

MELIONG MADRAINGLAI, et al., Plaintiffs
v.
YOSIWO EMESIOCHEL, and THE SCHOOL OF THE PACIFIC,
Defendants
Civil Action No. 1-74
Trial Division of the High Court
Palau District
February 4, 1974

Hearing on motion for preliminary injunction, in which defendant sought injunction bond. The Trial Division of the High Court, D. Kelly Turner, Associate Justice, held that where it appeared that private foreign corporation with no interest in a certain property, though interest was sought to be shown, would enter and occupy the land, clear it and build structures, interest of plaintiff in the land, as member of municipality which had been given the land by the territorial government, would be irreparably harmed were corporation to proceed, so that only adequate remedy would be a temporary injunction.

1. Landlord and Tenant—Leases—Foreigners

Private real property may not be leased to foreign corporation desiring to operate a school thereon without prior approval of the lease by the High Commissioner, and if his approval is not endorsed on the lease, the lease is prima facie invalid. (1 TTC § 13)

2. Injunctions—Preliminary Injunction—Merits of the Case

Determination going to the merits of the case would not be resolved in proceeding to determine whether temporary injunction should be issued.

3. Injunctions—Preliminary Injunctions—Tests or Grounds for Granting

Elements to be considered before a temporary injunction decision can be made are whether plaintiff has a substantial chance of prevailing on the merits, relative importance of asserted rights, the acts sought to be enjoined, irreparability of injury resulting from denial of relief, potential harm to the enjoined party, and balancing of damages and conveniences generally.

4. Injunctions—Preliminary Injunction—Discretion of Court

Grant or denial of a temporary injunction rests in the sound discretion of the court, based upon the several determinative elements.

5. Injunctions—Preliminary Injunction—Potential Harm

Where it appeared that private foreign corporation with no interest in a certain property, though interest was sought to be shown, would enter and occupy the land, clear it and build structures, interest of plaintiff in the land, as member of municipality which had been given the land by the territorial government, would be irreparably harmed were

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corporation to proceed, so that only adequate remedy would be a temporary injunction.

6. Injunctions—Preliminary Injunction—Bond

Where defendant seeking injunction bond showed no potential damage as result of granting temporary injunction, bond would be denied.

Assessor: FRANCISCO MOREI, *Acting Presiding Judge, District Court*
Interpreter: AMADOR D. NGIRKELAU
Reporter: SAM K. SASLAW
Counsel for Plaintiffs: JOHN NGRAKED
Counsel for Defendants: ROMAN TMETUCHEL

TURNER, *Associate Justice*

A temporary restraining order without notice requiring defendants to cease use and occupancy of the land known as Ibobang in Ngatpang Municipality, Babelthaup Island, Palau District, until hearing could be held on a preliminary injunction pendente lite was issued by this Court January 21, 1974. Thereafter, notice of hearing on defendant's motion to post an injunction bond and in the alternative to vacate the preliminary restraining order and deny a preliminary injunction pendente lite was issued January 23, 1974, and hearing was held January 25, 1974, with the parties, their counsel and their witnesses present. The temporary restraining order and subsequent hearing were in accordance with Rule 19 (a), Trust Territory Rules of Civil Procedure.

Plaintiff's complaint is in the nature of a class action in that he asserts representation of "people and residents" of Ngatpang Municipality "too numerous to name in this complaint." Attached to the complaint, and introduced at the hearing as plaintiff's exhibit 4 was an instrument in support of the complaint purportedly signed by some 40 residents of Ngatpang.

The record shows that the Trust Territory government released to the municipality the tract known as Ngerdubech, Old Ngatpang, by Determination of Ownership and Release No. 126, dated December 28, 1959. According to the government sketch attached to the release the area comprised 8,479,421.55 square meters.

In an instrument dated December 22, 1973, the defendant, Emesiochel, entered into a lease with the defendant, The School of the Pacific, Inc., a California non-profit corporation, for 374,847 square meters, being the land known as Ibobang, within the larger area of Ngerdubech released by the Trust Territory to Ngatpang Municipality. The lease was for a ten-year period with an additional ten-year option.

There was no indication on the lease nor in the testimony at the hearing that the High Commissioner had approved this lease to a foreign corporation. Land Management Regulation No. 4 and the much more elaborate provisions in the Trust Territory Manual of Administration require that leases of private real property to non-citizens of the Trust Territory must be approved by the High Commissioner by endorsement on the lease instrument. Part 483, Land Management/Private Lands Manual of Administration, sets forth lengthy and detailed "Guidelines and Criteria To Be Considered in Approving Leases." The regulation also lists the information required to be submitted to the High Commissioner.

The requirements for lease approval are based upon 1 TTC § 13 of the Code, which provides:—

“. . . the High Commissioner may restrict or forbid the acquisition of interests in real property and in business enterprises by persons who are not citizens of the Trust Territory.”

The Land Management Regulation No. 4, provides:—

“in accordance with the terms of Section 13 (1 TTC 13) of the Bill of Rights, no acquisition of interests in real property by persons

who are not citizens of the Trust Territory, or by a foreign corporation or any corporation or association in which an alien owns any interest shall be valid without the prior written approval of the High Commissioner."

[1] The defendant Emesiochel's lease to The School of the Pacific, Inc., a foreign corporation, is thus specifically prohibited by law without High Commissioner approval. Even if the defendant Emesiochel does have sufficient interest in the land to permit him to lease it, the lease here attempted is without validity.

The Municipal Council of Ngatpang attempted by a last minute maneuver to bolster Emesiochel's claim to the land. It adopted an instrument denominated "Record of Ownership of Land," dated August 22, 1973, and Municipal Resolution No. 1-73, dated December 5, 1973. We note the purported lease was dated December 2, 1973, and that the application made by the defendant school for a permit to establish and operate a nonpublic school was signed December 3, 1973, but was dated August 17, 1973.

The "Record of Ownership of Land" adopted by five members of the municipal council, two representatives of members of the council, the defendant Emesiochel as a member of the council and the municipal magistrate said in part:—

"Know all men by these presents that the undersigned Chiefs and Magistrate of Ngatpang Municipality . . . by their authority as traditional, customary and elected leaders of Ngatpang Municipality acknowledge and certify that Emesiochel is the true, exclusive and lawful holder of the title of that piece of land located within Ngerdubech . . . known as Ibobang . . . that said title was heretofore granted to Emesiochel by the undersigned in accordance with Palauan custom and law. . . ."

Only four of the nine signatories to the instrument were members of the council when the land was purportedly given to Dlangebiang Clan in 1960 or 1961. The clan chief granted permission to the defendant Emesiochel to use

some of the land. Neither transfer was approved by the adult members of the municipality or of the Dlangebiang Clan. It is obvious no transfers were made and the transfers attempted were not "in accordance with Palauan custom and law" as recited in the instrument.

The Municipal Magistrate clearly contradicted the municipal instrument. He testified:—

"Q. . . . who still owned the land, the clan or Emesiochel?

"A. The land is owned by the Dlangebiang Clan."

The municipal declaration, according to the magistrate's testimony, was merely to satisfy the "American system." The magistrate testified:—

"Q. Now, if it is true that the clan gave this land to Emesiochel in 1961, why was it necessary to call a meeting of the council, seven of whom were present at Emesiochel's house, to sign this document in August of 1973, if he already owned the land?

"A. Then it is the American system of doing the work that the person from who we were getting money from, or financial aid from, wanted to make sure that Emesiochel really owned the land and had authority to the land and could release it."

The council did not submit a similar declaration to the High Commissioner in support of the application of The School of the Pacific for a school permit. The testimony shows:—

"Q. You did not worry about the authority, though, when you told the High Commissioner that he (Emesiochel) owned the land; you did not worry about any document like that, then, did you?

A. No."

The school permit application declared:—

"The land has been offered by a private owner, Mr. Emesiochel, on a land-use-rights basis."

The council supplied similar support to its "Declaration of Ownership" of August 22, 1973, by its resolution of December 5, 1973, sent to the district administration after

the school permit application had been approved by the district administration. The resolution said among other things:—

“. . . the school as has been planned to be established and built on a land called Ibobang, which land Mr. Emesiochel Yoshiwo has full responsibility and authority of. . . .”

“Be it further resolved, that the Municipal Council and the Council of Chiefs of Ngatpang Municipality shall and will make certain that nothing whatsoever shall and will cause any unnecessary and undue restraints on Mr. Emesiochel Yoshiwo’s rightful authority over said land so as to provide for a smooth and effective institution of the program for this school toward the optimum amelioration of the public.”

However adamant the council may be to prevent “restraints” on Emesiochel’s authority, whenever a citizen of the municipality with an interest in the land objects to the council’s and Emesiochel’s actions, and the objection has the support of applicable law, both statutory and customary, then it is the function of the Court to impose restraint as may be appropriate to halt wrongdoing.

From the evidence presented by defendants an even greater defect appeared than prima facie invalidity of the lease. It is apparent from the testimony of the municipal magistrate that even though the land was transferred to the municipality there was no formal transfer by the municipality to the four clans of Ngatpang. The magistrate said:—

“A. I really do not know when it actually happened but when it came into being, these four clan leaders were having this land in four divisions and when the land was released to Ngatpang Municipality, the clan to which I am a member was already or in the practice of using their share of land.”

* * *

“Q. Was there a survey made of these four divisions, an actual survey?”

“A. No.”

The testimony indicates that not only was there no formal distribution of municipal land to the four clans but the clans themselves had not formally distributed any of the land to their members. The defendant, Emesiochel, testified:—

“Q. Was the land given to you by the whole membership of the Dlangebiang Clan or by Rubelkuul Demei (the first chief of the clan), alone?

“A. When I learned that the land belonged to the Dlangebiang Clan I went to Rebelkuul and asked him for a piece of land. He told me to go ahead and do whatever I can do on the land. When people come there then we will get together on how much land will be given to whom.”

The defendant admitted he did not know how much land he received from the chief nor how much of it he leased to the school. He testified he “had given” the school what “they would need” and in response to the question “But you do not know the size of the land you have given them?” the defendant responded “No.” The lease itself did not specify the amount of land but provided that:—

“The property has been surveyed and a map has been prepared as part of Schedule A attached hereto.”

All witnesses agreed there was no map attached when the lease was executed. There was introduced, however, a map (Plaintiff’s Exhibit 3) prepared by the Division of Lands and Surveys showing the school site area comprised 379,847 square meters. How this school site was determined in a tract for which partial use rights were given by a clan chief in an unsurveyed larger parcel was not explained.

[2] No testimony was given on the propriety under Palauan custom and traditional land law, of the highly informal transfers from the municipality to the California corporation. Nor will the Court at this point determine whether the defendants—either of them—have any rights

to use the land in question. That determination goes to the merits of plaintiff's case. That ultimate question may not be resolved in connection with the decision whether a temporary injunction should issue or not.

[3] One of the elements necessary for consideration before the Court may issue a temporary injunction is whether or not the plaintiff has a "substantial chance" to prevail upon the merits. For that purpose, the Court may consider testimony given by the defendants and their witnesses as to whether or not there has been an effective transfer of land to the foreign corporation.

Without deciding the ultimate question—which even now may be in a posture for summary judgment based upon the applicable land law—the Court must hold plaintiff has established a *prima facie* case that he will ultimately prevail upon the merits.

The chances of eventual success is only one of several criteria upon which issuance of a temporary injunction depends. It was said in *Luster Enterprises, Inc. v. Jacobs*, 278 F.Supp. 73, that the court must consider:—

"the relative importance of the rights asserted, the acts sought to be enjoined, the irreparable nature of the injury allegedly flowing from the denial of preliminary relief, probability of ultimate success *or* failure of the suit, and balancing of damages and conveniences generally."

[4] To the same effect is *Nelson v. Miller*, 373 F. 474, 477. It also must be observed that the granting or withholding of a temporary or interlocutory injunction rests in the sound judicial discretion of the trial court based upon the several determinative elements of law.

As to the first of the criteria—(1) the potential harm to the enjoined party—the defendants attempted to show that halting construction of the school might result in a loss of funds to the Jannss Foundation because the Federal government might take in taxes funds that otherwise

would inure to the benefit of The School of the Pacific.

The argument is untenable. It is based on unreasonable speculation without factual support. It is rejected as a ground for refusing to issue an injunction.

[5] Next to be considered is the irreparable nature of the harm to be prevented. Plaintiff and those he represents are entitled to have the land of the municipality in which he and those he represents have an interest free from occupancy by strangers having no interest in the land, particularly when it is the purpose of the encroachers to cut trees and clear the land and build concrete structures. The only relief available is the maintenance of the status quo until the litigation is ultimately decided.

It must be held that to permit the defendants to proceed in the face of plaintiff's objections would be to irreparably harm the plaintiff's interests in such a way there can be no adequate remedy except to temporarily halt proceedings.

The Court is guided by what the United States Supreme Court said in *Yakus v. United States*, 321 U.S. 414, 64 S.Ct. 600, 675, that:—

“Even in suits in which only private interests are involved, the award is a matter of sound judicial discretion in the exercise of which the court balances the conveniences of the parties and possible injury to them according as they may be affected by the granting or withholding of the injunction. And it will avoid such inconvenience and injury so far as may be, by attaching conditions to the award such as the requirement of an injunction bond conditioned upon payment of any damage caused by the injunction if the plaintiff's contentions are not sustained.”

[6] As has been demonstrated plaintiff is entitled to a temporary injunction until his right to prevail is denied or granted by a determination on the merits. The Court is thus confronted with defendants' motion that an injunction bond be set. The bond is intended to protect the de-

defendants from any damage they may incur if plaintiff does not obtain a permanent injunction.

The defendants, however, failed to demonstrate any potential damage resulting from a preliminary injunction. The argument that the financial backer of the school might lose its contribution because of United States tax exaction cannot be seriously considered in the present context.

No other loss, except delay in completion of the project, is apparent. The workers for the defendant engaged in clearing the land were volunteers who did not even receive food for their efforts. It was testified they were not paid and not fed. The workers brought their own food from their homes and when they had run out of food they went home to gather more. No monetary loss to the defendants could result in delaying this arrangement.

It must be concluded there has not been sufficient showing to justify an injunction bond.

Ordered:—

1. That the defendants, and each of them, their agents, servants, employees, representatives and persons acting in concert or participating with them, shall be and hereby are restrained and enjoined from engaging in or performing directly or indirectly, any and all acts of use and occupancy of the land known as Ibobang, Ngatpang Municipality, Palau District, until further order of the Court.

2. That the defendants' motion that plaintiffs be required to post a bond during the pendency of the temporary injunction is denied.

3. That the temporary restraining order heretofore issued against the defendants and continued upon hearing is vacated and is replaced by the injunction pendente lite herein ordered.