

DALAM MAHKAMAH TINGGI MALAYA DI KUALA LUMPUR

DALAM WILAYAH PERSEKUTUAN, MALAYSIA

[GUAMAN NO: WA-22NCVC-281-06/2017]

ANTARA

AIEYAPPAN TULUKANAM

(NO. K/P: 240214-71-5267)

... PLAINTIFF

DAN

1. DUSUN DURIAN PLANTATIONS LTD

(NO. SYARIKAT: 990015-A)

(Dahulunya dikenali sebagai Golden Hope Plantation LTD)

2. KOGLIAMAH MALAYAN

(NO. K/P: 461204-10-5042)

**... DEFENDAN-
DEFENDAN**

***CIVIL PROCEDURE:** Striking out - Action - Res judicata - Vexatious and abuse of process of court - Estoppel per rem judicatum - Existence of previous suits involving same parties - Correctness of earlier decision accepted - Public interest - Whether it was in public interest that there should be finality in litigation - Whether principle of estoppel per rem judicatum applicable - Whether plaintiff's action was vexatious and an abuse of process of court - Whether plaintiff's action should be struck out*

[First and second defendant's application allowed with no order as to costs.]

Case(s) referred to:

Asia Commercial Finance (M) Berhad v. Kawal Teliti Sdn Bhd [1995] 3 CLJ 783 SC (*refd*)

Carl-Zeiss-Stiftung v. Rayner and Keeler Ltd and Others (No 3) [1969] 3 All ER 897 (*refd*)

Eu Finance Berhad v. Lim Yoke Foo [1982] 1 LNS 21 FC (*refd*)

Kogilamah Malayan v. Aieyappan Tulukanam [2015] 1 LNS 962 CA (*refd*)

Letchumanan Chettiar Alagappan (As executor to SL Alameloo Achi (Deceased) & Anor v. Secure Plantation Sdn Bhd [2017] 5 CLJ 418 FC (*refd*)

Syed Omar Syed Mohamed v. Perbadanan Nasional Berhad [2012] 9 CLJ 557 FC (*refd*)

Legislation referred to:

Rules of Court 2012, O. 18 r. 19(1)

JUDGMENT

- [1] This case has a long and somewhat chequered history, which originated in 1968. That is half a century long. The parties therein, in particular the plaintiff and defendant had gone through a series of court battles reaching as far as the Federal Court.
- [2] The dispute is in respect of 2.5 acres of land in sub lot 46 held under the master title C.T.4828, Lot 746, Mukim Tanjung Dua Belas, Daerah Kuala Langat, Selangor, now known as Lot No. 44522 (“sub lot 46”). The plaintiff, who, going by the details of his identity card is 94 years of age, is seeking for a declaration

that the said sub lot 46 is held by the 1st defendant in trust for him.

- [3] As against the 2nd defendant, the plaintiff is seeking for damages and a further order that the 2nd defendant do vacate and deliver up vacant possession to the said sub lot 46 to the plaintiff. Sub lot 46 is part of the 961.5 acres of Lot 44522 (“the said Land”). The 1st defendant is the registered owner of the said Land.
- [4] By an agreement dated 7.10.1968 (“the SPA”) the 1st defendant had agreed to sell an area measuring 311.52 acres of the said Land (“the 311.52 acres’ portion”) to Low Yok Seong, Lim Pit Tat, Ong Siew Tung and Chip Eng Realty Sdn Bhd (“the Original Purchasers”). It became apparent later that the Original Purchasers had assigned their rights and interests in the SPA to the late Ng Kim Chuan (“Kim Chuan”) and that Kim Chuan was their nominee.
- [5] The plaintiff’s case is that by an agreement dated 17.7.1978, Kim Chuan had sold 2.5 acres of sub lot 46 to one Ong Tai Bak who in return sold the same to the plaintiff.
- [6] In short, the plaintiff is saying that he is the beneficial owner of the said sub lot 46.
- [7] The two applications before me are in Encls 14 and 17 filed by the 2nd and 1st defendants respectively for the writ and statement of claim be struck out under O. 18 r. 19(1) of the Rules of Court 2012 (“ROC”).

The multiple suits before this

- [8] By way of the Shah Alam High Court Suit No. 22-333-1992, one Patchaiamah d/o Perumal (Mendakwa sebagai Pentadbir Harta

Murugashu a/l Marie) had sued Pegawai Pentadbir Pusaka Malaysia (sebagai wakil harta Ng Kim Chuan (si mati) (“Suit 333”). The 2nd defendant herein is the daughter of the said Patchaimah d/o Perumal (“Patchaimah”).

[9] There was another suit filed at the Shah Alam High Court in 2001 known as Suit No. MT2-22-620-2001 (“Suit 620”) where the plaintiff in this suit, Aieyappan had sued Patchaiamah.

[10] In between Suit 333 and Suit 620, the 1st defendant Dusun Durian Plantations Limited, had filed an Originating Summons at the Kuala Lumpur High Court No. S9-24-2337-2000 (“OS 2337”) where the plaintiff and the 2nd defendant’s late mother (“Patchaimah d/o Perumal”) herein were the 66th and 67th defendants respectively. In the OS 2337, the 1st defendant herein sought *inter alia* for the determination of the identities of various beneficial owners of the said Land in particular the 311.52 acres’ portion. The 1st defendant even sought for a declaration that the parties thereto were entitled to separate documents of titles in respect of the 311.52 acres’ portion.

[11] By way of a consent order in respect of OS 2337, recorded by Prasad Sandosham Abraham JC (later FCJ), it was *inter alia* ordered as follows:

[46] Sublot 46, diserahkan dan didaftarkan seperti berikut:-

- (i) Dua setengah (2.5) ekar daripada lima (5) ekar atas nama harta pesaka Defendan 66 iaitu Patchaimah d/o Perumal (simati);
- (ii) Baki dua setengah (2.5) ekar daripada lima (5) ekar akan ditentukan berdasarkan kepada

keputusan Guaman Sivil No. MT2-22-620-2001 di Mahkamah Tinggi Shah Alam iaitu Defendan 66 dan Defendan 145 sebagai pengganti dan Defendan 67.

In other words, the parties consented that the entitlement of the remaining 2.5 acres in sub lot 46 (“the disputed 2.5 acres) would be determined based on the decision of the Shah Alam High Court in Suit 620.

[12] In so far as Suit 333 is concerned, the Original Purchasers and Patchaiamah had come to an agreement by a consent order dated 2.11.1995 that Patchaiamah was entitled to the 5 acres of Lot 46 (“the 2.11.1995 Order”).

[13] The 2.11.1995 Order was however set aside by another order dated 18.10.2012. By way of another order dated 7.12.2011, the 2nd defendant herein, Kogliamah, was substituted as the plaintiff in the said Suit. By the same Suit 333, the plaintiff herein was given leave to intervene.

The Suit 620: At the High Court

[14] In Suit 620, the plaintiff herein, had sued the late Patchaiamah and sought *inter alia* for a declaration that the plaintiff was a valid beneficial owner in respect of the disputed 2.5 acres. By an order dated 10.11.2005, the 2nd defendant herein was substituted for the late Patchaiamah in Suit 620.

[15] Suit 620 went on for full trial. At the end of the trial, the learned trial Judge *inter alia* made the following orders on 18.6.2013:

- (i) Adalah dideklarasikan bahawa Plaintiff adalah pemilik benefisial yang sah terhadap 2½

daripada Sub lot 46 yang dipegang di bawah CT 4828, Lot 746, Mukim Tg. Dua Belas, Kuala Langat;

- (ii) Gantirugi khas sebanyak RM186,000.00 terhadap kehilangan pendapatan dari April 1998 hingga kini.

[16] Aggrieved by the decision, the 2nd defendant herein appealed to the Court of Appeal.

The Suit 620: The Appellate Stage

[17] At the Court of Appeal, the 2nd defendant's appeal was allowed and the order of the learned trial Judge dated 18.6.2013 was set aside with costs of RM30,000. The judgment of the Court of Appeal which was dated 13.2.2015 ("Appeal No. 1") was reported as *Kogilamah Malayan v. Aieyappan Tulukanam* [2016] 3 MLRA 290; *Kogilamah a/p Malayan v. Aieyappan a/l Tulukanam* [2016] 6 MLJ 663 CA.

[18] In delivering the judgment of the Court, Hamid Sultan Abu Backer JCA held as follows:

The plaintiff in this case has not been issued with title. What he is holding are contractual documents evidencing an interest in land without appropriate endorsement from registered owners of the property. The three documentary evidence relied on by the court were hearsay documents in respect of ownership of the land relating to the master title. These three documents will not entitle the plaintiff to seek the prayer as stated in the statement of claim (see *Malayan Banking Berhad v. Worthy Builders*

Sdn Bhd & Ors [2015] 3 MLRA 309; [2015] 3 MLJ 791).

- [19] The plaintiff, unhappy with the decision of the Court of Appeal, had applied for leave from the Federal Court but it was dismissed by the Federal Court.
- [20] In the meantime, the 2nd defendant herein had applied to reinstate the 2.11.1995 Order in Suit 333 which ruled that Patchaiamah was entitled to the 5 acres of undivided shares in sub lot 46.
- [21] The application was heard before my learned sister Hadhariah Syed Ismail J who, on 9.4.2015, *inter alia* made the following orders:
- (i) Pihak Plaintiff dibenarkan lanjutan masa untuk memfailkan permohonan untuk menghidupkan semula Penghakiman Persetujuan bertarikh 02.11.1995;
 - (ii) Penghakiman persetujuan bertarikh 02.11.1995 dikekalkan.
 - (iii) Penghakiman Persetujuan bertarikh 02.11.1995 yang telah diketepikan melalui perintah bertarikh 18.10.2012 dihidupkan semula.

The plaintiff (who was the intervener in Suit 333) was represented by two counsel at the hearing of the application. Aggrieved with the decision of Hadhariah Syed Ismail J, the plaintiff appealed to the Court of Appeal.

[22] The appeal came up for hearing at the Court of Appeal on 9.5.2016 (“Appeal No. 2”). The plaintiff however, withdrew his appeal culminating in the Appeal being dismissed.

The implication of the withdrawal the Appeal

[23] I do not think that it is out of place to state at this stage that the withdrawal of the appeal has the same effect as failure to appeal. It simply means this. The withdrawal of the appeal means that the plaintiff had accepted the correctness of the decision of the learned Judge.

[24] If any authority is needed for the aforesaid proposition of law, it can be found in the Federal Court case of *Syed Omar Bin Syed Mohamed v. Perbadanan Nasional Berhad* [2013] 1 MLJ 461 FC. Zulkefli CJ (Malaya) (as the PCA then was) in delivering the decision of the apex Court held as follows:

The Plaintiff did not appeal against the decision of the learned judge striking out the first suit. The failure to appeal meant that plaintiff accepted the correctness of the decision to dismiss its suit.

In fact, recently the Federal Court had reiterated the same proposition in *Letchumanan Chettiar Alagappan @ L Allagappan (as executor to SL Alameloo Achi, deceased) & Anor v. Secure Plantation Sdn Bhd* [2017] 5 CLJ 418 FC where Jeffrey Tan FCJ in delivering the judgment of the Court said:

There was no appeal by the Registrar of Titles against the order of the trial court. That meant that the Registrar of Titles accepted that the rejection of transfer was wrong.

- [25] To conclude, the effect of the authorities on the subject is that, the failure of the plaintiff to proceed with the appeal of Suit 333 at the Court of Appeal would mean that the plaintiff had accepted the correctness in the decision of the learned Judge in reinstating the 2.11.1995 Order that Patchaiamah, and hence the 2nd defendant, was entitled to the 5 acres of undivided shares in sub lot 46.
- [26] The Court of Appeal's order dated 9.5.2016 did not give the liberty to the plaintiff to file the appeal afresh or otherwise relitigate the matter. In the absence of such order, I think it is not open for the plaintiff to pursue the matter any further.

The analysis

- [27] It is not surprising that both counsel for the 1st and 2nd defendants respectively are in tandem in arguing that the matter is subject to the principle of *res judicata*.
- [28] To recapitulate, the Appeal No. 1 held that the plaintiff's case was based on hearsay documents in respect of ownership of the said Land relating to the master title. The plaintiff, for all intents and purposes had failed to prove his case. Further by OS 2337, the plaintiff had affirmatively agreed that he would be bound by the eventual outcome of Suit 620 in respect of the disputed 2.5 acres. Finally, the failure of the plaintiff to proceed with Appeal No. 2 would mean he had accepted the correctness of the 2.11.1995 Order.
- [29] In any case, the instant case was premised *inter alia* on the agreement dated 17.7.1978 between the late Kim Chuan and Ong Tai Bak and another agreement entered between Ong Tai Bak and the plaintiff. Both of the agreements were rejected by the

Court of Appeal in Appeal No. 1 for want of appropriate endorsement from the registered owners of the property.

[30] It would be beyond any legal imagination, bordering preposterous, for me to sit in this Court and declare that the Court of Appeal was wrong in the finding that it made in Appeal No. 1 and that the Federal Court was equally wrong in not granting the leave to appeal. It has been finally adjudicated.

[31] I can only recall the judgment of Buckley J (later LJ) in *Carl-Zeiss-Stiftung v. Rayner and Keeler Ltd and Others (No 3)* [1969] 3 All ER 897 wherein his Lordship said:

I now come to the consideration of the present application. This jurisdiction under RSC, Ord. 18, r. 19, an exercise of which results in excluding all or certain issues in prospective litigation *in limine* from consideration by the court, is one which, as has often been said, should be exercised with great caution. For a party to seek to relitigate a cause of action which has already been finally adjudicated on by a competent court so that further litigation is barred by what has been called ‘cause of action estoppel *per rem judicatum*’ would clearly be vexatious and an abuse of the process of the court, and any such attempt should, no doubt, be frustrated by the court as soon as it is brought to its attention.

[32] I must however commend Encik Shahabuddin Shaik Alaudin, counsel for the plaintiff for his valiant attempt to convince me otherwise. The quality of his research is, I must say with certainty, meticulous and above par. The plaintiff could not have engaged a better counsel.

- [33] Learned counsel had mounted a massive attack on the learned trial Judge's decision to revive the 2.11.1995 Order in Suit 333 which according to him was unprecedented and illegal in that "it amounts to a nullity and the plaintiff and all others concerned could ignore the order without the need to appeal the same".
- [34] The plaintiff through his then counsel had all the opportunities to ventilate the aforesaid argument at the Appeal No. 2 but chosen not to proceed with the same. With respect, the plaintiff is deemed to have accepted the correctness of that decision; see *Syed Omar* and *Letchumanan*. In any case, since the plaintiff was represented by his then counsel at the hearing at first instance as the intervener in Suit 333 and the question of any breach of the principle of natural justice does not arise.
- [35] For the reasons aforesaid, I am not prepared to declare the said order to revive the 2.11.1995 Order as a nullity so as to render the same capable of being attacked in a collateral proceeding within the meaning of *Eu Finance Bhd v. Lim Yoke Foo* [1982] 2 MLJ 37 FC.
- [36] In the result, Encls 14 and 17 are allowed and the writ and statement of claim against both the defendants are struck out. In as much as this Court is sympathetic with the plaintiff, unfortunately the law is not on his side. The public policy of the law is that it is in the public interest that there should be finality in litigation – *interest reipublicae ut sit finis litium*; see *Asia Commercial Finance (M) Bhd v. Kawal Teliti Sdn Bhd* [1995] 3 MLJ 189 FC. This case is subject to the principle of estoppel *per rem judicatum* and would clearly be vexatious and an abuse of the process of the court and I so hold. I am making no order as to costs.



Dated: 19 FEBRUARY 2018

(WAN AHMAD FARID WAN SALLEH)

Judicial Commissioner
High Court Kuala Lumpur

COUNSEL:

For the plaintiff - Shahabudin Shaik Alaudin, Rosnida Che Ibrahim & Nur Fateha Abd Ghani; M/s Shahabudin & Rozima

For the 1st defendant- Anita Sockalingam; M/s Zain & Co

For the 2nd defendant - M Manohara & Lily Chua; M/s M Manoharan & Co