



# National Court of Papua New Guinea

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## Ramu Nickel Ltd v Temu [2007] PGNC 113; N3252 (5 April 2007)

[N3252](#)

PAPUA NEW GUINEA  
[IN THE NATIONAL COURT OF JUSTICE]

OS NO. 950 of 2005

Between

**RAMU NICKEL LTD**  
*First Plaintiff*

And

**IMURUBA CLAN (IMURUBA ILG)  
& KURUMBUKARI  
LANDOWNERS' ASSOCIATION**  
*Second Plaintiff*

And

**ANTON GAMU  
(DUAKAI OWOZA ILG)**  
*Third Plaintiff*

And

**THE HONOURABLE DR PUKA TEMU,  
MP, MINISTER FOR LANDS  
& PHYSICAL PLANNING**  
*First Defendant*

And

**OWOZA LAND GROUP INC.**  
*Second Defendant*

And

**THE INDEPENDENT STATE  
OF PAPUA NEW GUINEA**

*Third Defendant*

Waigani: Injia, DCJ  
2007: 5 April

***JUDICIAL REVIEW – Decision of Minister for Lands to grant Special Business and Agricultural Lease to Landowner Group over land the subject of an existing Special Mining Lease – Special Mining Lease conferred indefeasible title – State Lease subsequently granted and registered also conferred indefeasible title – Whether subsequent registered State lease extinguished existing registered Special Mining Lease – Constructive fraud implied - Certiorari granted – Decision quashed – Registered Special Business and Agricultural Lease set aside – [Land Act 1996](#), ss. 11(2), 102, [Mining Act 1992](#), ss. 4, 33, 120; Land Registration Act (Ch.19) s. 33; Land Dispute Settlement Act (Ch. 45), s. 4(I).***

**Cases cited:**

*Attorney General Michael Gene v Hamidian-Rad* (1999) SC278

*Emma Estate v Mea* [\[1993\] PNGLR 229](#)

*Highlands Pacific Resources Ltd v Honourable Sam Akotai & Others* (Unpublished Judgement dated 19 November 2005)

*Hi Lift Co. Pty Ltd v Miri Setae* (2000) [N2024](#)

*Ramu Nickel Ltd v Dr Puka Temu & Others* (Unreported Judgement dated 11 January 2007)

*Steamships Trading Company Ltd v Garamut Enterprises Ltd* [N1959](#).

**Counsels**

*I Shepherd*, for the First Plaintiff

*G Yapao*, for the Second Plaintiff

*C Jaminan*, for the Third Plaintiff

*R Tanuvasa*, for the First and Third Defendants

*P Parkop and L Kandi*, for the Second Defendant

**5 April, 2007**

1. **INJIA, DCJ:** On 15 February, 2007 the first plaintiff filed an application for judicial review under O 16 r 5(1) of the *National Court Rules* (NCR) after leave was granted on 22 November 2005. The Second and third plaintiffs have been joined as parties under O 16 r 5(2) and r 9.

2. The application relates to a decision made on 18 August 2003 by the then Minister for Lands and Physical Planning the Hon. Michael Nali, to grant a Special Agricultural and Business Lease (SABL) to the second defendant over land described as portion 19C, Milinch Sepu, Fourmil Ramu, Madang Province, known as the "*Duakai Owoza*" land.

3. The second defendant is an incorporated customary land group which claims ownership of the "*Duakai Owozo*" land. There is no dispute that the SABL was granted under s 11(2) and s 102 of the [Land Act 1996](#). The SABL was registered under the *Land Registration Act* (Ch. No. 191) on 22 September 2003.

4. The first plaintiff claims it has a registered Special Mining Lease over the same land which pre-existed the SABL and as such the land was not lawfully available for leasing by the State and it should be set aside. There is no dispute that Portion 19C is included in or is part of land contained in Special Mining Lease No 8 (SML 8) granted to the first plaintiff by the Head of State on 26 July 2000 under s 33 of the [Mining Act 1992](#). The lease was for 40 years. There is no dispute that under s 120 of the [Mining Act](#), the SML confers indefeasible title over the land for mining purposes.

5. The second and third plaintiffs claim they are customary landowners of the same land and their interests were not considered when the SABL was granted. They support the first plaintiff.

6. The first and third defendants have no reply to the plaintiffs' case except to support the second

defendant.

7. The second defendant says the two leases, SABL and SML 8, both grant indefeasible title under the respective Acts and they can co-exist. Alternatively, the first plaintiff failed to comply with a condition of the lease in that it failed to erect improvements in three (3) years as stipulated in SML 8 and therefore, SML 8 ceased to be effective or was terminated by operation of law, hence the land was available for leasing. The second defendant acquired an indefeasible title over the land which can only be set aside on fraud.

8. The second defendant also raises procedural issues as to the proper procedure to follow in challenging a registered State Lease on the ground of fraud and other issues as to standing and delay in bringing the application for leave and the substantive application.

9. All the parties filed affidavits to support their respective cases and these were admitted into evidence and marked with the letters Exhibits "A" – "S". The party in whose favour the affidavits are admitted is indicated on each affidavit. Counsel representing all the parties made written and oral submissions. I have considered the pleadings of the relief sought and the grounds upon which those relief is sought as pleaded in the *Statement* filed under O 16 r 3. I have considered the evidence and submissions.

10. The main issue is whether the Minister's grant of SABL over the existing SML 8 was validly done.

11. The first plaintiff contends that under s 4 of the [Mining Act](#), a dispute relating to customary land contained in a mining lease "*shall be settled as provided for by the Land Dispute Settlement Act Ch. No 45*". The "*Duakai Owoza*" land was the subject of dispute between different groups of landowners including the Second and third plaintiff and the second defendant all of whom claimed customary ownership rights. By notice published in National Gazette No G169 dated 29 December 2001, the Head of State acting on advice declared that there was a dispute over various mining tenements issued to the first plaintiff including SML 8 and ordered the Land Titles Commission to determine customary ownership of these lands.

12. Earlier on the Iwaza Clan, the Owoza Clan and the Imuraba Clan were locked in a bitter dispute over the same dispute before the Lands Courts under the *Land Dispute Settlement Act*. The Local Land Court granted ownership of the land to the Imuraba Clan. The Owoza Clan appealed to the Provincial Land Court which dismissed the appeal. On application for judicial review of this decision, the National Court at Madang on 15 June 2001 in OS 174 of 1999 quashed the decision of the Provincial Land Court and ordered a rehearing by the Local Land Court before a differently constituted Magistrate and land mediators. The rehearing was pending when the second defendant granted the SABL.

13. Therefore, the first plaintiff submits, the SABL was granted in breach of s 4 of the [Mining Act](#) and in breach of the National Court order. The first plaintiff contends that the actions of the second defendant in seeking a SABL and the Minister in granting that lease created confusion, it was irregular, contrary to law and is tantamount to fraud. The first and third defendants have not provided any material or explanation which justifies the validity of the SABL. For these reasons, the SABL should be set aside: per Lay J in OS 1064 of 2005, *Ramu Nickel Ltd v Dr Puka Temu & Others* (Unreported Judgment dated 11 January 2007), per Lay J in OS 218 of 2005, *Highlands Pacific Resources Ltd v Honourable Sam Akotai & Others* (Unpublished Judgment dated 19 November 2005) and per Sheehan J in *Steamships Trading Company Ltd v Garamut Enterprises Ltd* [N1959](#). Also see per Sevua J in *Hi Lift Co. Pty Ltd v Miri Setae* (2000) [N2024](#) cited in OS 1064 of 2005, *supra*.

14. The first plaintiff's next submission is that the first plaintiff and other landowner groups claiming customary land over the land were deprived of their interest in the "*Duakai Owoza*" land without giving an opportunity to be heard on the matter before the SABL was issued and therefore denied natural justice. The lease should be set aside for this reason: per Salika, J in *Emma Estate v Mea* [1993] PNGLR at 229.

15. The second and third plaintiffs adopt the first plaintiff's submission.

16. The second defendant does not dispute the publication of the notice by the Head of State and the National Court order in OS 174 of 1999. It contends that under s 33(2) of the [Mining Act](#), a SML was

granted on conditions, the terms of which were set out on the SML. A breach of any one of those prescribed conditions can result in the cessation or termination of the lease by operation of law. In the present case the third condition stated in SML 8 was that the first plaintiff should commence construction of the mine within thirty six (36) months of the grant of SML or from the date of finance being secured whichever occurs first. The first plaintiff failed to construct the mine and later sought an extension which was granted. Upon breach of this condition the SML 8 was terminated or ceased to be effective, hence the land was legally available for leasing under s 11 and s 102 of the [Land Act](#). The SABL was therefore validly granted by the Minister and duly registered by the Registrar of Titles.

17. In the absence of any express provision in the [Mining Act](#), the second defendant invites me to interpret s 33(2) to say that where the holder of a SML fails to comply with a condition specified in the SML, the lease terminates or ceases to have effect by operation of law. However, no case authority is cited to support this contention.

18. The second defendant contends that under s 33 of the *Land Registration Act*, its registered lease can only be set aside on the ground of fraud. Fraud must be pleaded in a Writ of Summons and sufficiently particularized and proved with evidence as required by law and the rules of Court. In the present case the first plaintiff failed to commence proceedings by Writ of Summons, failed to plead fraud and adduce evidence of fraud. The application is incompetent and lacks proof of fraud and it should be dismissed.

19. The first plaintiff contends it is entitled to challenge the decision of the Minister made under statute by way of judicial review procedure: *Attorney General Michael Gene v Hamidian-Rad* [\[1999\] SC 278](#).

20. In my view, it is trite law that a registered lease cannot be validly granted over an existing valid registered lease. Section 33(1)(b) of the *Land Registration Act* makes this abundantly clear that the registered proprietor of an estate or interest holds it absolutely free from all encumbrances except "*the estate or interest of a proprietor claiming the same land under a prior instrument of title*".

21. Section 33(1)(a) of the *Land Registration Act* also says the registered interest of a leaseholder is subject to fraud. I accept the plaintiff's submission that the grant of SABL was erroneous and to the extent that the Minister knew or ought to have known that there was a pre-existing registered SML 8 over the same land, this amounted to constructive fraud. And to the extent that the second defendant knew or ought to have known that the first plaintiff held a registered SML 8 over the same land, such actions also amounted to constructive fraud. I adopt and apply the principle of constructive fraud enunciated and applied in the various cases cited by the first plaintiff. I see no good reason to adopt a different view.

22. In my view, the procedural objection taken by the second defendant as to pleading and proof of fraud is not necessary in these proceedings. The first plaintiffs' case is based on constructive fraud based on the second defendant's pursuit of a SABL and the Minister's grant of the same in the exercise of statutory power. In any event, such procedural objection is a competency issue which should have been raised and dealt with at the directions hearing. The second defendant could have moved for summary determination under r 13 of *Judicial Review (Amendment) Rules 2005*. This was not done. It is too late to revive this issue after the issues have been tried.

23. In relation to s 33(1)(b) of the *Land Registration Act*, this provision is relevant. The second defendant's registered leasehold interest is subject to the first plaintiffs' registered SML 8. The second defendant's registered lease cannot take priority over the first plaintiffs' registered lease over the same land. Section 33(1)(b) also reflects the trite principle of law two or more granted leases and registered in respect of the same land cannot co-exist. I do not accept the second defendants' submission that the two registered leases can co-exist. As a matter of law, lease granted and registered latter in time must give way to the former.

24. I am also of the view that the SABL was granted in breach of s 4 of the [Mining Act](#). The second defendant knew or ought to have known and the Minister knew or ought to have known that the dispute over customary ownership of the "Duakai Owozo" land including SML 8 was pending rehearing before the *Local Land Court* under the *Land Dispute Settlement Act* and also before the *Land Titles Commission* under s 4(1) of the *Land Dispute Settlement Act* and Part V of the [Land Titles Commission Act 1962](#). The SABL effectively resolved the dispute and vested exclusive ownership of the land on the second

defendant, without resolving the dispute over customary ownership of the land under the *Land Dispute Settlement Act* and the [Land Titles Commission Act 1962](#). Consequently, the second and third plaintiffs were deprived of their customary interest on the land without giving them an opportunity to be heard. Likewise, the first plaintiff was deprived of its registered interest without giving it an opportunity to be heard. The grant of SABL is therefore in breach of principles of natural justice, principles which are embodied in the land dispute settlement procedure set out in the *Land Dispute Settlement Act* and the [Land Titles Commission Act](#). This is another reason why the SABL should also be set aside.

25. I reject the second defendant's arguments as to cessation of lease due to non-compliance with condition of the lease. The procedure for determination of a SML by operation of law due to non-compliance with a condition of the SML should be expressly provided in the [Mining Act](#). There is none. In the absence of any express provision, I am not persuaded that I should interpret s 33(2) of the [Mining Act](#) to accord the interpretation advanced by the second defendant.

26. As to the other procedural issues raised such as undue delay and lack of standing, I am satisfied that the delay was due to the time taken for the SABL to come to the notice of the first plaintiff. Even if there is undue delay, I am satisfied that the first plaintiff and other contractors who have been sub-contracted by the first plaintiff stand to suffer substantial economic loss if the relief claimed is not granted. The first plaintiff has carried out substantial mining construction work which runs into millions of kina. The second defendant on the other hand has not put up any improvements and therefore, do not stand to lose economically, except the expenses-associated with obtaining the SABL. Therefore, in the exercise of my discretion under O 16 r 4(2), I grant the relief sought by the first plaintiff.

27. As to standing, I am satisfied that the first plaintiff had sufficient interest to bring the proceedings in its own name because at the time of the grant of SABL, the SML 8 was issued in its name. The subsequent transfer of its interest in the mine to the Joint Venture Company under the *Mining Development Contract Amending Agreement Ramu Nickel Project* dated 10 August 2006, in no way divests the first plaintiffs interest in the Mining Project and SML 8.

28. For all these reasons, I grant the first plaintiff's application with costs to each plaintiff as against the second defendant and third defendants to be paid in equal portions.

29. The orders of the Court are:

1. An order in the nature of certiorari is granted quashing the decision of the first defendant the Hon. Michael Nali, MP, the then Minister for Lands and Physical Planning, dated 18 August 2003 to grant a Special Agricultural and Business Lease to the second defendant with respect to the property known as Portion 19C, Milinch Sepu, Fourmil Ramu, Madang Province.

2. Consequently, the registration of the said Special Agricultural and Business Lease by the Registrar of Titles as State Lease Volume 12 Folio 47 on 22 September 2003 is also quashed and declared *void ab initio*. The Registrar of titles shall de-register or cancel the registration of the said lease forthwith.

3. The Special Mining Lease granted to the First Plaintiff is declared to be the only valid lease in respect of the said land.

4. Pursuant to s 4 of the [Mining Act](#), the dispute over customary ownership of the land "Duakai Owoza" shall be resolved by the Land Courts under the *Land Dispute Settlement Act* as ordered by the National Court on 15 June 2001 and/or by the Land Titles Commission as determined by the Head of State on 29 December 2001 .

5. The second defendant and the third defendants shall pay each plaintiffs' costs of these proceedings in equal portions.

6. The time for entry of this order is abridged to the time of settlement which shall take place forthwith.

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Blake Dawson Waldron: *Lawyer for the First Plaintiff*

Yapao Lawyers: *Lawyer for the Second Plaintiff*

Jaminan Lawyers: *Lawyer for the Third Plaintiff*

Solicitor General: *Lawyer for the First and Third Defendants*

Steels Lawyers: *Lawyer for the Second Defendant*

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