MALAYSIA

IN THE HIGH COURT IN SABAH AND SARAWAK AT KUCHING

SUIT NO: 22-249-98 lll(l)

BETWEEN

1. TR. NYUTAN AK JAMI (K.544160)
2. GANGAK ANAK GUMA (K.500444)
3. LANGA ANAK KAMA (K.544351)
[Suing for and on behalf of themselves and 183 other residents of Kampong Lebor, Jalan Gedong, 94700 Serian, Sarawak] …Plaintiffs

AND

1. LEMBAGA PEMBANGUNAN DAN LINDUNGAN TANAH (LAND CUSTODY AND DEVELOPMENT AUTHORITY)
Tingkat 10, Wisma Bapa Malaysia
Petra Jaya
93450 Kuching, Sarawak

2. NIRWANA MUHIBBAN SDN. BHD. (238058)
Lot 298, 2nd Floor
Lorong Rubber No. 9
Rubber Road, 93400 Kuchign

3. STATE GOVERNMENT OF SARAWAK …Defendants

BEFORE THE HONOURABLE JUSTICE
DATUK CLEMENT SKINNER **IN OPEN COURT**

JUDGMENT

The plaintiffs are Ibans by race and natives of Sarawak. The 1st defendant is a body corporate constituted under the Land Custody and Development Authority Ordinance 1981. The 2nd defendant is a company duly incorporated in Malaysia while the 3rd defendant is the State Government of Sarawak. The 1st, 2nd and 3rd plaintiffs represent some 183 other residents of Kampong Lebor, Jalan Gedong, Serian, Kuching and claim that prior to 1.1.1958 they and their forefathers had acquired native customary rights over areas of land which included about one kilometer along both banks of Sungei Tampoi ('the Sungei Tampoi land") some parts along Sungei Krang ("the Sungei Krang land") and at Sungei Meringgang ("the Sungei Meringgang land"). The extent of the area or boundary of the lands claimed by the plaintiffs as their native customary lands is described in more detail later.

The plaintiffs claim that their ancestors had occupied and cultivated their native customary lands since the rule of the Brunei Sultanate to whom a tribute was paid. The plaintiffs say they are still in occupation of those lands till today.

The 1st and 2nd defendants are the registered co-proprietors of 3 parcels of land, namely, Lot 2 Block 6 Melikin Land District (hereafter "Lot 2"), Lot 166 Block 5 Melikin Land District (hereafter "Lot 166") and Lot 7 Block 3 Melikin Land District (hereafter "Lot 7"). Apparently the Lot number of Lot 7 has change to Lot 2979 but I shall continue to refer to it as Lot 7 as this is how the parties have referred to it. These 3 parcels of land were alienated to the 1st and 2nd defendants by the 3rd defendant.

The plaintiffs claim that parts of their native customary lands have been included in the 3 parcels of land alienated to the 1st and 2nd defendants. In early 1997 the 1st and 2nd defendants entered the 3 parcels and began clearing works for oil palm cultivation. The plaintiffs claim that the inclusion of their native customary land within the 3 parcels of land and the destruction of their crops was unlawful and without their consent, or without their native customary rights over their land being first extinguished or without the payment of any compensation to them. Hence they seek the declarations and relief prayed for in this suit.

The 1st, 2nd and 3rd defendants deny that the plaintiffs have acquired any native customary rights to the areas claimed by them for the following reasons:

(1) They say the 3 parcels of land do not include any native customary land as virgin jungle has at all material times existed on the 3 parcels of land.

(2) The 1st and 2nd defendants say that the areas claimed to be farmed by the plaintiffs fall outside the boundary of the 3 parcels of land.

(3) In 1976 pursuant to section 6(1) of the Land Code, the Native Communal Reserve (No. 4) Order 1976 was published in the Sarawak Gazette 51/76, whereby 121 parcels of land were declared Native Communal Reserve in the Melikin Land District. Out of these 121 parcels, 26 parcels of land were reserved for the Ibans of Kampong Lebor (i.e. the plaintiffs) for their kampong and agriculture purposes and as burial sites. Accordingly the 3rd

defendant contends that the plaintiffs rights over the land are confined to those 26 parcels of land only;

(4) That the 3 parcels of land fall outside the area of land claimed by the plaintiffs;

(5) That the land on both sides of the Sungei Tampoi on the right hand side of Jalan Gedong was virgin jungle in 1978 and land on both sides of the river were issued with Forests Timber Licence No. T/5102 and T/5108 which were granted to Syarikat Eastern Sawmill Sdn Bhd and Nawi Sulaiman & Yusof Sheikh Mutu respectively. Further under s 38 of the Land Code, all lands within 66 feet of the banks of all navigable rivers, streams canals or creeks shall be reserved for Government;

(6) That the Sungei Krang land claimed by the plaintiffs is not within the area claimed by the plaintiffs as indicated in the map attached to the plaintiffs' Statement of Claim;

(7) That the Sungei Meringgang land is also claimed by the people of Kampong Marakai; that the area was covered by virgin forests in 1978;

(8) There was nothing wrongful or unlawful in the 3 parcels of land being alienated to the 1st and 2nd defendants as alleged.

he issues for trial.

The parties did not settle the issues at the same time. As a result the plaintiffs/1st and 2nd defendants agreed to certain issues while the 3rd defendant submitted its own issues to be tried. I find the issues raised by the parties overlap. In their closing submissions the plaintiffs and the 1st and 2nd defendants agreed that it would be most convenient if the court addresses the Issues raised by the 3rd defendant which I now do.

1. **Whether the Plaintiffs are entitled to bring this action on their own behalf as well on behalf of the residents of their longhouse Kampong Lebor, Jalan Gedong, Serian, Sarawak?**

The 1st, 2nd and 3rd plaintiffs have sued in a representative capacity for themselves as well as the other 183 residents of Kampong Lebor. The 1st plaintiff TR Nyutan Ak Jami (PW1) is the Tuai Rumah or Headman of Kampong Lebor, having been appointed in 1986 to that position. By the time this case was heard the 2nd plaintiff had been elected to be Tuai Rumah but was still waiting recognition from the government. The evidence shows that when meetings were held between the representatives of the Government, the 1st and 2nd defendants and the residents of Kampong Lebor to resolve differences that had arisen over allegations that the crops of the latter had been wrongfully destroyed by the 1st and 2nd defendants clearing the land to plant oil palm, it was TR Nyutan Ak Jami who represented the residents of Kampong Lebor.

Order 15 r 12 Rules of the High Court 1980 permits the bringing of representative proceedings. To be able to bring this representative action, what the plaintiffs have to show is that they are members of a class having a common interest and a common grievance and the relief sought is beneficial to all whom the plaintiffs represent (see *Bedford (Duke) v Ellis* [1901] AC7, which was followed by Haidar J (as he then was) in *Jok Jau Evong & 2 Ors v Marabong Lumber Sdn Bhd & 2 Ors* [1990] 2 CLJ 625.

I find the plaintiffs have satisfied the conditions just mentioned. The plaintiffs and the 182 other residents are members of a class i.e. a community of Remun Ibans who live in and around Kampong Lebor which was originally a longhouse community but now also includes individual houses since the community has increased. They have a common interest and grievance, in that, they claim to have acquired native customary rights over lands, certain parts of which have allegedly been wrongfully alienated to the 1st and 2nd defendants by the 3rd defendant. The nature of the relief they seek will also be beneficial to them all as the declarations and orders sought, if successful, will allow them as members of the Iban community at Kampong Lebor to continue to assert their native customary rights over lands they claim as their native customary lands.

The defendants had questioned whether the plaintiffs had obtained the consent of all who they purport to represent, which the plaintiffs say they do as they have obtained the oral consent of the other residents of Kampong Lebor, but it is well settled that consent is not

necessary to bring a representative action (see *Marke & Co. Ltd v Knight Steamship Co. Ltd* [1910] 2 KB 1039).

2. **Whether the plaintiffs have lawfully acquired or created native customary rights (NCR), as recognized by the Land Code (Sarawak Cap.81) and the other relevant legislation preceding the Land Code, over the parcels of land described in paragraph 2(c) of the Statement of Claim (hereinafter referred to as "the said parcels of land").** I should point out that the parcels of land being referred to in paragraph 2(c) of the Statement of Claim are Lot 2, Lot 166 and Lot 7.

3. **Whether any lands over which the plaintiffs have lawfully created NCR are included in the Provisional Leases issued to the 1st and 2nd defendants.**

These two issues will be considered together as they overlap.

The present plaintiffs claim to be the 8th generation of the original Iban settlers who were Sea Dayaks from the Kapuas Basin in Indonesia who came and finally settled in the area around Kampong Lebor during the reign of the Sultan of Brunei. They called themselves 'Remun' Ibans as that was the call of a bird found in the area of early settlement. The account of how the plaintiffs' forefathers came to settle there is given by Tuai Rumah Nyutan Ak Jami (PW1) , who was born in Kampong Lebor and is now 65 years old. The history of the early settlement was passed

down from generation to generation and was told to PW1 by his grandfather when PW1 was 17 years old.

It is PW1's evidence that during the reign of the Sultan of Brunei the Renum or Melikin Sea Dayaks paid yearly tributes in the form of "Ai Pinang" to the Sultan. The Sultan gave the first 6 Renum Chiefs the title of Orang Kaya, which title, when the British took over, became know as a Penghulu. During one of the visits of Orang Kaya Sago, a Renum Dayak Chief, to pay tribute to the Sultan of Brunei, the Sultan gave Orang Kaya Sago a handful of *Tanah Keramat* as a symbol that the Renum Dayaks were his subjects and under his protection. The plaintiffs' ancestors then created the "Guna Gayau" in the shape of a crocodile at a site about 4 kilometres from Kampong Lebor. The heart of "Guna Gayau" was made out of the *Tanah Keramat* given by the Sultan of Brunei. Till today, every year a ceremony called "Enselan Guna" is performed to offer food and thanksgiving to the spirits of "Guna Gayau" in the belief that the welfare of the people of Kampong Lebor will be looked after.

Besides the *Tanah Keramat*, the Sultan of Brunei is also said to have presented to Orang Kaya Sago a wooden door, a Tombak (spear) and a keris. The spear and keris have since gone missing but the wooden door with its carvings of a dragon and snake are still kept at "Rumah Guna".

PW1 testified that their ancestors left many important landmarks and sites where they settled and occupied, which are to be found within

the area claimed by the plaintiffs as their native customary land. Thus, besides numerous *Tembawai* which were the sites of settlement during the time of various Orang Kayas, *Pendam Serias* is the earliest burial ground as well as the site of a *Pulau* (a term explained shortly) which is sacred to the residents of Kampong Lebor. According to PW1*, Punjong Berut* is the site where the original *belian peg* was planted to show the extent of the Rajah's authority to the plaintiffs' land which can still be seen today. PW1 also referred to another site of significance called *Tapang Tanah Keladan* where the brother of Orang Kaya Daka, one Igin was the pioneer to open up this area where the Tapang Keladan tree is found and still growing there. It is PW1's evidence that the areas which their ancestors occupied, cultivated and lived upon subsists until today. According to PW1 the present residents of Kampong Lebor are mostly farmers who plant padi, vegetables, rubber, pepper and other crops for their own consumption and as a source of income. The plaintiffs also hunt in their "*pulau"* which are areas of forest and jungles, which aside from those which are sacred grounds, have abundance of useful timber, fruit trees, animals and other jungle produce. The plaintiffs also fish in the rivers within their "*pemakai menoa*" which is a communal land, comprising of a "*pulau*" and "*temuda*" or farmland. Therefore, PW1 testified that to the plaintiffs, their "*pemakai menoa*" or lands and forest over which they claim native customary rights is not just a source of livelihood but also constitutes life itself as the land and forest is also fundamental to their social, cultural and spiritual aspects as natives.

PW1 further testified that the residents of Kampong Lebor exercise their native customary rights over the lands which they claim as their

native customary land within a defined boundary only, the extent and location of which is marked by rivers, mountain ridges, particular trees and other important landmarks, which is known to the residents of Kampong Lebor. These boundaries separate their native customary lands from that of other native communities who also claim to exercise customary rights over areas they claim. Thus PW1 testified that:

> **"The boundary of *pemakai menoa* between Kampong Lebor and Kampong Renum is from Punjong Berut to Tapang Gudah until Simpang Telekon then proceed to Sungei Pian Antu to Tanah Keranji and Tinting Belumut, Teringap, Keruin, Temuda Ulu Bindu, Nanga Bindu along Batang Krang to Nanga Meringgang.**
>
> **Our boundary with the residents of Kampong Merakai is from Nanga Sungei Meringgang following the river upstream then to Tanah Emayung, Tapang Keladan and Ulu Sungei Jabatan.**
>
> **Our boundary with Kampong Senyabah is from Nanga Belian following Batang Krang to Nanga Sungei Gatal then to Jabalan Sungei Mawang then to Ulu Sungei Jabatan. Kampong Lebor's boundary with Tanah Puteh is from Tanah Kura to Aras Tanah Aka then towards Nanga Sungei Belian.**
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> **The boundary of Kampong Lebor and Kampong Ampungan/Sebangkiu is from and following Sungei Sebengkang (also known as Sebungkung) to Ulu Kampong Sebangkui, Isi Pendam Seras, Pengkalan Cempadak until Tanah Kura."**

To support their claim to have cultivated their native customary lands before 1.1.1958, the plaintiffs called two groups of witness. The first group consisted of families who farmed the Sungei Meringgang land. They were Marida Ak Jalai (PW2), Licha Ak Dima (PW3), Milun Ak Bigam (PW4) and Luma Ak Oga (PW5). They gave similar evidence. They testified to the effect that they owned parcels of land ranging in size from 2 to 3 acres each at Sungei Slumba or Sungei Meringgang which they either inherited from their grandparents or parents which was

planted with crops, mainly rubber. These witnesses produced documentary evidence in the form of “Rubber Tickets” or “New Planting Permits” issued by the Rubber Regulation Department Sarawak authorizing their grandparents or parents to grow rubber on these parcels of land. These Rubber Tickets were all issued in 1955 and marked as exh P21, exh P5, exh P26 and exh P27 respectively.

The second group of families consisted of those who farmed at the Sungei Tampoi land or Sungei Krang land. They were Segan Ak Degon (PW6), Kunan Ak Kawang (PW7), Sembai Ak Juwong (PW8), Rinjai Ak Suntong (PW9), Jambai Ak Mupieng (PW10) and Angat Ak Kuden (PW11). They gave similar evidence. PW6, PW7, PW8 and PW10 testified in relation to lands at Sungei Tampoi, while PW9 and PW11 testified to lands at Sungei Krang. They testified to the effect that they each owned a parcel of ancestral land measuring from 5 to 10 acres which parcels they inherited from their parents which was cultivated with padi and fruit trees. They complained that when land clearing works to plants oil palm commenced, their fruit trees were destroyed. At that particular time no padi was planted on their parcels of land as it was left fallow in between planting cycles. However each of the witnesses said they tried to prevent the clearing or planting works on their land and lodged police reports and claimed compensation from the plantation company, for which meetings between all parties concerned produced no results.

In addition to these witnesses, PW1 himself testified that he too owned a parcel of land at Sungei Tampoi which way planted up with

padi by his grandfather then his father and now him. PW1 also said he had another 3 parcels of land at Sungei Meringgang.

It was the evidence of PW1 that in February 2003 a working committee was at up from the residents of Kampong Lebor to produce a proper map of the boundaries of their native customary land. For this purpose they invited one Nicholas Mujah Ak Ason to assist them to survey their native customary land. PW1 testified that they held 2 meetings with Nicholas Mujah and in March and April 2003, PW1 and other members of the working committee walked the whole length of the boundary of their native customary land, indicating to Nicholas Ak Mujah numerous places of historical and cultural significance to the plaintiffs within the boundary of their native customary land.

Mr. Nicholas Mujah Ak Ason (PW12) confirmed what PW1 had said on the matter. PW12 testified that he has worked with the Sarawak Dayak Iban Association and attended numerous workshops and seminars on community mapping organized and conducted by Sahabat Alam Malaysia and Borneo Research Institute, Malaysia. Through those attendances, PW12 learned the methodology and techniques of mapping which included the operation of GPS (Global Positioning System) equipment, how to operate these equipment to collect GPS data and for surveying, the setting of co-ordinating points, how to do plotting on a topographic map, how to count the acreage of land surveyed and how to transfer GPS data into the GIS (Geographic Information System).PW12 said he had undertaken mapping work for 11 other rural native communities besides that of Kampong Lebor. PW12

testified that he used a Garmin brand GPS to take readings at some 77 co-ordinate points to determine the boundary of Kampong Lebor. The data collected by him were entered into a note-book (exh P72(1) to (12), where the co-ordinate points had names or where the committee members gave names of rivers, hills, "*tembawai*" or "*pendam*", these data were also recorded in the note book. I accept PW12's evidence. Although he admitted in cross-examination to making errors in some of his recordings, I did not regard them as material nor affecting the overall accuracy and reliability of his mapping work.

PW12 handed all the data he had collected for the boundary map of the plantiffs native customary land to Mark Bujang (PW13) who graduated with a degree of Bachelor of Science Geology, during which course of study he was trained to produce scaled geological maps. PW13 works as a programme and community mapping coordinator. He has worked with native communities of Sarawak to demarcate their native customary land boundaries. PW13 testified that from the data he received from PW12 (Nicholas Mujah Ak Ason), he produced a map drawn to scale showing the boundaries of the plaintiffs' native customary lands which the court marked exh P 76. This is the same as the map found in the Bundle of Disputed Documents (BDD) which the court eventually admitted into evidence and marked Exh P76A. I accept the evidence of PW13. I also accept that the scale maps produced by him are reliable and accurate.

When exh P 76, exh P 76A and the plan attached to the plaintiffs statement of claim are compared, it cannot be denied that parts of the

areas claimed by the plaintiffs as their native customary land is covered or comes within the 3 parcels of land alienated to the 1st and 2nd defendant.

Finally, to show that they have lawfully acquired native customary rights over the lands they claim in accordance with Iban customs or adat, the plaintiffs called Mr Nicholas Bawin Ak Anggat (PW14). He is an Iban and was, at the time of giving evidence, the Deputy Head of Majlis Adat Istiadat Sarawak, having been appointed to that position since 12.8.1992. PW14 obtained his knowledge in adat Iban through his experience, learning, reading and studying of the adat Iban. Further, his work in the Majlis Adat Istiadat Sarawak requires him to study and record the adat Iban. PW14 testified that pioneering families of Iban would fell virgin forest for settlement and farming after which the community can establish its rights to the felled areas. According to PW14, a "*Pemakai Menua*" encompasses an area of land held by a distinct longhouse or village community, and includes farms, gardens, fruit groves, cemetery, water and forest within a defined boundary or "*garis menua*". A *pemakai menua* also includes '*temuda*" which is cultivated land which is left to fallow, "*tembawai*" or old longhouse sites, and "*pulau*" or patches of virgin forest that have been left uncultivated to provide the community with forest resources for domestic use. As a general rule, the household within the community that first felled the forest secured rights over specific areas of land. Those rights are heritable, passing ideally from one generation to generation of household members. According to PW14 where several pioneering villages occupied a general area, boundaries ("garis menua") are drawn

between villages. These boundaries followed streams, watersheds, ridges and permanent landmarks. I accept what PW14 said about the adat Iban above. I accept it that from the various ways he has come into this knowledge, he is able to give evidence on the matters related by him.

The defendants contend that the plaintiffs have not proved the two issues we are dealing with for the following reasons:

(a) The evidence of PW1 and the other residents of Kampong Lebor i.e. PW2 to PW11 are uncorroborated, unconvincing, contradictory and based partly on hearsay evidence. According to the defendants the plaintiffs witnesses could not identify on the map the lands they claim and their evidence seemed vague, unsatisfactory and unreliable. I do not agree. Even though the historical account of how the plaintiffs came to settle and exercise customary rights over the the areas of land they claim may be based on hearsay evidence the court must take a realistic approach in a case such as this when applying the rules of evidence. It would be unrealistic to insist on strict evidentiary standards to prove things which occurred many generations ago within a rural community. In *Hamit B Matussin & 6 Ors v Superintendent of Lands & Surveys & Anor* [1991] 2 CLJ 1524, Haidar J (as he then was) applied s 48 of the Evidence Act 1950 in a case concerning native customary rights. He said at pg 1526:

> "In respect of native custom, s 48 of the Evidence Act 1950 Provides:
>
> > "when the court has to perform opinion as to the existence of any general custom or right, the opinions as to the existence

> of such custom or rights of person who would be likely to know of its existence, if it existed, is relevant."

Cross on Evidence (Third Australian Edn) listed four ways in which the existence of customs or usage way he proved. One of these four methods which is relevant to the present action is stated as follows:

> "The first method consists of the testimony of a witness who deposes from his personal knowledge to the actual existence of custom or usage …. The evidence may be based on observation of many instances, and it may sometimes be based on reputation or hearsay."

Reverting to the facts of this case, I accept the evidence of PW14 relating to the custom or adat Iban on how a pioneering community acquire and exercise customary rights over land for settlement, cultivation and resources. I also accept the evidence of PW1 as to how it was related to him by his father the history of their occupation of their customary land. As the Tuai Rumah of Kampong Lebor PW1 would certainly be a person who personally acquainted with the history of his longhouse.

The defendants criticized the evidence of the plaintiffs as being bare statements of interested witnesses, uncorroborated by other evidence and therefore unworthy of belief. The defendants said that even though the plaintiffs witnesses had described their individual parcels of land and gave the names of other residents who owned neighbouring parcels to them, those other persons were not called to confirm the evidence of the plaintiffs witnesses. I find no merit in this complaint. Just because some of these village folk may not be able to read maps and pinpoint their parcel of land on a map does not mean that those parcels do not exist or they are not credible witnesses. There

is other credible documentary evidence to support what they said, which will be discussed shortly. Amongst those of the plaintiffs witnesses who could read a map, PW1 was able to mark in orange stripes on the map exh P 76A the location of those parcels of native customary land at Sungei Tampoi and Sungei Krang which were affected by the oil palm cultivation. PW1 was also able to mark on the plan marked "A" attached to the Statement of Claim, a blue triangle to indicate the "pulau" at Sungei Meringgang area; he marked in red surrounding the hexagonal shape the area of their "termuda" in Sungei Meringgang; he marked "A" surrounded by a red circle to indicate the "pulau" at Sungei Krang and marked "C" surrounded by a yellow circle the "pulau" at Sungei Krang.

I find there is credible corroborative evidence to show that prior to 1.1.1958, the plaintiffs forefathers had cultivated crops within the boundary of the area claimed by them as their native customary land. This corroboration came from 2 sources. The first is the Rubber Tickets issued by the Rubber Department itself in 1955. These Rubber Tickets show that those parcels of land at Sungei Tampoi mentioned in the rubber tickets which were issued to the plaintiffs forebears were being cultivated with rubber crops from 1955 which in turn shows that the plaintiffs claims about their ancestors having settled and cultivated in that area is not a bare statement as alleged. The defendants argued that since the parcels of land covered by these rubber tickets were located outside the boundary of Lot 2, Lot 166 and Lot 7 (i.e. the 3 parcels of land), therefore the rubber tickets were of no evidential value. The defendants further contended that the Environmental Impact Assessment Report produced in 1997 (exh D12) which was prepared for

the 1st and 2nd defendant shows that human activity is focused outside and along the periphery of the project site. I do not agree. I find that the Rubber Tickets provide uncontroverted evidence that the plaintiff's forebears were farming those lands since 1955. The fact that the Provisional Leases issued to the defendants excludes those parcels of land covered by the Rubber Tickets does not change in any way, the fact that the parcels of land issued with Rubber Tickets fall within the boundary or "garis menoa" of the land claimed by the plaintiffs as their native customary land.

The second source of corroborative evidence to the plaintiffs claim are the ariel photographs exh D 73A, D 73B, D 73C, D 73D, D 73E, D 73F and D 73G produced by the defendants themselves. According to the defendants, these ariel photographs which were taken in 1947 show two things: (a) there were areas under secondary growth in the areas claimed by the plaintiffs as their native customary land but these areas have been excluded from the area covered by the Provisional Leases and therefore not relevant to the plaintiffs case; and (b) the ariel photographs show that the other areas claimed by the plaintiffs at Sungei Meranggang, Sungei Tampoi and Sungei Skrang were covered by Primary Forest in 1947. Therefore the plaintiffs could not be exercising native customary rights in those areas. I do not agree. DW 4 Mr Wee Kang Hian the Pembantu Teknik Ukur attached to the Lands & Surveys Department Headquarters, Kuching, Sarawak and whose duties included 10 years of experience as a navigator for ariel photographs and interpretation of ariel photographs for Land Use maps, was requested to do a detailed analysis of the ariel photographs to determine the land use

in the areas claimed by the plaintiffs. DW4 selected 3 ariel photos, 5144 (D 73B) 5146 (D 73D) and 5147 (D 73E). In his analysis and write up which the court marked exh P 81 and P 81A (since they were admitted in evidence at the plaintiffs' request). PW 4 indicated in different colours the type of land use found in the area in 1947. His write up states:

> "The said area is coloured Purple for Horticultural Lands (Mixed Cultivation), shaded Purple for Rubber, Blue for Wet Padi, and coloured Orange for Secondary Growth, Grassland, Shifting Cultivation and Hill Padi."

This analysis provided by PW4 shows that from as early as 1947 the areas which the plaintiffs claim their forefathers had occupied was already cultivated with all the above crops. The defendants tried to make light of this fact by saying that the cultivated areas had been excluded from the Provisional Leases, but that does not alter in any way the compelling evidence afforded by the ariel photographs analysed in exh P81 and exh P81A, that by 1947 the areas claimed by the plaintiffs as their native customary land was already cultivated by their forefathers with the crops mentioned in DW4's write-up. This in turn would indicate that virgin jungle must have been felled for that purpose. The fact that areas of virgin jungle can be seen between and next to the areas under cultivated in 1947 and also shown in more recent land use maps made in 1978 such as exh D35 attached to D79 produced by the defendants does not detract from but rather supports the evidence of PW1 that "pulau's" are areas of forest and jungle within the boundary of their native customary lands which has abundance of useful timber, animals

and jungle produce. This evidence also accords with what PW14 said about the adat Iban in clearing jungle for settlement and cultivation but leaving areas of virgin forest as pulau's within the pemakai menoa to provide the community with forest resources for domestic use.

Even from those early days, the 1947 ariel photographs and exh P81 and P81A show that there were three distinct and separate areas where cultivation occurred. When the plaintiffs witnesses were asked how they and their forebears got to the cultivated areas at Sungei Meringgang, which were the furtherest away from Kampong Lebor, they said it was by river through Sungei Tampoi than on to Batang Skrang and eventually on to Sungei Meringgang. It is noteworthy that this evidence was given by the plaintiffs witnesses well before DW4 gave his evidence and they had no means of knowing that what he would say would in effect support that evidence. Although the plaintiff's witnesses may have been unable to read maps or had made mistakes in describing the types of fruit trees or the crops that were damaged on their parcels of land, I accept them as credible witnesses as their evidence is supported by other credible evidence such as the Rubber Tickets and Ariel Photographs.

The defendants contended that the boundary of the plaintiffs native customary land cannot extend to areas where the plaintiffs had roamed to forage for their livelihood. I do not find this to be so in the plaintiffs' case. None of their witnesses said that the boundary of their native customary land included areas where they roared to forage for their livelihood. When the community map exh P76A, which demarcates

the boundaries of the plaintiffs native customary land is compared with the analysis of the ariel photographs in exh P81A, and the plan annexed to the Statement of Claim marked 'A', it can be seen that the plaintiffs claim is limited to the areas cultivated by them and the areas regarded by them as their pemakai menoa, temuda and pulau.

Are the Iban's "Pemakai Menoa" "Temuda" and "Pulau" recognized as customary law?

The defendants called Mr Philip Tunggak Ak Hermanus Assan (DW6) the Deputy Director of Lands and Survey Sarawak who testified that he had acquired much knowledge regarding native customary rights over land, from his working experience of 31 years and also as Assistant Director in charge of the Adjudication Section of the Department where he would scrutinize claims to native customary rights in relation to land Settlement Orders, claims for issuance of native titles under s 18 of the Sarawak Land Code and relating to issuance of Provisional Leases.

DW6 testified that there is a significant difference between native customs (Adat) and native customary law. He said the Land Code (Sarawak Cap 81) and its predecessor have defined "customary law" to mean "a custom or body of customs to which the law of Sarawak gives effect." DW6 then said: "The natives of Sarawak may have and in fact do have many customs; but for these customs to have effect as "customary law", they must have the sanction of law. In other words, "Adat" is custom or practice of a certain community which has no force of law".

DW6 said he was aware that the Government has established the Majlis Adat Istiadat to codify the Adat of the various communities and established the Native Courts System to see that native customs are enforced. DW6 said so far the following Adat have been codified:- (i) Adat Iban Order 1993; (ii) Adat Bidayuh Order 1994; and (iii) Adat Kayan-Kenyah Order 1944. DW6 then said: “Although the natives have their customs such as *pemakai menoa* and *pulau galau*, these customs are not part of the Tusun Tunggu or the Adat Iban or other Codes produced by the Majlis Adat Istiadat Sarawak. Hunting, fishing, and collection of jungle produce, therefore, do not create rights over land.”

DW6 further testified that in 1954 the land laws were amended by the Land (Classification)(Amendment) Ordinance 1954 (w.e.f. 21.5.1954) which provided that upon declaration of any land as Mixed Zone Land or Native Area Land, no Native Customary Rights shall, whether by the felling of virgin jungle or otherwise, thereafter be created. DW6 further testified that, in 1955 the Land (Classification)(Amendment) Ordinance 1955 (w.e.f. 16.4.1955) was passed whereby it became illegal for any native to occupy any Interior Area Land by felling virgin for the purpose of creating native customary rights upon such land without the prior permit in writing of a District Officer. So in view of these amendments to the law, DW6 said that no NCR can be created over Native Area Land or Mixed Zone Land as from 21.5.1954, and no NCR can be created over Interior Area Land except by permit issued by the District Officer as from 16.4.1955.

By this evidence, it was obviously the defendants contention that the plaintiffs occupation of the areas claimed by them was not in accordance with customary law of the state, nor could they have created any such rights over Mixed Zone Land, Native Area Land or Interior Area Land after 1954 and 1955 except in accordance with the laws then in force. According to Mr Ho Thiam Hee (DW5) the Land Officer of Lands and Surveys Department, Kota Samarahan, the lands alienated to the 1st and 2nd defendants were, before alienation, Interior Area Land until 1998 when they were re-classified to Mixed Zone Land.

I do not agree with the defendants contention. It will be recalled that Mr Nicholas Bawin Ak Anggat (PW13) testified that he was able to testify about the Iban practice of felling virgin jungle to establish for the community of a longhouse or village the rights of pemakai menoa, temuda, pulau etc because he had had knowledge of the adat Iban through his experience, learning, reading and studying of the adat Iban. What PW14 said about the adat of the Iban relating to their land practices is supported by what AF Porter wrote in "The Development of Land Administration in Sarawak from the rule of Rajah James Brooke to the present time 1941-1965" where he said:

> "At the time of James Brooke's arrival in Sarawak there had for centuries been in existence in Borneo and throughout the eastern Archipelago a system of land tenure originating and supported by **customary law**. This **body of custom** is known by the generic term "Indonesian adat". Within Sarawak the term "Adat", without qualification, is used to describe this body of customary rules or laws; the English equivalent is usually "Native customary law" or "Native customary rights". Where these rights relate to land the expression used may ordinarily be either "native customary tenure" or "native customary rights over land". Statutory definitions and mentioned in later chapters".

So it will be seen that the term Adat describes Native customary law or Native customary rights which is made up of a body of customs. There was no suggestion that the customs or adat had to be codified to be lawful. This must be so as those customs or adat were in existence even before the arrival of James Brooke. The plaintiffs here claim to have exercised native customary rights over the lands they now claim since the reign of the Sultan of Brunei, which is well before 1.1.1958 or 1954 or 1955 and which pre-existed the rule of Rajah Brooke and the passing of various Orders and Ordinances relating to native customary rights, the first of which was the Land Settlement Ordinance 1933. And under s 2 of the Land Code Cap 81, "Native Customary Land" means:

> (a) land in which native customary rights, whether communal or otherwise, have lawfully been created prior to 1.1.1958, and still subsists as such.

The words "lawfully been created" means created in accordance with law. Article 160(2) of the Federal constitution defines "law" to include "written law, the common law in so far as it is in operation in the Federation or any part thereof, and any custom or usage having the force of law in the Federation or any part thereof".

In *Superintendent of Lands and Surveys Miri Division and Government of Sarawak v Medeli bin Salleh* [2007] 6 CLJ 509 the Federal Court held that the common law of Malaysia recognizes native customary rights to land. The apex court "wholly agreed with the view expressed in "*Adong Kawau* (supra) and *Noor Ak Nyawai* (supra) that common law respects the pre-existence of rights under native laws and

customs". The Federal Court in Medeli's case also said that the various Orders and laws made by Rajah Brooke in fact gave recognition to native customary rights over land.

Accordingly, the non-codification of the Iban customary practice of pemakai manoa, temuda and pulau in relation to land occupied by the plaintiffs and their forefathers before 1.1.1958 does not affect the plaintiffs claim in this case. I find on the evidence before me that the plaintiffs and their forefathers had lawfully created and exercised native customary rights prior to 1.1.1958 over the lands they now claim as their native customary land which subsist. For that reason too I find that the plaintiffs' rights were not affected by the various land classification ordinances or orders declaring Mixed Zone Land, Native Area Land and Interior Area Land as those enactments and orders sought to regulate, restrict or prohibit the creation or exercise of native customary rights from the date of passing of those enactments or orders whereas the plaintiffs rights predate these enactments and orders, as the 1947 ariel photographs clearly indicate.

I also find that the plaintiffs have been in continuous occupation of their lands from the time of their forefathers. They have effectively exercised control over these areas and whilst the issuance of timber licences in the Sungei Tampoi area may have constituted an intrusion to some of their areas, there is no evidence that the plaintiffs stopped occupying the whole of the area claimed by them. Further the evidence shows that the company which was issued a licence to take timber from Lot 166 had informed PW1 that it was not claiming any interest in the

land and their presence was there only for the duration of licence to extract timber. When the company polluted the Sungei Tampoi, the company paid compensation of RM700.00 to the residents of Kampong Lebor as compensation. In my view there is no evidence to show that by the issuance of such licences, the plaintiffs native customary rights over their lands had been extinguished abandoned or lost. I also find that there is no evidence to prove that the areas claimed by the plaintiffs fall within 66 feet of the banks of rivers or streams which are reserved for government.

It was also contended by the defendants that in respect of the Sungei Meringgang lands, there were other claimants to those lands from the residents of Kampong Marakai. However PW1 denied that there was any overlapping claim as alleged. I find there is no evidence to substantiate the allegation of the defendants.

For all the reasons given above I find on a balance of probabilities that issue 2 and 3 must be answered in the affirmative in favour of the plaintiff.

4. Whether the said parcels of lands are included in or within the Native Communal Reserve (No. 4) Order 1976 (GN Swk 51/76) published in the Sarawak Government Gazette, which was declared and reserved for, inter alia, the benefits of Iban of Kampong Lebor where the plaintiffs hail from.

It is not in dispute that by the above mentioned order, the government declared 121 parcels of land in the Miliken Land District as a Native Communal Reserve for either kampong, agriculture or burial purposes. 26 of those parcels were reserved for the Ibans of kampong Lebor i.e. the plaintiffs. It is the contention of the defendants that the plaintiffs rights are confined to those 26 parcels.

I find no merit in this contention. The evidence of Mohammad Izzidin Bin Haji Basri (DW3) the Pegawai Tadbir Tanah in charge of the Settlement Section, Lands and Surveys Department, Samarahan Division shows that Native Communal Reserve (No. 41) Order 1976 was made pursuant to a Settlement Notification dated 31.7.1970. The lands affected were situated in the vacinity of Kampong Lebor, Remun, Rasau, Triboh, Belimbin, Berok, Semukoi, Antayan Ulu, Kerait, Meboi and Bayor and extended along both sides from 44th mile to 47th mile Serian/Simanggang Road in the Melikin and Sungei Kedup Land District.

However in his cross-examination PW3 confirmed that the area claimed by the plaintiffs as their native customary land were not subject to any settlement exercise. At pg 544 Notes of Proceedings, PW3 was asked:

> Q: Are you aware of any ground inspection conducted by you in paragraph 4 of your witness statement?
> A: No.
>
> Q: That area marked in brown referred to under paragraph 14 of your Witness Statement is covered by rubber garden. Do you agree?
> A: I am not aware of that.

Q: You confirm that there is no settlement exercise ever been conducted within Lots 2979 to date. Do your confirm?
A: Yes.

Q: What about Lot 166 Block 5 Milikin Land distric? Has there been any settlement exercise conducted over this lot to date?
A: No.

Q: Am I correct that in all cases where settlement exercise is carried out, it is always initiated by the State Government or the Lands and Surveys Department and not by the natives?
A: Yes.

Q: To date are you aware of any settlement exercise carried out by your department, Lands and Surveys Department, within the area claimed by the plaintiffs as the Native Customary Rights land in this case?
A: Nearby the affected area, there is a settlement area. However, the lots in question has been excised or excluded from the settlement operation.

Q: I still want you to answer my question very specifically whether there has been any settlement exercise ever conducted within the area claimed by the plaintiffs as their Native Customary Rights land in this case?
A: No.

In the light of the above evidence there is no basis for the defendants to contend that the plaintiffs rights are confined to the 21 parcels settled in 1976.

5. Whether the law or statutory authority under which the 3rd defendant issued the Provisional Leases, are unconstitutional and/or the process of issuance thereof violated, in any way, any legal rights of the plaintiffs or any of them.

In their defence the defendants pleaded that the Provisional Leases were issued pursuant to s 28 of the Land Code and in doing so, none of the plaintiffs' constitutional rights had been infringed.

It is not disputed that s 28 authorises the issuance of a Provisional Leases over State land subject to the conditions stated in the section. One of those conditions states that alienation of the land in question is subject to a survey of the land to the satisfaction of the Superintendent, and, that "[E]very provisional lease shall specify the approximate extent of area of the land included therein but shall not entitle the holder to a grant or lease of the whole area specified". Therefore, the suggestion is that when finally surveyed, the Leases issued to the 1st and 2nd defendants will exclude native customary land and so the rights of the plaintiffs have not been infringed. The defendants further contend that since the land covered by the Provisional Leaves were declared as Mixed Zone Area, no native customary rights can be created over the same.

I do not agree with these contentions. Although there is nothing unconstitution about s 28, the real issue here is whether in issuing the 3 Provisional Leases, the constitutional rights of the plaintiffs were affected. I have already found that the plaintiffs have acquired and exercised native customary rights over the areas claimed by them prior to 1.1.1958 which rights subsist till today. I have also explained why the declaration of a Mixed zone Area would not affect such rights. Those customary rights to land are heritable and capable of being passed down from generation to generation and recognized by the common law of Malaysia [see *Madeli's case* (supra)]. In *Adong Bin Kawau & Ors v Kerajaan Negeri Johore & Anor* [1997] 1 MLJ 418 it was held that the rights of the aboriginal people both under common law and statutory law

are proprietary rights protected by Article 13 of the Federal constitution, which reads:

Rights to property

"(1) No person shall be deprived of property save in accordance with law.

(2) No law shall provide for the compulsory acquisition or use of property without adequate compensation."

I accordingly find that the issuance of the 3 Provisional Leases to the 1st and 2nd defendants which covers an area which includes lands over which the plaintiffs have acquired native customary rights have violated their constitutional rights under Article 13. There are clear provisions of law in the Land Code Cap 81 by which native customary rights over land may lawfully be extinguished and the payment of compensation for such extinguishment, but this has not occurred in this case in respect of the areas of land claimed by the plaintiffs.

6. Whether the 1st and 2nd defendants and/or its agents or servants have committed trespass on any land lawfully held by the plaintiffs under native customary tenure.

It must follow from all my findings above that this question posed must be answered in the affirmative. The evidence shows that the works undertaken to prepare the 3 parcels of land for plantation works have destroyed the crops and fruit trees of the plaintiffs for which many police reports were lodged by the plaintiffs.

The agreed issues between the plaintiffs and 1st and 2nd defendants

For completeness I will now state the agreed issues between the plaintiffs and the 1st and 2nd defendants and my findings in respect of them:

1. Whether the plaintiffs are bringing this action on their own behalf as well as on behalf of the residents of their longhouse Kampong Lebor, Jalan Gedong, Serian, Sarawak.

My finding: Yes.

2. Whether the plaintiffs at all material times have acquired native customary rights over the lands about one kilometer (1 km) along both banks of Sungei Tampoi, (the Sungei Tampoi Land) some parts along Sungei Krang (the Sungei Krang Land) and at Sungei Meringgang (the Sungei Meringgang Land.

My finding: Yes.

3. Whether the said NCR lands comprising land and forest is not just a source or livelihood but also constitutes life itself as the said land is also fundamental to the plaintiffs'social, cultural and spiritual expect as native people.

My finding: Yes.

4. Whether the said NCR lands subsists as it were since the plaintiffs' ancestors occupied/cultivated and lived upon the said NCR Lands.

My finding:Yes.

5. Whether the plaintiffs are deemed licensees under the Land Code (Cap.81)

My finding: Yes.

6. Whether the Native Communal Reserve (No. 4) Order 1976 (G.N.Swk. 51/76) published in Sarawak Government Gazette Part I with a total of 121 parcels of land therein described were legally and properly constituted and declared as Native Communal Reserve under Section 6 (1) of the Land Code.

My finding: Yes, but such Order did not affect the plaintiffs' claim for the reasons given earlier.

7. Whether the plaintiffs' rights (if any) over land are, therefore, confined to those 26 parcels of land which have been declared as Native Communal Reserve and/or reserved for the Ibans of Kampong Lebor reserved for either Kampong or agricultural purposes and as burial sites under the Native Communal reserve (No. 4) Order 1976 (G.N. Swk.51/76). Whether the constitution of the Native Communal Reserve would affect, impair and/or restrict the Plaintiffs' NCR over the said NCR land.

My finding No, for the reasons given earlier.

8. Whether, under and by virtue of the said Native Communal

Reserve (No.4) Order 1976, the plaintiffs or their ancestors have exercised their NCR only in and over those 26 parcels of land.

My finding: No, as stated earlier the said Native Communal Reserve (No.4) Order 1976, was for a different location.

9. Whether the parcels of land described as Lot 2 Block 6 Melikin Land District and Lot 166 Block 5 Melikin Land district (hereinafter called "the Defendants' land") are not included in the said Native Communal Reserve (No.4) Order 1976 and therefore the plaintiffs do not have any rights of whatsoever nature, in or over the Defendants' land or any part thereof.

My finding: The said Native Communal Reserve (No.4) Order 1976, was for a different location. For the reasons given earlier the plaintiffs do have native customary rights over those of their lands which have been included in Lot 2 and Lot 166.

10. Whether the said parcels of land described as Lot 166, Block 5, Melikin Land district and Lot 2, Block, Melikin district have been classified as Mixed Zone Land and such classification would extinguish the plaintiffs' NCE over the said land.

My finding: Even if the said Provisional Leases are classified as Mixed Zone Lands, that classification did not automatically extinguish the plaintiffs' NCR over their lands for the reasons given earlier.

11. Whether land on both banks of Sungei Tampoi on the right hand side of Jalan Gedong were under virgin jungle in 1978 and whether the land on both banks of the river was covered by the following forest Timber Licences (Licence T/5102 issued to Syarikat Eastern Sawmill Sdn Bhd and Licence No. T/5018 issued to Nawi Sulaiman & Yusuf Sheikh Mutu) and logging operations were conducted on the said land until in or around 1997. Whether the logging operation were undertaken without any objection or complaint by the plaintiffs and/or whether such rights have been abandoned, waived and/or extinguished.

My finding: For the reasons given earlier the fact that there may have been virgin jungle at Sungei Tampoi in 1978 is not inconsistent with the plaintiffs' claim. Neither did the logging operations cause the plaintiffs to lose control or occupation of their lands.

12. Whether the Sungai Meringgang land was covered with Virgin forests in 1978 and whether the people of Kampong Marakai has a better claim over the said Sungai Meringang Land.

My finding: No, the evidence of DW4 shows the Meringgang Land was already cultivated in 1947. Therefore it cannot be a virgin forest in 1978. Neither is there a dispute with the residents of Kampong Marakai over this area of land.

13. Whether the plaintiffs had protested against the 1st and 2nd

defendants' entry, land clearing and planting of oil palm plants and seedlings on the Sungei Tampoi land and the said Sungei Krang land. Whether the plaintiffs had loged police reports to register their protests.

My finding: Yes, as shown from various police reports lodged.

14. Whether the 3rd defendant and/or its Department of Land and Survey has issued the said parcels of lands wrongfully and in disregard of the plaintiffs acquired rights over the said native customary land and is therefore bad in law and/or void, considering:

(a) the land areas covered by the said parcels of land cover and include a substantial parts of the plaintiffs' said native customary land.

(b) there has been no prior extinction or extinguishments of the plaintiffs, native customary rights over the said native customary land according to the law or at all.

(c) There has been no provision for compensation to the plaintiffs.

(d) There has been no payment of compensation to the plaintiffs.

My finding: Yes, to all the issues above for the reasons given earlier.

15. Whether the said titles of the defendants' land are void in as far as it includes the said native customary lands claimed by the plaintiffs, considering:

(a) Whether the granting of the said parcels of land by the 3rd defendant to the 1st and 2nd defendants is unconstitutional and/or wrongful in so far as it abridges or impairs the plaintiffs' rights.

My finding: Yes, for the reasons given earlier.

(b) Whether the granting of the said titles over the said Parcels of land amounts to an extinguishment of the plaintiffs rights which extinguishment is bad as inter alia it was not and had not been done by legislation designed specifically and clearly for that purpose.

My finding: As there was no submission on this issue I consider it as abandoned.

(c) Whether the plaintiffs have a legitimate expectation to be issued a document of title in respect of the said native customary land.

My finding: All applications to be issued a document of title to land are regulated by the Land Code.

(d) Whether the plaintiffs' rights were impaired without a right to be heard.

My finding: Yes.

16. In granting the s aid title to the 1st and 2nd defendants,

whether the 3rd defendant and/or its department the Land and Surveys division had acted unreasonably and had failed to take relevant matters into consideration.

(a) That the said titles over the said parcels of land affected the rights and/or interest of the plaintiffs and would tantamount to condoning trespass upon the said native customary land;

My finding: This issue was not addressed and deemed abandoned.

And

(b) That the activities of the 1st and 2nd Defendants upon the said native customary land would cause irreparable damages to the environment and eco-system of that area, thereby affecting the lives and lifestyle of the plaintiffs who are dependant on their lands and river for their food and medicine, well-being and the very survival of themselves their children and their community.

My finding: In view of the Environment Impact report produced by the defendants, this issue cannot be answered in the affirmative.

17. Whether the legislation or any process exercised pursuant to it in so far as it impairs the plaintiffs' rights is unconstitutional and invalid, having considering:

(a) the provisions of the aforesaid legislation impair the plaintiffs' rights to property in a manner which is discriminatory and unfair and based on criteria which is not made applicable to the right to property acquired and held by non-native.

(b) the granting of the said leases amounted to the compulsory acquisition of the plaintiffs' said native customary land but no provision for compensation in accordance with law has been made nor have the plaintiffs been paid any compensation.

(c) the acts as aforesaid of the defendants their servants and/or agents and/or the provisions of the law which impair the rights of the natives to their native customary rights over land amounts to, inter alia, deprivation of life (which includes the right to livelihood) not in accordance with law, that:

(i) the plaintiffs have been deprived of their source of food, fish, medicines, wildlife and other forest produce which the plaintiffs need and are dependant upon for their daily sustenance.

(ii) the plaintiffs have also been deprived of their sources of income from their fruit trees, rubber, and other essential trees and crops.

(iii) The plaintiffs' rights to livelihood has been and will continue to be seriously impaired by the aforesaid acts and provisions of the law.

(iv) The impairing of their right to livelihood by the aforesaid acts and provisions of the law is unjust, unfair and unreasonable, destructive of their economic, cultural and social system for their existence and therefore not in accordance with the law.

My finding: These issues are too widely framed and do not affect the decision in this case as the issues raised by the 3rd defendant already deal with some of the questions raised here. I therefore decline to make any findings on these issues.

18. Whether as of the middle of 1997 the 1st and 2nd defendants and/or its agents or servants wrongfully trespassed onto the plaintiffs said native customary land in particular the Sungei Tampoi Land and Sungei Krang Land which is covered by part of Lot No. 166 Block 5 and with the said bulldozers and lorries destroyed and damaged the said native customary lands and the crops thereon and planted oil palm trees on the said land and whether they have also caused extensive pollution and silting of Sungei Tampoi on which the plaintiffs and other members of the community are dependant for their water supply and their source of fish.

My finding: Yes,on the question of trespass but the extent of the damage suffered to the plaintiffs land and crops was not ascertained at the trial.

19. Whether the 1st and 2nd defendants and/or its agents or servants continued and still continue to trespass on the said native customary land at Sungei Tampoi and Sungei Krang and about to enter the Sungei Maringgang land despite the numerous and continued objections and protest raised by the plaintiffs.

My findings: Yes. Although the 1st and 2nd defendants deny it was they who caused destruction, in the agreed facts they admitted entering Lot 166 and beginning clearing works. In the light of this admission who ever actually caused the destruction was either the 1st and 2nd defendants or their agents.

20. Whether the 2nd defendant and/or its agents or servant wrongfully claim that they have the right to enter, utilize and occupy the said native customary land.

My finding: Yes, for the reasons given earlier.

21. Whether the plaintiffs have suffered the following damages;

(a) Destruction of the plaintiffs' source of livelihood includes food valuable medicines, wildlife and other forest produce which the plaintiffs need and are dependant upon.

(b) Extensive erosion and damage to the said native

customary land.

(c) Extensive pollution and silting of the rivers and streams which the plaintiffs and the members of their community are dependant on for water supply and for their source of fish.

(d) Damage to cultivated padi land.

(e) Damage to fruit trees, rubber gardens and other essential trees and crops.

My findings: An appropriate order to assess damages will be made later.

22. Whether the plaintiffs may further claim exemplary damages by reason of the conduct of the 1st and 2nd defendants, that:

(a) The 1st and 2nd defendants and/or their servants or agents despite continued objections and protests made by the plaintiffs to the defendants, have persisted in continuing to trespass on the plaintiffs said native customary land.

(b) Such conduct is oppressive, arbitrary and unconstitutional.

My findings: I find there is no basis to make such an order.

Conclusion

In the result, I find the plaintiffs have proved their claims on a balance of probabilities. There will be judgment for the plaintiffs against the Defendant. I grant the following declarations and orders:

1. A Declaration that the plaintiffs have acquired native customary rights over land described in paragraph 3(a) of the amended Statement of Claim;
2. A Declaration that this right precludes the 1st and 2nd Defendant and/or their servants or agents from impairing or abridging the plaintiffs' rights;
3. A Declaration that the issue of the titles to the said parcels of lands Lot 7, Block 3/Lot 2979 Block 3 and Lot 166 Block 5 Melikin Land District to the 1st and 2nd defendants in so far as they impair the plaintiffs customary rights over their said native customary land, is void;
4. I decline prayer (iv) of the Statement of Claim as provisional leases have already been issued;
5. A Declaration that the act of the 3rd defendant and its Department of Lands and Surveys in issuing the said titles to the said parcels of land are void and/or wrongful;
6. I decline prayer (vi) of the Statement of Claim;
7. A Declaration that the issuance of the said titles over the said parcels of land constitutes a violation of Article 13 of the Federal Constitution;
8. I decline prayer (viii) of the Statement of Claim;
9. A Declaration that the 1st and 2nd defendants and/or their agents or servants are trespassing on the plaintiffs customary lands and or otherwise unlawfully interfering with the plaintiffs rights over the said lands;
10. Prayer (x) of the Statement of Claim is granted in the following terms: The 3rd defendant to take steps within 30 days to rectify

the 3 Provisional Leases by excluding the plaintiffs native customary land from the area covered by Provisional Lease to Lot 2, Block 6, Lot 7/Lot 2979 Block 3 and Lot 166 Block 5 Melikin Land District;

11. I decline prayer (xi) of the Statement of Claim;

12. I decline prayer (xii) of the Statement of Claim as the balance of convenience does not lie in favor of its grant;

13. I decline prayer (xiii) of the Statement of Claim for the same reason as above;

14. Damages to the plaintiffs occasioned by the Provisional Leases Lot 2, Block 6, Lot 7/Lot 2979 Block 3, and Lot 166 Block 5 Melikin Land district be assessed by the Registrar and paid by the 1st and 2nd defendants with interest at 4% per annum from the date of writ to full payment;

15. Costs to the plaintiffs.

DATUK CLEMENT SKINNER

Judge

Date : 23rd February 2012

For the plaintiffs: Mr. Baru Bian
Mr See Chee How with him
Messrs Baru Bian & Co
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Kuching, Sarawak

For 1st and 2nd defendants: Mr Reginald Akiew
Messrs Abdul Rahim, Sarkawi, Razak
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Note:This Judgment is subject to typographical and editorial corrections.