

EJECTION OF SQUATTERS:**Herman Gawi v PNG Ready Mixed Concrete, Pty Ltd. ***

In Herman Gawi v PNG Ready Mixed Concrete Pty Ltd, the Supreme Court of Papua New Guinea (constituted by Kidu, C.J., Kapi, D.C.J., and McDermott, J.) held that an equitable lessee could not commence proceedings for eviction against squatters under the Summary Ejection Act (cap 202). Justice Kapi went even further to say that a person with an unregistered interest in land was not entitled to give notice to quit. This note examines the legal grounds for the decision.

To appreciate the judgment a brief background is necessary. In the Government Gazette of 15 November 1979 tenders were invited for lease of certain Government land at Lae. The respondent's (PNG Ready Mixed Concrete Pty Ltd, hereafter the company) offer was accepted and it was gazetted on 19 February 1981. A month later a notice (pursuant to s.35 of the Land Act, cap 185) setting out the terms and conditions of the proposed lease and details of fees due, etc, was received by the company. Although the company paid all the money that was required and complied with all other conditions imposed by the Government, no formal lease was issued under the Land Act and no interest was registered under section 17 of the Land Registration Act (cap 191).

As the Land was occupied, the company in July, 1981, applied to the National Court for a declaratory order for vacant possession against "various persons occupying dwelling houses, shanties and other constructions" on parts of the land allegedly leased to the company by the Government of Papua New Guinea. The Government was added as a co-defendant.

The presiding judge, Miles J., found that at the time the company instituted these proceedings the number of persons occupying the land had in the previous ten years, risen to over five hundred people. It was contended on behalf of the residents that although their original entry upon Government land was illegal they had acquired an "equitable interest" to stay on the land because the Government, although aware of their presence and influx, did nothing to discourage them. Moreover, it was argued that the company could not take possession of the land in disregard of their equitable interest as it also had notice of their presence prior to its tendering to lease the land.

* Unreported Supreme Court Judgment SC 267 of 1984.

Justice Miles held (decision dated 13 October 1981, N319, unreported) that by early 1981 the squatters had acquired a "proprietary estoppel" which is analogous to a licence "entitling them to remain on the land despite the state's legal right to possession". The nature of the company's interest was not in issue. Miles J., assumed, without deciding, that it had a legal estate. He agreed with counsel's submission that since the company, prior to its tender to lease the land, was aware of the squatters and did not insist on their eviction (perhaps for fear that the Government might withdraw the offer) they acquired a similar right against it. To balance the interest of the company, and the squatters, Justice Miles made an order that the company was entitled to possession but could not exercise that right for a period of six months against persons who took possession after 1976, and one year against the others who had been in occupation of the land for a much longer period.

None of the parties appealed against the decision. At the expiration of the six months period, the company took out proceedings in the District Court to eject those persons whose rights under the court order had expired. The application was made under s.6(1) of the Summary Ejectment Act which provides:

Where a person without right, title or licence is in possession of premises, the owner may make a complaint to a Magistrate of a District Court to recover possession of the premises, and the Magistrate may issue a summons in the prescribed form to the person in illegal occupation.

It was contended for the company that, on the basis of Justice Miles' decision, it was "the owner" within the meaning of the foregoing provisions and entitled to possession. The Magistrate, rightly, dismissed the submission because the judge did not determine the nature of the company's interest. Since there was no evidence before him to prove the company's title, he held that its interest was still unresolved. Consequently, pursuant to s.29(4) of the District Courts Act, 1963, he decided that he had no jurisdiction to deal with the case.

The company appealed to the National Court before Justice Gajewicz. Its appeal was upheld because, in the judge's opinion, the company had a legal interest determined by Justice Miles and that on the expiration of the six months the occupants had no interest in the land.

It was against Justice Gajewicz's decision that the case finally went on appeal to the Supreme Court. Separate judgments were written by Justices Kapi and Mcdermott; the Chief Justice concurred with the reasoning and conclusion of both of them.

Justices Kapi and McDermott held that the company could not commence proceedings under the Summary Ejectment Act because the Act was intended to provide a quick remedy to people who had a clear title to the land against persons without any rights to possession. From the judgment it would seem that the only "clear title", for purposes of the Act, is a legal estate. McDermott J., said:

It may well be that against all others the company has a better claim to possession but this could only be as the result of a contested hearing. To establish the claim via the provisions of the Summary Ejectment Act is in my view to misuse that Act. The remedy it is designed to give is a quick and efficient means of obtaining possession of premises,... from persons without any rights to possession. The whole procedure is designed to facilitate this. It is a matter for the claimant to show title, simply by producing a registered certificate of title or a registered lease and of producing evidence of adverse possession. If title is disputed use of this Act is inappropriate.

Justice Kapi made a similar claim when he remarked that in the instant case it was only the Government which could take out proceedings under the Summary Ejectment Act.

With due respect to the learned judges, their view cannot be accepted. There is no doubt that the Summary Ejectment Act was intended to facilitate quick recovery of possession, and this necessarily has to be where title is not contested. Although it is true that legal estates are less likely to be disputed than equitable ones, it does not follow that this is always so. There may well be cases where the unregistered estate is not challenged by the defendant. This is possible, for example, where a court in a previous dispute between the same parties declared their respective rights. Why should the unregistered lessee in cases such as these not proceed to recover possession under the Act?

It is submitted that whether or not a person can proceed under the Summary Ejectment Act does not depend on the nature of his title; it depends on the nature of the dispute. The nature of the plaintiff's title is one of the facts which should be taken into account in determining whether he could institute proceedings under the Act or has to follow the ordinary judicial procedure to establish his claim. To limit the Summary Ejectment Act to registered estates is an unnecessary restriction of the scope and the purpose of the Act.

As indicated above, Justice Kapi went even further in restricting the remedies of an equitable lessee. He held that; "it has been decided in cases involving similar registration provisions to those of the Land Registration Act, 1981, that until a lease is registered, an equitable owner is not entitled to give notice to

quit". He referred to two Australian cases to support this proposition: Freeman v Hambrook (1947) V.L.R. 70 and Adelstein v Morgan (1968) 2 N.S.W.R. 170.

Both cases cited by the judge related to notices to quit given to tenants by equitable owners. Thus they are distinguishable from the instant case which involved eviction of squatters. Besides, if, according to the principle of Walsh v Lonsdale, ([1882] 21 Ch.D.9) an agreement for a lease (within limits) is as good as a lease why should the person entitled to a lease have to register it before he could recover possession from squatters or other persons in unlawful possession? Justice Kapi did not explain the principle upon which he based his conclusion. Surprisingly none of the leading texts deal with this issue. Nor was the author of this note able to find any case directly on the point (See Harper v Charlesworth 107 E.R. 117, at pages 1180-81, where Holroyd J., says, obiter, that an equitable lessee cannot evict "intruders" to his possession. This decision was given before the Judicature Act, 1873, see below. It may also be added that the dictum cannot stand analytical scrutiny. For if, the equitable lease is enforceable against the legal owner, a fortiori, it should be enforceable against "intruders".)

Nevertheless, the possible explanation of Justice Kapi's decision, that an equitable lessee cannot evict, is based on the past division of Courts of Equity and Common Law. As it is well known, eviction is a legal remedy which, according to this classification, was administered only by the Common Law Courts. Since the latter courts did not recognize non legal titles, a person with an equitable claim was barred from suing for eviction by a plea that he had no legal estate. (See generally H.R.W.Wade, "Equitable Mortgagee's Rights to Possession", (1955) 71 L.Q.R. 204). This of course, is now of historical interest in England and Papua New Guinea. The Judicature Acts 1873 and 1975 did away with the distinction of proceeding in Courts of Equity and Common Law by vesting jurisdiction in all courts to grant whichever remedy - whether equitable or common law - appeared to be appropriate. Consequently, there should be no basis for denying the equitable lessee remedies (like eviction) which were formally administered by the Common Law Courts. (See General Finance, Mortgage, and Discount Co. v Liberator Permanent Benefit Building Society (1878) 10 Ch.15 at p.24.)

Moreover, eviction proceedings are won or lost depending on the relative strength of the parties' right to possession. In principle it does not boost the defendant's case to plead an outstanding estate: his only defence is to satisfy the court that his own claim to possession is superior to that of the plaintiff (see S.D. Hargreaves, "Terminology and Title in ejectionment," 56 LQR 376). If that is so, why should the equitable lessee not proceed against

squatters on the land? It would then be up to the court to decide who, between the two contending parties, had a better title to possession.

* John Mugambwa
Lecturer in Law, UPNG.