

**MALAYSIA
WRIT OF SUMMONS
IN THE HIGH COURT IN SABAH AND SARAWAK AT MIRI
IN THE STATE OF SARAWAK
SUIT NO.22-46-98 (MR)**

BETWEEN

- | | | |
|----|--------------|---------------------------------|
| 1. | KELASAU NAAN | 1st Plaintiff |
| 2. | JAWA NYIPA | 2nd Plaintiff |
| 3. | PELUTAN TIUN | 3rd Plaintiff |
| 4. | BILONG OYOI | 4th Plaintiff |

(Suing on behalf of themselves and all other proprietors, occupiers, holders and claimants of native customary rights land at Long Kerong, Long Sepigen, Long Sait and Long Ajeng Upper Baram, Miri Division, Sarawak.)
c/o Long Kerong, Upper Baram, Miii Division, Sarawak.

AND

- | | | |
|----|--|---------------------------------|
| 1. | GOVERNMENT OF SARAWAK | 1st Defendant |
| 2. | SAMLING PLYWOOD (BARAMAS) SDN. BHD.
Lot 296, Wisma Samling,
Jalan Temenggong Datuk Oyong Lawai Jau,
98007 Miri, Sarawak. | 2nd Defendant |
| 3. | SYARIKAT SAMLING TIMBER SDN. BHD.
Lot 296, Wisma Samling,
Jalan Temenggong Datuk Oyong Lawal Jau,
98007 Miii, Sarawak. | 3rd Defendant |

DEFENCE AND COUNTERCLAIM OF 2ND AND 3RD DEFENDANTS

DEFENCE

- 1.1 With regard to paragraph 1 of the Statement of Claim, save that the Plaintiffs are presently in occupation of the areas referred to in paragraph 1(a) thereof and are Penans by race, all other allegations therein contained are hereby denied. The 2nd and 3rd Defendants deny that the Plaintiffs and those whom they claim to represent are natives of Sarawak until and unless the Plaintiffs and those whom they claim to represent prove that they are born in Sarawak and are Malaysian citizens.
- 1.2 The 2nd and 3rd Defendants deny that the Plaintiffs are bringing this action on behalf of the residents of the Penan longhouses and/or settlements known as Long Kerong, Long Sepigen, Long Sait and Long Ajeng Upper Baram, Miri Division Sarawak and put the Plaintiffs are put to strict proof thereof.

2. Paragraphs 2 and 3 of the Statement of Claim are not denied.
3. With regard to paragraph 4 of the Statement of Claim, the 2nd and 3rd Defendants
 - (a) deny that the Plaintiffs or those whom they claim to represent have acquired native customary rights over the land (hereinafter referred to as “the said land”) shown in the map attached to the Statement of Claim which the 2nd and 3rd Defendants noted was drawn or produced by a foreign source as it has the endorsement that it was “Produced in 1994 from Directorate of Overseas Surveys, 1968 and 1977” and “Updated in 1997 with local informants”;
 - (b) say that the persons whose thumb prints are affixed to the said map are incapable of preparing the said map or making any representation as to the matters alleged/stated thereon;
 - (c) object to the production of the said map in evidence herein in light of the matters stated above and having regard to the provisions of Sections 83 and/or 87 of the Evidence Act, 1950;
 - (d) aver that any rights if any, (which is denied) over the said land were not created in accordance with the provisions of the Land Code of Sarawak or any other law which recognises and/or permits the creation and/or acquisition of native customary rights over land and hence are not recognised thereunder;
 - (e) aver that the said land is State land which is classified as Interior Area Land and no native customary rights may be created over the same, save and except in accordance with the provisions of the Land Code or any other law which recognises and/or permits the creation and/or acquisition of native customary rights over land.
4. (1) With respect to paragraph 5 of the Statement of Claim, it is admitted that two (2) Forest Timber Licences viz: Timber Licence Nos. T/0411 and T/0412 (hereinafter collectively referred to as “the said Forest Licences”) were issued to the 2nd Defendant to fell, extract and remove merchantable timber from timber areas described therein, which include, inter alia, the said land.

(2) The said Forest Licences covered areas (including the said land) [hereinafter referred to as “the licensed area”] which were previously licensed under the following timber licenses, viz:

<u>Timber Licence No.</u>	<u>Date of issue</u>	<u>Licensee</u>
T/0291	30.11.1984	Pélutan Sdn. Bhd.
T/0292	30.11.1984	Kelesa Sdn. Bhd.

(3) No objections were raised by the Plaintiffs or those whom they purportedly represent to the felling of timber from the said land by the abovenamed former licensees.

(4) The 3rd Defendant is an approved contractor for the 2nd Defendant.

(5) Save where hereto before expressly admitted, the 2nd and 3rd Defendants deny each and every allegation in paragraph 5 of the Statement of Claim and puts the Plaintiffs and those whom they claim to represent to strict proof thereof.

5. Paragraph 6 of the Statement of Claim is denied and the Plaintiffs and those whom they claim to represent are put to strict proof thereof. If (which is denied) the Plaintiffs and those whom they claim to represent had any rights or privileges over the said land, such rights or privileges had been extinguished for reasons set forth hereunder:-

- (a) Pursuant to section 26 of the Forests Ordinance, the 1st Defendant and/or its servant or agent caused to be published vide a Gazette Notification (“the said notification”), a proposal to constitute a “protected forests” over an area of forests described therein, including those over the said land. The said notification was published in the Sarawak Government Gazette dated 11.9.1997. The 2nd and 3rd Defendants will refer at the trial of this action to Gazette Notification No. 2642 dated 11.9.1997. Copies of the proposal (as gazetted) were published in a local newspaper on 27.4.1998 and at the sub-District Office at Long Lama, Miri Division, on 20.5.1998.
- (b) the said notification stipulates, inter alia, -
- (i) any person claiming any right or privilege in or over the said land must within 60 days from the date of publication of the said notification, submit to the Regional Forests Officer for Miri Division his claim with evidence in support thereof;
- (ii) upon expiry of the said period, all rights and privileges in or over the said land where the intended protected forest is to be constituted, shall be deemed extinguished, and that compensation shall be paid to any person whose rights and privileges have been so extinguished in accordance with Part III of the Forest Ordinance.
- (c) Pursuant to the said notification, the Regional Forest Officer, Miri, received 274 claims relating to rights and privileges over the area to be covered by the proposed protected forests. The claimants according to racial breakdown are as follows:-
- | | | |
|---------|---|-----|
| Kenyah | - | 259 |
| Kayan | - | 9 |
| Kelabit | - | 2 |
| Penans | - | 4 |
- (d) The names of the 4 Penans who submitted claims to the Regional Forests Officer, Miri Division are:-
- (i) T.R. Abeng Jak
- (ii) T. R. Riman Abo
- (iii) T.R. Luyang Nyugun
- (iv) T.R. Bujau Akek
- (e) None of the Plaintiffs herein or any of those whom they claim to represent submitted any claim to the Regional Forests Officer for rights and privileges extinguished pursuant to the said notification. The Plaintiffs and those whom

they claim to represent are therefore estopped from making any claim for rights or privileges in or over the said land.

- (f) The period for the submission of such claim pursuant to the said notification has expired. Even if (which is denied), the Plaintiffs and those whom they claim to represent have any rights or privileges over the said land, such rights or privileges have been extinguished and that by not submitting their claims within the period mentioned in the said notification, the Plaintiffs and those whom they claim to represent have lost their rights to compensation for the extinguishment of whatever rights or privileges (if any) they may have over the said land (which is denied).
6. In the premises, the 2nd and 3rd Defendants will say that at the time of the institution of this Suit, the Plaintiffs or those whom they purportedly represent, do not have any native customary rights or any other rights or privilege in or over the said land or any part thereof.
7. Paragraphs 7,8 and 9 of the Statement of Claim are denied and the Plaintiffs are put to strict proof thereof.
8. (a) With regard to paragraph 10 of the Statement of Claim, the 2nd and 3rd Defendants say that the said Forest Timber Licences were validly issued pursuant to the provisions of the Forests Ordinance over State land which is classified as Interior Area Land over which no native customary rights have been created by or in favour of the Plaintiffs or those whom they claim to represent in accordance with section 5 c the Land Code or any other law which recognises and/or permits the creation and/or acquisition of native customary rights over land.
- (b) The 2nd and 3rd Defendants say that the Plaintiffs being Penans, migrant community, do not occupy land or have occupation of State land classified as Interior Area Land either with or under a permit from the District Officer, Baram or have continued occupation there(prior to, on or subsequent to the 1st January, 1958 to form the legal basis of any claim to native customary rights over State land classified as Interior Area Land. The claim of the Plaintiffs (as a community on the move) to native customary rights is unprecedented, unsupported by their adat or culture and/or not in accordance with the provision of the Land Code or the Forest Ordinance or any other law which recognises and/or permits the creation and/or acquisition of native customary rights over land.
9. Paragraph 11 of the Statement of Claim is denied and the Plaintiffs and those they claim to represent are put to strict proof as to the matters alleged therein.
10. Paragraph 12 of the Statement of Claim is denied and the Plaintiffs and those whom they claim to represent are put to strict proof as to the matters alleged therein. The 2nd and 3rd Defendants further say that the Plaintiffs and those whom the claim to represent do not have any rights in or over the said land and/c alternatively, their claim to such rights was not in accordance with the provisions the Land Code or any other law which recognises and/or permits the creation and/or acquisition of native customary rights over land.
11. Paragraph 13 of the Statement of Claim is denied and the Plaintiffs and tho5 whom they claim to represent are put to strict proof as to the matters alleged therein. The 2nd

and 3rd Defendants further say that forest licences over the said land hi been issued since 1984 and the persons living on the said land have been able I survive and continue to live their own way of life in accordance with their economic, cultural and social system, despite the fact that logging activities in or near the area described in paragraph 1(a) of the Statement of Claim, since the mid 1980s.

12. Paragraphs 14, 15 and 16 of the Statement of Claim are denied and the Plaintiffs and those whom they claim to represent are put to strict proof thereof.
13. Paragraph 17 of the Statement of Claim is denied. The entry of the 2nd Defendant's and 3rd Defendant's (as the approved contractor of the 2nd Defendant) agents and servants onto the licensed area were to survey, construct logging and access roads, extract merchantable timber from the licensed area in accordance with the said Forest Licences and to maintain and implement a sustainable forest management scheme over the licensed area.
14. The damages or loss as alleged in paragraph 18(1) of the Statement of Claim or at all, are hereby denied and the Plaintiffs and those whom they claim to represent are put to strict proof thereof. The 2nd and 3rd Defendants have no knowledge of the matters alleged in paragraph 18(2) of the Statement of Claim which are not admitted.
15. In light of the matters aforesaid, the allegations in paragraph 19 of the Statement of Claim are misconceived and frivolous and are denied and the Plaintiffs and those whom they claim to represent are put to strict proof thereof.
16. (1) The 2nd and 3rd Defendants further add that the Plaintiffs and those whom they claim to represent instituted this action with improper motive and/or to articulate the agenda or interests of some foreign parties who assisted them in the preparation of the map attached to the Statement of Claim. The 2nd and 3rd Defendants further say that the persons whose thumb prints are affixed to the said map are incapable of preparing the said map or making any representation as to the matters alleged or stated thereon.

(2) The Plaintiffs and/or those whom they claim to represent are aware of the activities of the 2nd and 3rd Defendants, their servants and/or agents on the land comprised in the said Forest Licences as early as 1993.

(3) The agents and / or servants of the 3rd Defendant in its capacity as the previous contractor for Pelutan Sdn. Bhd. And Kelesa Sdn. Bhd. Have met up with the Plaintiffs and / or these whom they claim to represent on numerous occasions since 1984 to explain to them that Pelutan Sdn. Bhd. And Kelesa Sdn. Bhd. Were then the licensees of Timber Licence Nos. T/0291 and T/0292 respectively and that the 3rd Defendant was the Contractor to Pelutan Sdn. Bhd. And Kelesa Sdn. Bhd. And their servants and agents would be entering the licensed area which include the said land. The 3rd Defendants, Pelutan Sdn. Bhd., kelesa Sdn. Bhd. And their servants and agents have in fact entered the licensed area since 1984.

(4) Furthermore, the agents and/or servants of the 2nd and 3rd Defendants have met with the Plaintiffs and/or those whom they claim to represent on numerous occasions since 1994 and explained to them that the 2nd Defendant is the licensee of the said Forest Licences and that the 3rd Defendant is the approved contractor of the 2nd Defendant and that the agents and servants of the 2nd and/or 3rd Defendants will be entering the licensed area which includes the said land to inter alia, survey construct

logging and access roads and extract merchantable timber from the licensed area (which includes the said land.)

(5) Notwithstanding the numerous meetings as stated in paragraphs 16(3) and (4) above, the Plaintiffs and/or those whom they claim to represent and the Penans who claim to be in occupation of the said land have

- (a) harassed, threatened and/or intimidated members of the police field force and the 2nd and 3rd Defendants' agents and/or servants who entered onto the said land to inter alia, survey, construct logging and access roads and/or to extract merchantable timber from the said land; and
- (b) stolen, robbed, interfered with, burnt and/or damaged the property of the 2nd and 3rd Defendants, their agents and/or servants and members of the police field force and caused them to suffer damage and losses.

Full particulars of such harassment, intimidation, threats made and loss and damage suffered are as stated in the **PARTICULARS OF HARASSMENT, INTIMIDATION, THREATS MADE AND LOSS AND DAMAGE** dated the 12th day of November, 1998 served with this Defence and Counterclaim.

(6) By reason of the matters stated herein, the 2nd and 3rd Defendants urge this Honourable Court not to exercise its discretion to grant the Plaintiffs and those whom they claim to represent the declaratory reliefs sought herein as the Plaintiffs and those whom they claim to represent, by only commencing this action in May, 1998 after having harassed, intimidated and/or threatened the 2nd and 3rd Defendants agents and/or servants and the members of the police field force and stolen, robbed, interfered with, burnt and/or damaged the property of the 2nd and/or 3rd Defendants' servants and/or agents and the members of the police field force are guilty of laches and have not come before this Honorable Court with "clean hands"

- 17. Save where hereto before expressly admitted, the 2nd and 3rd Defendants deny each and every allegation contained in the Statement of Claim as if the same were herein set forth in seriatim and traversed specifically.
- 18. By reason of the matters stated herein, the Plaintiffs' claims herein are misconceived and ought to be dismissed with costs.

COUNTERCLAIM

- 19. The 2nd and 3rd Defendants repeat paragraphs 1-18 above.

WHEREFORE the 2nd and 3rd Defendants pray for

- (a) A declaration that the 2nd Defendant is the lawful licensee of the areas described in Forest Timber Licence Nos. T/0411 and T/0412;
- (b) a prohibitory injunction against the Plaintiffs or any of them or those whom they purportedly represent and/or their agents or servants from f

- (i) trespassing onto the licensed area or any part thereof or any part of the land described in Forest Timber Licence Nos. T/0411 and T/0412;
 - (ii) damaging or interfering with any of the 2nd and 3rd Defendant's operations, activities, property (including but not limited to machineries, equipment, structures or assets);
 - (iii) harassing, assaulting, threatening or harming any of the 2nd or 3rd Defendants' agents or servants; and
 - (iv) damaging or interfering with any of the activities, machineries, property (including but not limited to equipment, structures or assets) belonging to any of the servants or agents of the 2nd or 3rd Defendants;
- (c) special damages in the sum of RM1,187,742.85;
 - (d) damages (including exemplary and aggravated damages);
 - (e) interest;
 - (f) costs; and
 - (g) such further and/or other relief as the Court deems fit.

Dated this 12th day of November, 1998.

(signed)
REDDI & CO.,
Advocates for the 2nd and 3rd Defendants.

- To:
- (1) The abovenamed Plaintiff through their Advocates
Messrs. BARU BIAN ADVOCATES,
Lot 136, 1st Floor, Jalan Petanak,
93100 Kuching
 - (2) The abovenamed 1st Defendants through State Legal Officer,
State Attorney-General's Chambers,
Tingkat 16, Wisma Bapa Malaysia,
Petra Jaya, 93502 Kuching

This Defence and Counterclaim is filed by Messrs. **REDDI & CO** Advocates for and on behalf of the 2nd and 3rd Defendant whose address for service is Lane Building, 29, Kai Joo Lane, Kuching..