

TRANSCRIPT OF PROCEEDINGS

Commission of Inquiry into SABL
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COMMISSION OF INQUIRY INTO SABL

MR ALOIS JEREWAI

COMMISSIONER

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KIMBE CATHOLIC DIOCESE HALL, KIMBE, TUESDAY 7 FEBRUARY
2012 AT 2.05 P.M.
(Continued from Monday 6 February 2012)

[2.05 p.m] COMMISSIONER JEREWAI: Good afternoon everyone. Counsels, let us get on.

MR TUSAIS: Good afternoon Commissioner. For the record, the Commission visited the Akami Oil Palm, Portions 47C and 2628C in the earlier part of today and we are back. Today is reserved for hearings into the Akami Oil Palm Estate SABLs. However, Commissioner, you raised a certain relevant and pertinent preliminary issues yesterday, we will be addressing the Commission on that aspect today as to whether any further proceedings might be viewed as sub judice by the National Court.

10 There are two Counsels present this afternoon, Mr Linge, who appeared yesterday and Mr Jackson Gah is also a private practitioner in Kimbe. He is the Counsel for Plaintiff, David Mota and others.

COMMISSIONER JEREWAI: Mr Gah is the Counsel for the Plaintiff?

MR TUSAIS: For the Plaintiff, Mr Mota.

COMMISSIONER JEREWAI: Very well, perhaps the Counsels could approach and take their seats at the Bar Table at this point too.

MR TUSAIS: Sorry, Commissioner. Perhaps before we proceed, might we mention certain witnesses who were put down for mention this afternoon.

COMMISSIONER JEREWAI: Fine.

20 MR TUSAIS: Get that out of the way and then proceed with---

COMMISSIONER JEREWAI: Proceed that way, yes.

MR TUSAIS: Yes, thank you. The first witness is Philip Nomol.

Philip Nomol? There is no appearance, we will extend it over to next week Monday, if he does not turn up before then Commissioner.

COMMISSIONER JEREWAI: That is Mr Philip Nomol? Monday is 13th is it not?

MR TUSAIS: Yes, Commissioner.

COMMISSIONER JEREWAI: 9.30?

MR TUSAIS: 9.30, thank you. The second witness is Herman Sekeo.

Herman? He is also not present. If we could also stand him over also to the 13th?

COMMISSIONER JEREWAI: Yes, stood over. The third witness is Mr Peter Kalingio.

Peter?

[2.09p.m] He is also not present this afternoon. Monday the 13th, Commissioner. The final witness that was stood over today I think is Mrs Abby Lele Camillus but she is already present. I think she was advised yesterday.

COMMISSIONER JEREWAI: Yes.

10 MR TUSAIS: Those are the witnesses we stood down for mention this afternoon.

COMMISSIONER JEREWAI: Thank you.

MR TUSAIS: Thank you, perhaps if Counsels could make their appearances and seek relevant ---

COMMISSIONER JEREWAI: Yes, let us have Counsels appearances please.

MR GAH: For the record, Jackson Gah, here for the Applicant.

COMMISSIONER JEREWAI: Good afternoon Mr Gah. I am pleased to have you here this afternoon with us.

20 MR LINGUS: Yes, Commissioner, good afternoon, again for the record I am Mr Lingus. I appear for the Respondent.

COMMISSIONER JEREWAI: Yes, I am also very pleased to have---

MR LINGUS: I was here yesterday and I am pleased to be here again.

COMMISSIONER JEREWAI: Thank you. I am also very pleased to have you back here this afternoon. For the record, I am a very close friend of both Counsels who have made their appearances this afternoon. But this Inquiry relates to matters which they both represent their respective clients in those capacities and they will appear and make representations accordingly. And the disclosure is for the purposes of ensuring that there is no innuendo or suggestions of any kinds of prejudices. We have our Terms of Reference. As

far as this Inquiry is concerned, all their clients, both Mr Gah's and Mr Lingus' clients' interest will be seen in those contexts only. Thank you..

Counsels, perhaps, Mr Tusais, perhaps I should now invite Counsels to address me on the preliminary issues that I made mention of yesterday afternoon that in my view I needed to hear you but having given a deeper thought to it, the issue will not be in relation to the question of sub judice only because our Terms of Reference, and I want to speak loudly and I will speak shortly in Pidgin so that everyone understands. The second issue would be whether or not issues raised here in relation to Portions 140C and Portion 2628C are involved also a
10 question of customary land dispute. If in the course of hearing the submissions from all the lawyers, both assisting the Inquiry and representing the parties, I should arrive at the conclusion with their assistance that it is one or the other of these two issues or both, then we will not proceed any further to inquire into these SABLs.

Having said that, I want to repeat this in Pidgin in the Pidgin language.

(PIDGIN VERSION)

Thank you.

[2.15 p.m] Let us hear the Counsel assisting the Inquiry, Mr Tusais.

MR TUSAIS: Thank you Commissioner. Just a background. There is
20 landowner dispute in relation to the two SABLs. A writ of summons No 673 of 2011 was filed last year in 2011 on 28 June. Commissioner, the pleadings alleged fraud on the part of Mr Albert Camillus. The plaintiffs I think David Mota and other landowners say that they only agreed to give 40 hectares of land described or known as Roka Number 2 which is now Portion 104C with a now much larger portion of land 231.2 hectares. The plaintiffs in WS673 of 2011 also allege that land known as Roka Number 3 which is now registered and described as Portion 2628 with a total land area of 345.75 hectares – sorry,
Commissioner, this should be in the opening statement. What has never been part of the agreement reached in 2000, on the 15 March 2000. That is the
30 course of action. They say that there was an agreement between Mr and Mrs Camillus and the landowners in 2000. So the plaintiffs seek a declaratory orders that Akami Oil Palm be allowed only 40 hectares in Portion 140C. And for the other Portion 2628C , they seek orders that that be declared null and void, ab initio.

Commissioner, as Counsel Assisting, I say from the outset that what the issues are crystal clear, that is the two protagonists will say, one will say, yes, everything was done by the book and the other say, no, they cheated us. So if the Commission were to proceed and receive evidence or if we were to proceed, that is the nature of evidence that would be given before the Commission.

A matter is sub judice when it is on foot in the court, whichever court, and for another tribunal or for another court to ---

THE COMMISSIONER: I beg your pardon.

[2.18 p.m] Go on Counsel.

10 MR TUSAIS: Yes. For another tribunal or for another court to proceed to hear evidence and to make determination on those same issues would be tantamount to contempt to that other tribunal, in this case the National Court. So the ground upon which this Commission stands is a bit uncertain in that aspect. No
uncertain but we would be hearing exactly the same evidence that the National
Court is waiting to hear once all the pre-trial issues and the pre-trial proceedings
are done with. As Counsel Assisting, that is my only concern that Counsel
Assisting the Commission is supposed to bring evidence from all parties before
the Commission and for the Commission to determine and eventually because it
is a Commission of Inquiry, it has to make findings. And for the Commission
20 to make findings, it has to make findings either way, that it has to make findings
that having evidence, I believe this party or that party. That I consider a little
bit tantamount to stepping on the toes of the National Court that we assume to
be hearing and determining issues that rightfully belong to that forum or that
court. That should be their court of record with powers to make orders that are
unforeseeable and binding unless it has been appealed against in the Higher
Courts.

That is only area of concern. Under its Terms of Reference (a) and (b), the
Commission I think can safely proceed to investigate the processes involved,
that is to examine the land investigation report. The legislative background,
30 how this SABL came into being. There is no danger of being in contempt of the
National Court. So I submit that we can without any reservation receive
evidence from Lands Department and other concerned government agencies.

COMMISSIONER JEREWAI: Yes, Counsel if I may interrupt sorry interrupt
you at this stage. If the issue is really one of the size of the area, agreed to by

the protagonist against the SABL, as he should, namely that 40 hectares was agreed to be released to Mr and Mrs Camillus and the actually area comprised in the SABL as issued under the grant is in excess of that, obviously that can only be determined by looking at the land investigation report as endorsed and recommended by the Provincial Administrator at the time for the grant to be made. Which should then mean the land investigation report is going to have to be before the National Court for a formal finding.

MR TUSAIS: Yes.

[2.21p.m] COMMISSIONER JEREWAI: I do not know how you can disassociate the
10 land investigation report from the National Court proceedings if that is in essence the issue. But I will hear both Mr Gah and Mr Linge on behalf of their clients. It may be that we may have to commence with some evidence depending on what you say. It may be that we may have to commence with some evidence and restrict it to the question of survey, participation in the agreed survey and the payments which may have been made or exchanged or any other benefits that may have been presented before we determine whether or not the matter indeed is sub judice. So I am just raising it at this point so that you can address it while you are on your feet.

MR TUSAIS: Thank you Commissioner. Perhaps I go back a bit and it will
20 may be make it – if we see it from this side that the land investigation report was done, it is slightly different from other land investigation reports that we have being seeing. This SABL as we have noted, the Commissioner will notice is different from others. The other SABLs we have seen, there have been disputes between, it has been foreigners coming to develop at the invitation of landowners and we have tried to work out whether majority consent has been given.

COMMISSIONER JEREWAI: The choice of the title as to who should receive the title under section 102(b), yes I have noted that these two SABLs are totally different in nature to the ones that we have looked into.

MR TUSAIS: What Mr and Mrs Camillus' contend is that this land already
30 belongs to them by nature of – it was converted under the Customary Land Tenure Conversion Act and that they already had title so they invited the land investigation officer to walk the boundaries and to comply the LIR. But then and again I agree with you that it also goes to that issue does it not that by doing the land investigation, the Lands officer assumed that everything was okay, that

these are the owners without perhaps consulting peripheral or customary owners living adjacent to the disputed portions of land. So yes that is something I would have to leave to the Commissioner but from my perspective I would submit if the receiving of evidence from either party poses those questions that the National Court may very well view with intruding into its jurisdiction and touching on matters that is properly before it as the action is currently approved.

[2.26p.m] That is all I wish to say. I have spoken briefly to the two Counsels, they have other issues to raise which may assist you, Sir, to come to a decision.

10 COMMISSIONER JEREWAI: Very well Mr Tusais, thank you. Mr Gah and Mr Linge, who will proceed first? For Plaintiffs? Alright, Mr Gah, thank you you may address these issues.

MR GAH: Thank you Commissioner. To all those things you have mentioned and Mr Tusais has mentioned, as the matter is before the National Court now, we intend to produce those evidences; the survey report, land investigation report, the whole are going to be taken care of by evidence in the National Court. My only thing to say is whether this Commission has the power to impose any penalty if there is a breach according to the evidence. For instance, if we by evidence produce before the Commission that Camillus is wrong or getting more than 40 hectares, what would the Commission do? Because in the
20 National Court, we are seeking declaration to nullify certain portions of land in Portion 2628 because he got it by fraud as he alleged ---

COMMISSIONER JEREWAI: Not portion 140?

MR GAH: Sorry?

COMMISSIONER JEREWAI: What about portion 140C?

MR GAH: Apart from 40 hectares. 40 hectares is included in 140C.

COMMISSIONER JEREWAI: 140C?

MR GAH: Yes. And he has sort of extend the boundary from there to also cover 2628 .

COMMISSIONER JEREWAI: 2628C?

30 MR GAH: Yes, that is correct. Because the matter is before the National Court we determine to go before the National Court.

COMMISSIONER JEREWAI: Yes, perhaps it might assist you if I indicate to you what the powers of the Commission are. This Commission of Inquiry, its powers are restricted to the Terms of Reference only. And I assume you have familiarised yourself with the Terms of Reference. If not, Mr Tusais can assist you to look at it later.

MR GAH: Thank you.

COMMISSIONER JEREWAI: But I will overall inform you this that the Terms of Reference includes as a matter of practicalities to examine land investigations and the reports compiled according to those investigations to
10 determine if there had been lacking in the integrity of the processes in that regard. And if there had been lack of integrity, we must report accordingly among other aspects of the report that we must compile to the Prime Minister for him to table in the Parliament. Because based on those findings the whole purpose is to put up our overall set of recommendations which will recommend, based on the findings recommend the procedures to improve or further legislate including amendments to the only two provisions so far we have found are in
20 existence to govern Special Agriculture and Business Leases and they are sections 11 and 102 of the Land Act. Apart from those two provisions, there are absolutely no other provisions that provide for the entire legal machinery to enable the administrative application to go through these processes before the
30 grant of these leases to the people who applied for them. And these people are customary landowners; totally exclusive to any land that is government land. Such as in Kokopo I discovered one was wrongly issued under section 11 of the Land Act when it was actually a State land already acquired under the Plantation Acquisition Scheme on the eve of independence for the purposes of redistributing their land to the people who were originally customary landowners. Those are totally different. So what we have here is an Inquiry that is limited to those processes. We have absolutely no power to make findings. We could make findings as to whether or not the official process was
30 carried out by integrity. But we are powerless to ourselves declare that is the leases' annulity because of that irregularity that we should find.

[2.31p.m] Our powers is mainly to make that finding and report what we know with our recommendations in relation to that particular SABL for the Parliament to take note and refer to the appropriate authority such as the Department of Lands for instance who will then nullify should the processes determined by us to be irregular. But where you are going with the National Court proceedings is very

direct. If the National Court indeed finds that, for instance there is lack of consent, then obviously it is going to declare as you seek, as your client seeks, declare the lease as null and void and that it should be cancelled and direct the Department of Lands accordingly.

Our Commission of Inquiry does not in any way intervene with the Court of competent jurisdiction in the process that you have embarked upon, in the action that your client had embarked upon. So I hope that is clear. But I think while informing you of that I need to draw your attention to section 13 of the Commission of Inquiry Act. Section 13 of the Commission of Inquiry Act renders that any matters deposed to in the course of this Inquiry by way of evidence, cannot be also used in parallel or proceedings of any other type in a, for instance in a court of competent jurisdiction. Yes, that is the position you are faced with so I will take it therefore from what you have said so far that indeed the question of consent which will be contained in the land investigation, which resulted with a land investigation report is affected because in there will be the issue of whether your clients agreed to the area comprised in the lease as granted or far less, namely 40 hectares. And if that is the case, it may very well be that this could be – I am not saying it, I am not making a ruling at this stage – it may well be that the matters to be raised in the Inquiry may be sub judiced. But I hear you, I hear you clearly.

Yes, go on please.

MR GAH: Thank you Commissioner. The other matter that I was going to raise you have already mentioned that the evidence here cannot be used at the other tribunal. Okay. That is essentially our case submitted to the Commission this afternoon that the matter is before the National Court and we are determined to go by that.

COMMISSIONER JEREWAI: And your clients would rather that, insofar as the question of area of these two SABLs in excess of 40 hectares is concerned that this Commission of Inquiry should just take note of it for our purposes but inquire no further into it because it is now before the National Court?

MR GAH: Well subject to your consideration of what two Counsels have submitted.

COMMISSIONER JEREWAI: Sure, I just want to hear from you that is all.

MR LINGE: Yes, thank you Commissioner. I hear what the Counsel is saying and I am here because I am Counsel responding as it were, we are only responding to the complaint that came before this Commission of Inquiry. So I am duty bound to appear and address the issue. Yes, upon some of the points that we want to raise have been raised by my friends, both Counsels. There are one or two other matters that I want to raise. The fact of this Inquiry finding or the National Court, that is one. I think Counsel yourself have partly answered that, virtually not in a legal way but it is purely administrative function that will go through the procedure through the Prime Minister's department. But in any
10 case I am also mindful of the other point that you raised and you draw attention to section 13 of the Commission of Inquiry Act and I am very mindful of that fact. I do not want to be, as it were, to be limited in the scope of our evidence in the current proceedings in the National Court.

[2.36 p.m] I took note of that and especially the concerns of my clients. The other issue is the indefeasibility of title which is a question before the National Court. My client is basically saying that. And yes, indefeasibility of title you cannot disturb until under section---

COMMISSIONER JEREWAI: Indefeasibility of title?

MR LINGE: Indefeasibility of title. That all courts of competent jurisdictional
20 authority must accept unless of course it is proven under section 33 of the Land Registration Act, that is one of the others including fraud, which has been alleged in the National Court---

COMMISSIONER JEREWAI: It has been alleged in the National Court?

MR LINGE: It has been alleged on both proceedings and we will vigorously fight that.

COMMISSIONER JEREWAI: Well of course Mr Linge, I cannot put my finger on the particular precedent but the shakeability of the principle of indefeasibility of title, can I believe, can only be done if fraud is proven. In the absence of fraud, indefeasibility of title cannot be shaken.

30 MR LINGE: Correct. That is, with respect, that is the law, that is the way and we propose to we intend to fight our case in accordance with law. And we will be adducing evidence that there is no such and that goes with the root of everything that there is no fraud in the processes that was followed, in the signing of the agreement, in the demarcation of the land---

COMMISSIONER JEREWAI: Survey?

MR LINGE: Surveying demarcation. And it is our case that the complainants in this are also recipients of certain---

COMMISSIONER JEREWAI: What survey plan category are those two? Because I understand category 4 is a rough one, category 1 is the more advance one.

MR TUSAIS: Category 4 is the large scale rural survey. I do not believe this is---

10 COMMISSIONER JEREWAI: Sorry, Mr Linge, I just want to get this first before you go.

MR TUSAIS: This is a class 1 survey.

COMMISSIONER JEREWAI: Class 1?

MR TUSAIS: Class 1.

COMMISSIONER JEREWAI: That is a pretty tight one.

MR TUSAIS: More precise, it is clearly not that big. Class 4 I think they just lock it by using the GPS system as the manual. River systems are natural order, land marks.

COMMISSIONER JEREWAI: Sure. Thank you. Mr Linge please continue. It is a class 1 survey, it is a more defined survey, yes.

20 MR LINGE: Yes. Thank you Commissioner. Also the question of 40 hectares being coming up thisis really an agreement for that. And whether it was the landowners, the plaintiffs that the clan that are gave that approval. So those are issues that go to the root of this Inquiry and also in the National Court with respect. So basically we are, Sir, at the par with both Counsels. We have reservations as to whether we may have been intruding into an arena where this Commission could leave it to the competency of the National Court. Commissioner, clients want swift justice and there may be an misapprehension that they are getting the justice here whereas it is not, this is an Inquiry.

30 COMMISSIONER JEREWAI: I encountered that in East New Britain, over in Kokopo.

MR LINGE: Yes, and maybe to serve your Commission of Inquiry's time and our time, and everybody's time and their time too. But to give that false impression that we are like the others and I hope you are the only one, but having heard you Commission that at the outcome of this some have decided to go to court. The question of customary ownership, whether to dispute to ownership or whether you question the title. So we have gone past the stage. We have actually gone to the National Court, court of competent jurisdiction. We are basically add a few more but we are also not comfortable on behalf of my clients, they are not comfortable. We are only here because we are
10 responding to the complaint and we are also mindful that the evidence that we present here are the kind of evidence that we will be vigorously pushing and arguing in the National Court. So without further comments, Commissioner, I also agree that this matter be taken out of your, well I submit that this matter be conveniently taken off your Inquiry list, even if you are, Commissioner is saying a while ago that you may just want to look at the survey, you may want to look at – they are interwoven, you cannot isolate one.

COMMISSIONER JEREWAI: Yes, absolutely.

MR LINGE: Yes, so these are my few remarks. Thank you.

COMMISSIONER JEREWAI: Thank you Mr Linge. I will just comment
20 before we adjourn these two matters for a decision. Can we hand down the decision, Mr Tusais, tomorrow before we head down to Talasea?

MR TUSAIS: Could I just talk to Mr Linge?

COMMISSIONER JEREWAI: Yes, please.

MR TUSAIS: Sorry, thank you Commissioner, that would be fine, as long as we left I think by 10.00 o'clock. We proceeded at 9.00.

COMMISSIONER JEREWAI: Can we start earlier? Can we start at 8.30?

MR TUSAIS: Thank you. We start at 8.30 and we be gone by 9.

COMMISSIONER JEREWAI: Alright. Gentlemen and the audience who are interested in these matters, I will hand down my Ruling as to whether the matter
30 of another jurisdiction or it is a matter that is sub judice, meaning a court of higher and more powerful jurisdiction is ceased, meaning it has in its deliberations right now the very issues that have come by way of this

Commission of Inquiry in relation to these two SABLs. I will make the ruling tomorrow morning at 8.30 in the morning.

[2.39p.m] In light of that we cannot call evidence and proceed with these matters this afternoon Counsels you realise that? Particularly, Counsels assisting the Commission of Inquiry. You will advise your respective clients?

MR GAH: Yes.

MR LINGE: Yes.

COMMISSIONER JEREWAI: Thank you. Mr Gah and Mr Linge, thank you very much, you are both excused thank you.

10 Mr Tusais and Mr Boi?

MR TUSAIS: We do not have any other matters apart from the two Akami Oil Palm matters this afternoon. We would appreciate it if we have the time to talk to witnesses in the other SABLs that would be---

COMMISSIONER JEREWAI: Well, then we will adjourn and I will retire with other uninvolved staff and you can proceed with that.

Associate adjourn the Inquiry to tomorrow at 8.30 a.m.

20 **AT 2.45 P.M. THE COMMISSION OF INQUIRY INTO SABL WAS
ADJOURNED TO TOMORROW, THURSDAY 8 FEBRUARY 2012 AT
8.30 A.M.**