

A final determination should be obtained from the *droulul*. However, if the parties are unable to get that body to meet and decide the question, the court will make the decision upon the basis of the evidence presented to it.

Ordered, that plaintiff's motion to re-open Marshall Islands Civil Action No. 134 is denied without prejudice to either party presenting the question for decision of who is the rightful holder of the *alab* interest in Jebeten *Wato*, Enemanet Island, Majuro Atoll, in a new cause of action.

MELIONG MADRAINGLAI, et al., Plaintiffs

v.

YOSIWO EMESIOCHEL, the School of the Pacific, the Magistrate and Municipal Council of Ngatpang Municipality, and Dlangebiang Clan by its paramount titleholder, Defendants

Civil Action No. 1-74

Trial Division of the High Court

Palau District

April 25, 1974

Motion for relief from order granting motion to vacate injunction. Trial Division of the High Court, D. Kelly Turner, Associate Justice, held that where defendants' motion to vacate injunction pendente lite was made without notice to plaintiff, plaintiff's motion to vacate order granting defendants' motion would be granted, for grant of motion to vacate the injunction when plaintiff had no notice and opportunity to resist the motion was a denial of due process.

1. Judgments—Relief from Judgment—Generally

Relief from an order or judgment for new facts or for newly discovered evidence, and relief for "any other reason justifying relief" are mutually exclusive. (Trust Territory Rules Civ. Proc. 18(a), (e)(2), (6))

2. Judgments—Relief from Judgment—New Evidence

Motion for relief from order granting temporary injunction, on ground of "new facts", was inappropriate and should not have been granted where the "new facts" consisted of counsel's conclusions.

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3. Constitutional Law—Due Process—Hearing

Where defendant's motion to vacate injunction pendente lite was made without notice to plaintiff, plaintiff's motion to vacate order granting defendants' motion would be granted, for grant of motion to vacate the injunction when plaintiff had no notice and opportunity to resist the motion was a denial of due process. (Trust Territory Rules Civ. Proc. 7)

4. Injunctions--Nature and Purpose

An injunction pendente lite maintains the status quo to prevent change of conditions until the court can decide the case on its merits.

Assessor: FRANCISCO MOREI, *Acting Presiding Judge, District Court*
Interpreter: AMADOR D. NGIRKELAU
Counsel for Plaintiffs: JOHN NGIRAKED
Counsel for Defendant School of the Pacific Inc.: JOHNSON TORIBIONG
Counsel for other Defendants: None appearing

TURNER, *Associate Justice*

An injunction pendente lite was issued by this Court requiring defendants to cease use and occupancy of land known as Ibobang in Ngatpang Municipality, Babelthaup Island, Palau District. Thereafter, one day after the Palau sitting of the Court at which the temporary injunction has been issued, had been concluded, and approximately three weeks after the issuance of the injunction order, counsel for defendants presented to the Chief Justice, presiding in the High Court Trial Division in Saipan, Mariana Islands District, a "Motion for Relief from Order of Injunction on the Ground of New Facts." Notice was not given to the plaintiffs or their counsel nor to the trial judge who had issued the injunction after extensive hearing.

Defendant did not ask for a new trial or hearing "by reason of newly discovered evidence or errors of law apparent on the record" as provided by Trust Territory

Rule 18(d), Rules of Civil Procedure, for the apparent reason more than 10 days had elapsed from entry of the injunction order. Nor did defendant bring his motion for "relief" within Rule 18(e) (2) requiring relief to be for reason of newly discovered evidence which by due diligence could not have been discovered in time to move for a new trial.

Defendant's motion was based upon Rule 17(e) (6), which obviously was a typographical error because the rule is No. 18, not 17, which has to do with appointment of a Master. The Court will ignore this slight bit of carelessness because there is much more serious fault to find with defendant's motion.

[1] Rule 18(e) (6) is a catch-all provision upon which a court may rely if none of the reasons for asking for relief are available in subparagraphs No. 1 through 5 of the rule. Federal Rules of Civil Procedure, 60(b) (6) is the same as Trust Territory Rule 18(e) (6). *U.S. v. Failla*, 164 F.Supp. 307. Relief from an order or judgment for "new facts" or "newly discovered evidence (Rule 18(d) or Rule 18(e) (2))" and "any other reason justifying relief" are mutually exclusive remedies. *Frank v. New Amsterdam*, 27 F.R.D. 258, the court (dealing with subparagraph (1) rather than (2)) said: "Rule 60(b) by its implications casts subsections (1) and (6) as mutually exclusive remedies."

[2] Even if the Court ignores the improper use of Rule 18, it can scarcely overlook that the motion is based upon counsel's conclusions and were thus inappropriate. The U.S. Court said in *Parker v. Checker Taxi*, 238 F.2d 241, that "conclusions of affiants" supporting a petition for relief from a judgment was not evidence newly discovered or otherwise. In his motion defendant makes a conclusion that may only be determined when the case is

tried on its merits when he said: "The undisputed legal owner of said land (is) Ngatpang Municipality."

The motion also recited as "new facts" that:—

"The Defendant Yosiwo Emesiochel and Dlangebiang Clan . . . have relinquished their claim of ownership to said land . . . as evidenced by this action through the Municipal Council of Ngatpang Municipality in leasing said land to Defendant The School of the Pacific, Inc." It is noted Dlangebiang Clan has not been a defendant in this case and both the plaintiff and the defendant Emesiochel are members of that clan. It was defendant's original theory, in an attempt to justify defendant Emesiochel's lease to the school, that the clan acquired title from the municipality at the time the government returned title to the municipality and that the clan then transferred some 374,847 square meters to Emesiochel who leased it to the school.

In the injunction pendente lite opinion this Court pointed out that the lease to the school was utterly invalid for several reasons, the principal one being there was no evidence (in fact the evidence was to the contrary) the clan had ever transferred the land to Emesiochel. The original maneuvering of the Municipal Council to bolster the attempted transfer of the land to the school by Emesiochel was held to be contrary to Palauan custom and law.

In addition to the invalidity of the attempted transfer, the Court held the lease between the defendants to be without effect because it had not been approved by the High Commissioner as required by law. Confronted with these two fatal defects to their attempt to vest a leasehold interest in the defendant school, between the time of the February 4, 1974, issuance of the temporary injunction and March 1, 1974, the day the matter was submitted

ex parte to the High Court in Saipan, the defendants undertook the following:

(1) February 14, 1974, drafted and obtained execution of a lease between the Magistrate of Ngatpang Municipality and the representative of the school (who had also executed in behalf of the school the lease with defendant Emesiochel December 2, 1973, for the same land). The new lease, however, was approved by the High Commissioner on March 1, 1974, the day the motion to vacate the injunction pendente lite was presented to the High Court in Saipan. Except for the change in lessors the two leases were much the same.

(2) To further complicate this leasing program, a lease dated February 12, 1974, between the Magistrate of the Municipality and the school was executed which was identical with the lease between Emesiochel and the school, except for the designated lessor and except for the reduction in term from 10 years to 10 months. In summary, the defendants attempted to vest a leasehold interest in the defendant school by: (1) Lease between Yosiwo Emesiochel and the school dated December 2, 1973, admitted as plaintiff's exhibit 1 at the injunction hearing January 25, 1974. (2) Lease between the Magistrate and the school dated February 12, 1974, for 10 months only. This lease was "filed" with the clerk and was entered in the case file. It is not an exhibit. (3) Lease between the Magistrate and the school dated February 14, 1974, for 10 years. This lease was said by defendant's counsel to have been presented to the Court in the ex parte hearing in Saipan, although nothing in the record confirms the statement. A copy was admitted as plaintiff's exhibit 1, at the April 22, 1974, hearing in Koror on plaintiff's motion for relief from the order to vacate.

In addition to the third lease the defendants presented to the Court in Saipan and to the Court in Koror at the

hearing for relief, defendant's Exhibit A, an affidavit apparently signed by 12 members of the Municipal Council, including the Municipal Magistrate and the defendant Emesiochel, both of whom are lessors of the land in question to the school. The affidavit says, among other things, that a resolution dated the same date as the affidavit, February 12, 1974, authorized the magistrate to lease "on behalf of Ngatpang Municipality" for less than one year and thereafter to execute "another lease" for a 10-year term the land in question to the defendant school. In addition to the affidavit and municipal resolution No. 1-74 two additional affidavits of no apparent special significance were "filed" with the Clerk of Courts and by him placed in the case file. They are not, the record indicates, exhibits at either the Saipan or Koror hearings.

Presented to the Court in Saipan in addition to (a) affidavit of the Municipal Council; (b) the municipal resolution No. 1-74, dated February 12, 1974; and (c) the third lease as approved by the High Commissioner, was (d) a letter from the plaintiff to Edwin Janss, Jr., the purported financial backer of the school in which the plaintiff, who signed the letter as "Acting Chief Rekesik, Ngatpang Municipality," explained his reason for bringing the suit against the school project and expressing the hope "Mr. Emesiochel will step aside and let the community of Ngatpang Municipality deal with the school as owner of the land in question." The "community" appears not to have dealt with the school unless it can be said the council was authorized to transfer the municipal land. This question, going to the merits, is not decided at this time.

This "package of new evidence," counsel for the defendant school argued to the Court in Saipan and in Koror, justified the Court to "vacate the order of injunction pendente lite against the defendant on the ground the

facts upon which said injunction was issued have been altered by the execution of the new lease agreement and said injunction is no longer applicable in the instant case."

Defense counsel "filed," by delivering to the Clerk of Courts who placed in the case file a letter or memorandum to "The Trial Division of the High Court (Palau District)," dated February 13, 1974, asking that the Court "lift its order of injunction against" the school. The reason for the request was given as: "That the state of facts upon which this court's order of injunction was based has been completely altered by the transpiration (sic) of new legal transactions which have lawfully and effectively vested defendant, The School of the Pacific, Inc., clear and unencumbered right and authority to engage in construction work"

This rather amazing instrument and its conclusion was not served upon the plaintiff, nor was it presented to the Court in Saipan. It also was based on conclusions drawn from events that did not transpire until March 1, 1974, when the High Commissioner approved the third lease to the school.

The same conclusion was made in the motion presented to the Court in Saipan which asserted the approval of the lease from the Municipality to the school by the High Commissioner made the lease effective for the purpose of "legally authorizing the School of the Pacific to recommence its work."

Defendant's counsel also avowed in his motion that defendant Emesiochel and Dlangebiang Clan "have relinquished their claim of ownership" to the land in question. This relinquishment, he argued, was by virtue of the affidavit Emesiochel signed evidencing support of Municipal Resolution 1-74 authorizing the Ngatpang Magistrate to enter into leases with the defendant school.

The motion for relief from the order for injunction pendente lite was presented to the Court in Saipan together with the supporting instruments on the same day the new lease—the third one—had been approved by the High Commissioner. Notice of the motion was not given to plaintiffs and plaintiffs' counsel. Nor was the case file available to the court. The record does not indicate whether or not the injunction pendente lite which was ordered vacated was available to the Saipan court.

Courts in the United States have said:—

“. . . the general rule is that a party interested in resisting a motion has a right to notice and an opportunity to be heard. (Citing.)” *State v. District Court*, 251 P.2d 840.

The text writer in 56 Am. Jur. 2d., Motions, Sec. 10, said:—

“Where notice is required, the general rule is that an order made on a motion without notice is void. Where, for example, a party seeks to vacate an order entered without notice to him, he is entitled to vacate it to the extent that it affects his interest because he has a right to be heard before the judge or court makes the order, not merely the right to show, if he can, that an order following an ex parte hearing unjustly affects him.”

Trust Territory Rule 7, Rules of Civil Procedure requires a party “unless the Court otherwise orders” to deliver or mail to each of the parties affected thereby, a copy of such . . . motion.” There was no court order relieving defendant from the obligation of the rule.

Although plaintiff's counsel did not receive notice of the motion presented to the Court and granted on the same day, his clients became aware that something had happened because the defendant school's workers were back on the land. When the material from Saipan was received by the Clerk in Koror plaintiff learned what had happened and he thereupon filed his motion for relief from the March 1, 1974, order to vacate the injunction.

[3] There are two valid reasons for granting plaintiff's motion for relief. The first was the unconscionable imposition upon the court and the plaintiffs by defendants' counsel. Failure to permit plaintiffs an opportunity to resist the action amounted to a denial of due process and the order cannot be allowed to stand for that reason, if for no other.

The second reason for setting aside the order to vacate is that it was only partially supported by the grounds recited in defendants' motion. It is not true that "the facts upon which said injunction was issued have been altered by the execution of the new lease agreement and said injunction is no longer applicable."

An examination of the injunction pendente lite shows it was not issued solely on the ground the lease was invalid because the High Commissioner had failed to approve it. Of equal importance is the question of ownership of the land and the authority of the Municipal Council to transfer the land to the school or to an individual. The injunction issued on the theory, among others, the attempted transfer by the Municipal Council to the clan and by it to the defendant Emesiochel were invalid because not in accord with Palauan custom.

Assuming Emesiochel now has released any claim to the land, what has the clan done to release its interest, if any? The defendant failed to show a valid relinquishment of claim. The Saipan order saying "it is shown that defendant Emesiochel, and the clan he represents, has abandoned claim of ownership" simply is not true. Whatever Emesiochel has done as to his own claim does not affect the clan's claim. The plaintiff also is a member of the clan and he has given no indication of any relinquishment of claim. One individual may not act for the clan without the consent or authorization of all the senior strong members of the clan. Plaintiff, a clan title bearer,

did not authorize the clan or Emesiochel to return the land to the municipality.

[4] Even if it is a fact—a matter to be determined when this case goes to trial on the merits—that the title to the land in question is vested in the municipality there remains the further vexing question whether or not the magistrate, authorized only by the eleven-member council rather than the adult citizens of the municipality or the members of the clan, can transfer the land to the defendant school. The municipal charter does not answer the question because no mention is made of the council's authority to lease or otherwise transfer municipal land. At this point the court record does show there has never been a meeting of the municipal citizens approving or authorizing the councils' authorization to the magistrate. Whatever the answer to those many controversial fact issues they are not to be decided in conjunction with issuance of a temporary injunction. All that an injunction pendente lite does is to maintain the status quo, to prevent changing the condition of the land by clearing it or building on it, until this Court has had an opportunity to decide this case on its merits. The ultimate question is, whether the plaintiff may or may not, in accordance with the law, permanently block the use of the land by the defendant school. The question could very well become moot, or in any event result in substantial harm, if the defendant school proceeds to use and build on the land before the court determines the school's entitlement to do so.

Counsel for the school announced during the hearing he represented only the school and not the other Ngatpang principals. As to defendant's suggestion the Magistrate and Municipal Council of Ngatpang had been summoned to the hearing by plaintiff's counsel as witnesses, rather than as parties, pursuant to Trust Territory Rule 19,

Rules of Criminal Procedure, made applicable to civil procedure by Rule 23 of the Civil Rules, and that they should be parties, the Court agrees. The plaintiff's motion to add the parties is therefor granted and in the interest of having all the parties before it the Court adds the Dlangebiang Clan represented by the paramount titleholder of the clan. Accordingly, it is

Ordered, that the ex parte order issued March 1, 1974, which vacated the injunction pendente lite entered February 4, 1974, is hereby set aside and quashed and the injunction pendente lite is reinstated until this case is determined on its merits or as the Court may otherwise order.

Further ordered, that the Magistrate and the Municipal Council of Ngatpang Municipality and the Dlangebiang Clan, to be represented by its paramount male titleholder, be added as party defendants.

TRUST TERRITORY OF THE PACIFIC ISLANDS

v.

CARLOS N. LUCAS

Crim. No. 13-74

Trial Division of the High Court

Mariana Islands District

April 26, 1974

Motion for bill of particulars and for pretrial discovery and inspection. The Trial Division of the High Court, Arvin H. Brown, Jr., Associate Justice, held that defendant charged with criminal trespass and disturbing the peace was entitled to a bill of particulars stating exact location of house where alleged offenses took place, the exact time thereof, the names and addresses of all who were present and the precise manner in which, and means by which, defendant allegedly committed the offenses, and was entitled to discovery of witnesses' statements, defendant's statements and physical evidence not available to defendant or consisting of internal government documents.