

# TAN KOK CHIANG v TAN YAW TI AND ANOR

CaseAnalysis  
| [2009] MLJU 0606

## Tan Kok Chiang v Tan Yaw Ti and Anor [2009] MLJU 0606

Malayan Law Journal Unreported

HIGH COURT (KUCHING)

RHODZARIAH BT BUJANG, JC

ORIGINATING SUMMONS NO 24-389-2008-11

30 July 2009

*Sandra Shek (Shek Wei Yee Advocates) for the plaintiff*

*Stephanie Chin (Mutang, Bojeng & Chai Co) for the 1st defendant  
Present / Unrepresented by Counsel for the 2nd defendant*

### Rhodzariah bt Bujang, JC

#### JUDGMENT

A piece of land described as Lot 18, Block 52, Kuching Town Land was co-owned by 3 brothers; the plaintiff has 5/10th share, the 1st defendant, 1/10th share and the 2nd defendant, 4/10th share and they have inherited the land from their father.

The plaintiff contended that the 2nd defendant had been collecting rentals from the said land without sharing it with him whilst he had to pay for the quit rents and assessment rates for it since 1986 until present time. For that reason he wants the court to order that his 2 brothers buy his share in the land at market value and if not, then, for the said land to be sold by public auction and all the proceeds of the land to be shared by them in the proportion of their shareholding in it. He also wanted an order that the rentals from the land to be given to him in accordance with his share in the land.

In opposition to his claim, the defendants have each filed an affidavit but the 2nd defendant represented himself at the hearing of this action. However, he adopted the submission on the law made by the 1st defendant's counsel, Ms Stephanie Chin.

The 1st defendant deposed that he is not interested to purchase his brother's share in the property, nor could the plaintiff forced him to do so but if the plaintiff so wished, he is free to sell his share to whoever is interested to buy it from him. The court, however, has no power to order the sale of the land by public auction, he added.

The 2nd defendant deposed in his affidavit how he had renovated the premises on the said land with his own money and that he only rented the premises in 2003 for RM1000 per month (later increased to RM1300 per month). He used the rental to pay for the quit rents and assessment rates of the property and in fact had been paying those rates since 1994. Copies of the said documents were exhibited to his affidavits. I paused here to say that it seems to me from his affidavit that the 2nd defendant would not have minded if the said land be sold at a market value.

In reply to these affidavits, the plaintiff deposed that the 1st defendant had wanted to be paid RM300,000.00 for his share in the land but this was not possible because in the year 2000 the land was valued by a registered valuer at only RM598,000.

The plaintiff still insisted, despite the proof, that he paid for the quit rents and assessment rates and he had given the 2nd defendant money for their payments but stopped doing so in 2007 and 2008 after knowing that the 2nd defendant had derived income from the rentals.

No power to order sale

Ms. Stephanie Chin has submitted that I do not have the power to grant the reliefs sought by the plaintiff – I do not have the power to force the defendants to sell their shares in the land to the defendants and neither do I have the power to order a sale by public auction of the land. Order 31 r.1 of the Rules of the High Court 1980 cited by the plaintiff's counsel, Ms. Sandra Shek in support of the application is merely procedural, she said, and I cannot order sale where no substantive law provides for it. She further submitted that in respect of the land, the governing law should be the Sarawak Land Code and the Land Code does not have a provision to enable the court to make the order for sale as prayed in this case. In support of her contention she referred to the Federal Court's case of *Asean Security Paper Mills Sdn Bhd v. Mitsui Sumitomo Insurance (Malaysia) Bhd* [2008] 6 CLJ 1.

In the said case, the Federal Court referred to and adopted another Federal Court's decision ie *R Rama Chandran v Industrial Court of Malaysia & Anor* [1997] 1 CLJ 147 in which the distinction between procedural and substantive laws were made. The distinction is this,

"Clearly, there is a vital distinction made between, on the one hand, substantive law, the function of which is to define, create, confer or impose legal rights and duties, and on the other hand, procedural law, the function of which is to provide the machinery, the manner or means, by recourse to which legal rights and duties may be enforced or recognized by courts of law or any tribunal seized with jurisdiction to adjudicate on a dispute before it".

Although I appreciate that the Land Code does not appear to have any specific provisions to cater for the order for sale prayed for in this case I disagree that I do not have the jurisdiction to do so.

The substantive law that gives me the jurisdiction is Item 3 to the Schedule of the Courts of Judicature Act 1964 ("the CJA"). It says that I have the "Power to direct a sale instead of partition in any action for partition of land; and in any cause or matter relating to land, where it appears necessary or expedient, to order the land or any part thereof to be sold, and to give all necessary and consequential directions." (emphasis added) but with the proviso under section 25(2) of the CJA that it must be exercised "... in accordance with any written law or rules of court relating to the same". (emphasis added).

'Cause' is defined under section 3 of the CJA 1964 as "any action, suit or other original proceeding between a plaintiff and a defendant, any criminal proceeding" and to me the originating summons filed by the plaintiff in this case comes within the definition of 'cause' stated in item 3.

I am compelled to state the obvious, which is the power to order sale of the land under Item 3 is an additional one conferred to the High Court, the main powers being that provided by section 25 of the CJA which are those vested in the High Court immediately prior to Malaysia Day and such other powers as can be found in any written law.

When the written law is silent on the power of the High Court, then it is right that we look into the additional powers conferred by the Schedule to the CJA and as I said earlier it is only the exercise of these powers which must follow any written law or rules of court. Clearly, therefore, Order 31 of the RHC 1980 regulates the exercise of the power of sale conferred by item 3 of the Schedule.

As for the above mentioned proviso to section 25(2), my interpretation of it is that the exercise of the power to order sale of the land must be done according to any written law or rules of court; not that the power to do so must be provided by written law. I agree with James Foong J (as His Lordship then was) in *KK Kumaran v. TS Sambanthamurthi* [1996] 3 MLJ 309 that Order 31 r.1 of the Rules of the High Court 1980 is the relevant Rules governing the exercise of the power conferred by the said item 3 and it says (as did item 3) that I could order such a sale if it "... appears necessary or expedient ...".

In arriving at this decision I respectfully declined to follow the decision of Suriyadi Halim Omar J's decision (as His Lordship then was) in *Rubyna Kaur Surinder Singh v. Jasbir Singh Harbajan Singh* [2004] 1 CLJ 347 cited by Ms.

Stephanie Chin and find support in the decision of Abdul Malik J (as His Lordship then was) in *Yong Hin Seong & Anor v Yong Teik Seong* [2003] 6 MLJ 38 the facts of which case is not unlike the present one before me. In that case 2 brothers also could not agree on the amount of rentals which one must to pay to the other. Abdul Malik J decided that an order for sale of the land should be made to resolve the impasse between the parties. His Lordship held that he has the power to order the sale based on the provisions of law I quoted earlier and not on any provision of the National Land Code.

With respect to the decision in *Rubyna's case* (supra) I do not think there is a necessity for there to be an existing court proceedings other than the action filed by the plaintiff in order for the court to exercise the power to order the sale.

#### Necessary or Expedient

From the affidavits filed in this case, it is clear to me that the 3 brothers have been at loggerheads about their inheritance for more than 20 years and to prolong their dispute over the land would not be in the best interest of the parties given the annual obligation of paying for it's assessment rates and quit rents and the fight over the rentals. It is not only necessary or expedient but also just in this case to have the land sold. I do not however think that I should compel the defendants to buy out the plaintiff's share in the land at market price and neither should it be sold by public auction because the courts in Sarawak is slowly but surely moving away from ordering sale by public auction as it is fraught with abuses by certain unscrupulous people.

What I would do and I so order is that the land be sold by public tender and at a reserve price to be determined by a registered valuer. I further order that the plaintiff takes out a summons for directions in respect of the sale in accordance with Order 31 r.2 of the RHC 1980. However, if anyone of the parties is able to find a buyer for the land at or above the reserve price, the sale can be done by way of a private treaty with the said buyer. As for cost of this action I order that it be taxed and paid out of the proceeds of sale of the property. Likewise the cost of the valuation report and any other cost arising out of and incidental to the sale of the said land.