1997*. The plaintiff had to deal with these and as a result this judicial review has been delayed up to now.

80. I find that the 1st defendant has delayed this proceeding in a substantive manner. The 1st defendant has also during this time and based on its own evidence, for the past 12 years, conducting activities on the two (2) SABL leases that were outside the terms of these leases.

81. I find this claim by the 1st defendant baseless.

SUMMARY

82. I generally uphold the plaintiff's application for judicial review.

83. I uphold grounds (i), (ii), (iii), (iv), (vi), (vii) and (viii) of the judicial review.

COSTS

84. Cost is discretionary.

85. I will award costs of this proceeding to the plaintiff to be assessed on a party/party basis which shall be taxed if not agreed.

THE ORDERS OF THE COURT

I make the following orders:

1. A Declaration that the said decision of the Second and Third Defendants was contrary to section 11 and 102 of the *Land Act 1996* as no instrumental lease in the approved form was signed by the legitimate landowners of Giregire Plantation.
2. A Declaration that the said decision was in direct breach of sections 11 and 102 of the *Land Act 1996* and natural justice as proper identification of legitimate landowners of Giregire Plantation were not identified and ascertained by the Second and Third Defendants.
3. An Order of Certiorari quashing the decision of the Second and Third Defendants.
4. An Order of Mandamus directed to the Second and Third Defendants to revoke the State Leases issued to the First Defendant on the following Portions:

(i) Volume 16, Folio 44, Portion 307, Milinch Kokopo; and

(ii) Volume 16, Folio 14, Portions 101 and 102, Milinch, Kokopo.

5. An Order that the Second and the Third Defendant or the current persons occupying these positions, to immediately create and issue agricultural leases over portions 101, 102 and 307 under section 87 of the *Land Act 1996*, to the name of the plaintiff, which, upon completion, shall be in compliance with the original agreement or arrangement had between the State and the plaintiff.

6. Costs of the proceeding to the plaintiff.

7. Time is abridged.

Nelson Lawyers : *For the Plaintiff*
Daniels & Associates : *For the 1st Defendant*
