

IN THE HIGH COURT OF MALAYA AT SHAH ALAM
IN THE STATE OF SELANGOR DARUL EHSAN, MALAYSIA
CIVIL SUIT NO.: BA-21NCVC-72-09/2016

BETWEEN

- 1. ANDREW MAHATHEVAN A/L GOPAL
(No. K/P: 630723-10-6471)
- 2. LEE CHUN MUN
(No. K/P: 781014-14-5919)
- 3. YONG CHENG SOON
(No. K/P: 670218-10-5861) ...PLAINTIFF

AND

- 1. KERAJAAN NEGERI SELANGOR
- 2. PENDAFTAR HAKMILIK NEGERI SELANGOR
- 3. PENGARAH TANAH DAN GALIAN NEGERI SELANGOR
- 4. PENTADBIR TANAH GOMBAK
- 5. TAN SRI DATO' ABDUL KHALID BIN IBRAHIM ...DEFENDANTS

INTRODUCTION

1] The First, Second and Third Plaintiffs were office bearers of the Ulu Kelang Recreation Club ("UKRC"), the First Defendant is the Government of the State of Selangor, the Second Defendant is the Registrar of Title for the State of Selangor, the Third Defendant is the

Director of Land and Mines of the State of Selangor, the Fourth Defendant is the Land Administrator for the District of Gombak and the Fifth Defendant was the Menteri Besar of the State of Selangor.

2] The Plaintiffs vide Enclosure 1 are seeking for –

- 2.1 a declaration that the decision of the Kuala Lumpur Land Office vide a letter dated 12.7.1958 is valid, enforceable and binds the First, Second, Third and Fourth Defendants;
- 2.2 a declaration that UKRC has the right to control and manage Lot 3026 in accordance with section 24(i) of the Land Code Cap. 138;
- 2.3 a declaration that the Selangor Government Gazette 2214 is void and unenforceable as at the material time Lot 3026 was a reserved land with the right to control being given to UKRC;
- 2.4 a declaration that UKRC has a legitimate expectation to remain occupying Lot 3026;
- 2.5 the Defendants are liable for misfeasance in public office and breach of statutory duty;
- 2.6 general damages;
- 2.7 exemplary and aggravated damages;

2.8 interest at 5% per annum on the total amount of the award from the date of the filing of the writ until the date of full realisation;

2.9 costs and other reliefs.

Factual background

3] On 12.7.1958 the Kuala Lumpur Land Office ("KLLO") and the First Defendant approved the Ulu Kelang Recreation Club ("UKRC")'s application to build a club-cum-community hall and playing field on a state land known as Lot 3026, Kampung Kuala Ampang, Mukim Hulu Kelang, Selangor Darul Ehsan ("the land"). It was stated in the letter of approval that the said land was reserved for public purpose and the UKRC was given the right to control and manage the same. UKRC duly paid the survey fees a sum of RM690.00 as required and they were exempted from paying the assessment tax. Having gotten the approval UKRC commenced their memberships' drive and constructed the club house, etc. Since then they had spent around RM30,000,000.00 up to 2013.

4] In 1999 attempts were made by the First Defendant to take over Lot 3026 and vide a letter dated 19.9.2003 (exhibit AMG-11) Majlis Perbandaran Ampang Jaya ("MPAJ") notified UKRC to vacate as the First Defendant had decided to give the right to control and manage to MPAJ. UKRC was not prepared to accept this and refused to budge.

5] Apparently the KLLO had overlooked to gazette the land as reserved for public purpose after the approval was given in 1958. It was only on 2.12.2004 and when the takeover was opposed to and with the intervention of the then Deputy Prime Minister Datuk Seri Abdullah Badawi who proposed that the open space to be gazetted for recreational purpose, the gazetting was done – Selangor Government Gazette No. 2214 (“Gazette”). This was done without the consent of UKRC and no public hearing was held. The State Secretary of Selangor instead of UKRC was given the right to control and manage the open space and the complaint is that this is not in accordance with the approval given in 1958.

Enclosure 12

6] The Fifth Defendant vide Enclosure 12 seeks to strike out the statement of claim and/misjoinder on the following grounds, *inter alia*,

6.1 the statement of claim discloses no reasonable cause of action in that the Plaintiffs have no legal or statutory rights that may be prejudiced or affected by any purported action of the Fifth Defendant and that the statement of claim fails to state the material facts to establish misfeasance in public office, breach of statutory duty or any tortious act by him;

6.2 this action is frivolous and vexatious in that the Fifth Defendant is not a public officer under the Government Proceedings Act 1956, the Interpretation Acts 1948 and

1967, the Laws of the Constitution of Selangor or the Federal Constitution;

6.3 this action is an abuse of the process of the Court in that –

- (a) it is time-barred by virtue of s.2(a) of the Public Authorities Protection Act 1948;
- (b) the Plaintiffs ought to have proceeded under s.418 of the National Land Code or applied for a Judicial Review; and
- (c) the plea of *res judicata* applies following the disposal of the Kuala Lumpur High Court Originating Summons No.24NCVC-1688-10/2013 – *Ulu Kelang Recreation Club v. Majlis Perbandaran Ampang Jaya* on 30.5.2013;
- (d) the Plaintiffs should have earlier resorted to Order 24 rule 7A of the Rules of Court 2012 instead of improperly and unnecessarily naming the Fifth Defendant as a party in this action; and
- (e) the Fifth Defendant is bound by the oath taken under Article 54 of the Laws of the Constitution of Selangor and that the affairs of the State Executive Council are strictly confidential and cannot be disclosed by virtue of ss.91, 92 and 123 of the Evidence Act.

7] The Fifth Defendant is being sued in his personal capacity. The learned counsel representing him submitted that Enclosure 1 cannot lie against him as he was not a public officer unless the tortious acts were committed by him personally. The Fifth Defendant was the Menteri Besar of the State of Selangor from 2008 to 2014. The allegations against him in the statement of claim are as follows:

- 7.1 he was biased and refused to give UKRC the right of hearing as regards the complaints made;
- 7.2 he had acted in bad faith in that he failed to disclose the decision of the First Defendant made in the EXCO meeting held on 9.10.2013 (confirmed in the following EXCO meeting held on 16.10.2013) during the OS No. 24NCVC-1688-10/2013 proceedings; and
- 7.3 he had committed misfeasance in public office by directing the First, Second, Third, Fourth Defendants and MPAJ to carry out actions which were unlawful.

The learned counsel referred to the case of **LBCN Development Sdn Bhd & Anor v. Pengarah Tanah dan Galian Selangor & Ors [2014] 3 MLJ 445** and argued that this action was not maintainable under the Government Proceedings Act 1956.

8] The learned counsel for the Plaintiffs submitted that the Fifth Defendant then was the Menteri Besar and a holder of a public office and public office must be read in a relatively wide sense to include

'bodies' or 'entities' and not to be read in a restricted manner to only include a specific individual and his 'personal misconduct'. He relied on among others the cases of Three Rivers District Council v. Bank of England (No.3) [1996] 3 All ER 558 and Riga Sdn Bhd v. Awang Sepian Haji Awang Joini & 3 Ors [2005] 1 LNS 251.

9] In Tun Dr. Mahathir bin Mohamed & Ors v. Dato' Sri Mohd Najib bin Tun Hj Abdul Razak [2017] 9 MLJ 1 the High Court ruled that the defendant was not a public officer but a member of the administration. Likewise, the Fifth Defendant being the Menteri Besar then was also a member of the administration in the State of Selangor until 2014. Hence, the tort of misfeasance in public office is not maintainable against him. I was made to understand that on 30.8.2017 the Court of Appeal had dismissed the appeal by the appellants and therefore the decision of the High Court was affirmed. With that, I am bound.

10] As the decision of the Court of Appeal is binding upon me, I do not think I should go further to discuss the rest of the submission advanced by both counsels.

Enclosure 15

11] The First, Second, Third and Fourth Defendants vide Enclosure 15 seek to strike out the statement of claim on the following grounds, *inter alia*,

11.1 it is time-barred by virtue of s.2(a) of the Public Authorities Protection Act 1948; and

11.2 there is a Judicial Review application which is pending hence, filing multiple actions is an abuse of the process of the Court.

12] The learned Senior Federal Counsel for the First, Second, Third and Fourth Defendants submitted that the Plaintiffs are time-barred in that the prayer sought by them to have the Gazette declared as null and void and has no legal effect is based on a decision made in 1958. The cause of action accrues on either the date of the decision or the date of the publication of the Gazette i.e. 2.12.2004. She referred to s.2(a) of the Public Authorities Protection Act 1948 which provides for an action must be taken within thirty-six months. The cases of Kerajaan Malaysia & Ors v. Lay Kee Tee & Ors [2009] 1 MLJ 1 and Alias bin Ismail v. Hairuddin bin Mohamad & Anor [1997] 3 MLJ 724 among others, were cited in support of her argument.

13] The learned counsel for the Plaintiffs in response argued that the cause of action accrues on/about 15.1.2013 i.e. when the First Defendant decided that Lot 3026 which is occupied by UKRC does not belong to UKRC pursuant to the Gazette. Since Enclosure 1 was filed on 30.9.2016 limitation has not set in.

14] It was also submitted by the learned counsel for the Plaintiffs that in Enclosure 1 the Plaintiffs are seeking for declaratory reliefs therefore s.2(a) of the Public Authorities Protection Act 1948 does not apply.

15] The Gazette reads as follows:

"No. 2214

Pada menjalankan kuasa di bawah subseksyen 62(1) Kanun Tanah Negara 1965 [Akta 56/65] yang diberikan kepada Pihak Berkuasa Negeri dan diwakilkan kepada Menteri Besar Selangor oleh Raja dalam Mesyuarat melalui Sel. P.U. 17 bertarikh 7 Jun 1984, Menteri Besar mengisytiharkan tanah yang diperihalkan dalam Jadual dan ditandakan dengan garisan dalam Pelan Ukur Hasil No. PA 100428 yang disimpan di Pejabat Pengarah Ukur Selangor adalah dirizabkan bagi maksud awam iaitu kawasan lapang yang akan dikawal oleh Setiausaha Kerajaan Negeri Selangor."

It is not disputed that in 1958 the KLLO approved the alienation of Lot 3026 and to be maintained by UKRC for a club-cum-community hall and playing field and this continued until the Gazette published on 2.12.2004 which put an end to UKRC having the right to control and manage the open area.

16] However, the learned counsel for the Plaintiffs contended that the Court should take the date 15.1.2013 as that was the date of the letter informing UKRC of the decision made by the First Defendant on 9.1.2013 that the clubhouse and the open area did not belong to UKRC and that the clubhouse and the open area have been gazetted as an open space pursuant to the Gazette.

17] The Gazette is self-explanatory. It clearly states that the land in question does not belong to UKRC. UKRC was only given the right to control and maintain in 1958 without paying rentals and assessment tax.

18] Section 18(3) of the Interpretation Acts 1948 and 1967 reads as follows:

“(3) Where any matter is of local application only and is issued under the authority of a State officer or any person in the State having authority to do so under federal law it shall constitute sufficient notice thereof if the matter is published in the official *Gazette* of the State concerned.”.

19] In SR Katherine Lim KH v. Ketua Pengarah Perkhidmatan Perubatan Malaysia, Kementerian Kesihatan Malaysia & Ors. (1997) 2 CLJ 564 the Court of Appeal speaking through Abdul Malek Ahmad JCA (as he then was) said,

“We are of the considered view that since this matter involves a public authority, s. 2(a) of the PAPA applies and time, therefore, must run from the date of the gazette publication namely 7 July 1988 meaning that any suit or action by the appellant against the respondents must be filed before 6 July 1991. Having filed the originating summons only on 7 November 1996, she is clearly out of time by five years and four months. On this preliminary point alone, her claim fails.”.

20] Likewise in Enclosure 1 the suit involves public authority thus, the Public Authorities Protection Act 1948 applies.

21] As regards the contention that s.2(a) has no application where declaratory reliefs are sought for, to my mind, this argument can be disposed of by referring to the decision of the Court of Appeal in Litus Jau & Anor v. Boustead Pelita Tinjar Sdn Bhd & Ors [2014] 1 CLJ

880 where the appellants prayed for declaratory orders pertaining to their native customary rights. The second defendant was Superintendent of Lands and Surveys Miri Division and the State Government of Sarawak was the third defendant. Raus Md Sharif PCA (as he then was) speaking for the Court of Appeal at pp. 897-898 held as follows:

"[31] We shall first discuss the limitation issues pertaining to the second and third defendants. In discussing whether limitation has set in against the second and third defendants, we will have to advert to the facts that gave rise to this suit.

[32] The pertinent undisputed facts of this case, which gave rise to this suit is thus:

- (i) in 1992 ie, about twenty years before the filing of the plaintiffs' writ herein, the second defendant exercising its power under the Land Code issued a provisional lease to the first defendant; and
- (ii) as a result of the provisional lease being granted the said land was alienated to the first defendant and the first defendant became the registered owner, thereafter the said land was developed into an oil palm estate wherein which the plantation was duly completed in year 1994.

[33] Against this backdrop the plaintiffs instituted an action against the defendants. The issue now is when the plaintiffs' cause of action accrued. Looking at the facts objectively it is safe to conclude that the plaintiffs' cause of action against the second and third defendants accrued after the issuance of the provisional lease in 1992. Given this scenario and premised on the thirty six months limitation provided under s. 2(a) of PAPA, there can be no doubt that the plaintiffs' action against the second and third defendants is time barred as the suit was brought nearly twenty years after the issuance of the provisional lease which is beyond the statutory timeline permitted."

22] Based on the above it is my considered opinion that the cause of action accrued on the date the Gazette was published and s.2(a) of the Public Authorities Protection Act 1948 applies. Thus, the Plaintiffs are caught by limitation.

23] The Plaintiffs are currently pursuing a Judicial Review application at the Kuala Lumpur High Court No. 25-63-03/2014 seeking for certiorari, mandamus and declaration against the first four Defendants and earlier on UKRC had filed an Originating Summons also at Kuala Lumpur High Court No. 24NCVC-1688-10/2013 against Majlis Perbandaran Ampang Jaya (see [2013] 1 LNS 1428) pursuant to s.8(1) of the Specific Relief Act 1950 to recover possession of the said open area.

24] In **Arab Malaysian Merchant Bank Bhd & Ors v. Lori Malaysia Bhd (In Receivership) & 5 Ors** [1994] 3 CLJ 599 Abdul Malek Ahmad J (as he then was) at p.601 held,

“Without the necessity of dealing with the other issues raised, the claim here is clearly for the monies due on the leasing agreements the validity of which is pending trial in the other suit. This is certainly, therefore, not an appropriate case for summary judgment especially so when the plaintiffs had blatantly initiated multiple actions for the same subject matter and obviously trying out their luck in different Courts. This is surely an undesirable situation and an abuse of the Court's process.”

25] Reverting to the present case, the High Court dismissed the action and UKRC appealed to the Court of Appeal. The Court of Appeal in Rayuan Sivil No: W-01(NCVC)(A)-107-04/2014 held that UKRC was a

mere occupier and the land was a reserved land and UKRC had no legitimate expectation that the title would be issued. The appeal was therefore dismissed and leave to appeal to the Federal Court was not given (see Permohonan Sivil No: 08(f)-302-07/Tahun 2015(W)).


26] Now vide Enclosure 1 the Plaintiffs are pursuing the same action which to my mind a clear abuse of the process of the Court. And I do not think I should consider other grounds raised by the learned counsels for the Defendants pertaining to *res judicata* and inappropriate mode which to my mind are also in favour of the Defendants. In the circumstances, I allowed Enclosures 12 and 15 with costs.



(DATO' SRI TUN ABD MAJID BIN DATO' HAJI TUN HAMZAH)
Judicial Commissioner
High Court Malaya
Shah Alam

Date: 12 OCTOBER 2017

SALINAN DIAKUISAH



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