

**IN THE FEDERAL COURT OF MALAYSIA
(APPELLATE JURISDICTION)**

APPLICATION NO: OF 200

BETWEEN

- 1. NOR ANAK NYAWAI (K. 457699)**
- 2. SEKALAI ANAK LING (K. 0053822)**
- 3. JERANGKU ANAK BAKIT (K. 0105425)**
- 4. LANI ANAK TANEH (K. 0162317)**

(Suing for and on behalf of themselves and all other occupiers, holders and claimants of native customary land (NCR) at Sungai Sekabai, Sungai Tajem, C/O Rumah Luang/Rumah Nor, Sungai Sekabai, Sebauh, Bintulu Division, Sarawak)

APPLICANTS

AND

- 1. BORNEO PULP PLANTATION SDN BHD**
- 2. BORNEO PULP & PAPER SDN BHD**
Both of
5th Floor, Crown Towers
88 Jalan Pending, Kuching, Sarawak
- 3. SUPERINTENDENT OF LANDS & SURVEYS,
BINTULU**

RESPONDENTS

**(IN THE MATTER OF CIVIL APPEALS NO. Q-01-42-2001 & Q-02-504-2001 IN THE
COURT OF APPEAL IN SARAWAK AND SABAH AT KUCHING)**

BETWEEN

- 1. SUPERINTENDENT OF LANDS & SURVEYS, BINTULU,
(CIVIL APPEAL NO. Q-01-42-2001).**
- 1. BORNEO PULP PLANTATION SDN BHD (CIVIL APPEAL NO. Q-02-504-2001).**
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RESPONDENTS

Decided by the Court of Appeal at Kuching, the 8th day of July 2005

NOTICE OF MOTION

TAKE NOTICE that the Honourable Court will be moved on the day of 200 atm or so soon thereafter as counsel can be heard for the abovenamed Applicants for the following reliefs: -

1. That the Applicant be given leave to appeal to the Federal Court against that part of the decision of the Court of Appeal given on the 8th day of July 2005 in allowing the Appellant's appeal against the decision of the High Court at Kuching on the 12th March 2001; where their Lordships said that, 'Despite the aerial photographs of the Disputed Area in 1951 showing the Disputed Area covered with jungles the learned Judge factually concluded that on balance of probabilities the Disputed Area (as shown in the map P 172) was the area where the Respondents and their ancestors had cleared for cultivation, accessed for fishing, hunting and to gather forest produce, all rights associated with '*temuda*' and '*galau*' and they came within the '*pemakai menoa*' of the Respondents', that there was no evidence adduced to show that the Disputed Area was in fact under continuous occupation by the Respondents (Applicants) and their ancestors 'and that the evidences of the Respondents/Applicants were self-serving testimonies which carry little or no weight, in the absence of some credible corroborative evidence.';
2. That the Applicant be given 30 days from the date of this order to file a Notice of Appeal against the decision of the Court of Appeal given on the 8th day of July 2005 or as this Honourable Court so orders;
3. That the costs of this application be costs in the cause; and
4. Further relief and/or directions that this Court deems fit;

The grounds of this Application are that the following issues and/or questions of law arise for the first time or of public importance or are questions of importance upon which the decision of the Federal Court would be to public advantage:

- i. That the Learned Judges had erred in law in ruling that "corroborative evidence must be adduced to support the Respondents' testimonies which are serve-serving", when testimonies of the respective witnesses for the Respondents must be judged in' law on its own merits and credibility.
- ii. That the Learned Judges had erred in law in ruling that since the Respondents longhouse's location and "*tembawai*" sites (old longhouse sites) are not within the disputed area, no Native Customary Rights had been established by the Respondents, as this is totally inconsistent with the established customary laws and/or adat of the Respondents.
- iii. Whether the existence of virgin jungle in the disputed area by itself concludes the case against the claim for native customary rights or is the court obliged to determine usage of the jungle area for roaming, collecting, foraging and hunting?
- iv. Whether the land claimed as native customary land must be physically occupied by the claimants or their ancestors before recognition could be given?
- v. Whether for the purposes of establishment of pre-1958 native customary rights over land in Sarawak the principles of '*menoa*', '*temuda*' or '*pulau*' are to be taken together or in isolation?

- vi. Whether a claim for native customary rights fails merely on failure to establish one of the three principles above when there could exist on the claimed land one or a combination of the three elements aforesaid?
- vii. Whether it is correct in law in cases involving claim to native titles by indigenous people without a tradition of written records to seek corroborative evidence of the claim other than by oral testimony?
- viii. Whether the accepted rule of evidence in native title cases in Australia and Canada that the oral tradition will be recognised to establish ancestral claim to land should not be accepted as sufficient also for purposes of establishing native customary rights in Sarawak?
- ix. Whether the principles of proximity and contiguity in relation to the '*tembawai*' constitutes by itself corroborative evidence of the size, extent and boundaries of the '*menoa*' for the purposes of establishing native customary rights?
- x. And as stated in the affidavit of Sekalai Anak Ling (K. 0053822) filed in support of this Motion.

Dated this day of August 2005

(signed)

**Messrs Baru Bian
Solicitors for the Applicants**

**Deputy Registrar
Federal Court Malaysia**

- To:**
1. **BORNEO PULP PLANTATION SDN BHD**
 2. **BORNEO PULP & PAPER SDN BHD**
Through their Solicitors
Messrs Reddi & Co.,
Bangunan Lane
No. 29, Lebuah Kai Joo
93000 Kuching, Sarawak
-
1. **SUPERINTENDENT OF LANDS & SURVEY, BINTULU**
Through their Legal Solicitors
The State Legal Officer
State Attorney-General's Chambers
Tingkat 16, Wisma Bapa Malaysia
Petra Jaya, 93502 Kuching.

This Notice of Motion is filed by Messrs Baru Bian, Advocates & Solicitors, for the Applicants, whose address of service is at 1st Floor, Lot.136, Jalan Petanak, 93100 Kuching, Sarawak. Tel: 082-257593/Fax: 259230.

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RESPONDENTS

AFFIDAVIT IN SUPPORT

I, SEKALAI ANAK LING (K. 0053822) a Malaysian citizen of full age and now residing at Rumah Luang/Rumah Nor, Sungai Sekabai, Sebauh, Bintulu Division, Sarawak, do hereby solemnly and sincerely affirm and say as follows:

1. That I am the Second Applicant in this matter and is being authorized to depose to facts stated hereinafter by the other Applicants and those were represent, which are within my personal knowledge, information and belief and/or have been obtained from documents kept in my Solicitors' office, Messrs Baru Bian, Advocates & Solicitors.
 2. The Applicants were Plaintiffs representing themselves and all other occupiers, holders and claimants of native customary rights (NCR) over lands located at Sungai Sekabai, Sungai Tajem, Sungai Ipuh, Bintulu Division, Sarawak, in the High Court referred herein, where we claimed amongst other things that we have acquired exercise NCR over the said disputed area and injunction ordered against the 1st and 2nd Respondents from entering the disputed area. Shown to me now is a copy of the said judgment in the High Court annexed herewith and marked as exhibit "SAL-1".
 5. The Respondents thereby appealed against the whole decision of the Learned High Court's Judge.
 6. By a judgment dated 8th July, 2005, the Court of Appeal, allowed the appeal of the Respondents on grounds amongst other things as stated in this Notice of Motion. Shown to me now is a copy of the said judgment in the Court of Appeal annexed herewith and marked as exhibit "SAL-2".
 7. The Applicants are not satisfied with part of the judgment of the Court of Appeal and therefore seek leave from this Honourable Court to appeal against the decision of the Court of Appeal in that:
 - i. the Learned Judges had erred in law in ruling that "corroborative evidence must be adduced to support the Respondents' testimonies which are self-serving", when testimonies of the respective witnesses for the Respondents must be judged in law on its own merits and credibility.
 - ii. the Learned Judges had erred in law in ruling that since the Respondents longhouse's location and "*tembawai*" sites (old longhouse sites) are not within the disputed area, no Native Customary Rights had been established by the Respondents, as this is totally inconsistent with the established customary laws and/or adat of the Respondents.
- Respondents' testimonies which are serve-serving", when testimonies of the respective witnesses for the Respondents must be judged in law on its own merits and credibility.
- ii. the Learned Judges had erred in law in ruling that since the Respondents longhouse's location and "*tembawai*" sites (old longhouse sites) are not within the disputed area, no Native Customary Rights had been established by the Respondents, as this is totally inconsistent with the established customary laws and/or adat of the Respondents.

8. Further, I am advised by my Solicitors Messrs Baru Bian, Advocates & Solicitors that the following issues and/or questions of law arise for the first time or of public importance or are questions of importance upon which the decision of the Federal Court would be to public advantage:

- i. Whether the existence of virgin jungle in the disputed area by itself concludes the case against the claim for native customary rights or is the court obliged to determine usage of the jungle area for roaming, collecting, foraging and hunting?
- ii. Whether the land claimed as native customary land must be physically occupied by the claimants or their ancestors before recognition could be given?
- iii. Whether for the purposes of establishment of pre-1958 native customary rights over land in Sarawak the principles of '*menoa*', '*temuda*' or '*pulau*' are to be taken together or in isolation?
- iv. Whether a claim for native customary rights fails merely on failure to establish one of the three principles above when there could exist on the claimed land one or a combination of the three elements aforesaid?
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- vi. Whether the accepted rule of evidence in native title cases in Australia and Canada that the oral tradition will be recognised to establish ancestral claim to land should not be accepted as sufficient also for purposes of establishing native customary rights in Sarawak?
- vii. Whether the principles of proximity and contiguity in relation to the '*tembawai*' constitutes by itself corroborative evidence of the size, extent and boundaries of the '*menoa*' for the purposes of establishing native customary rights?

9. In the circumstances I pray for order in terms of this application.

Affirmed by the said
SEKALAI ANAK LING (K. 0053822)
This 4th day of August 2005
At Kuching in the State of Sarawak

(Signed)
Before me,

(Signed)
Commissioner for Oaths

This Affidavit In .Support is filed by Messrs Baru Bian, Advocates & Solicitors, for the Applicants, whose address of service is at 1st Floor, Lot.136, Jalan Petanak, 93100 Kuching, Sarawak. Tel: 082-257593/Fax: 259230.