IN THE FEDERAL COURT OF MALAYSIA

(APPELLATE CIVIL JURISDICTION)

CIVIL APPEAL NO. 01(f)-42-11/2018(Q)

BETWEEN

DOUGLAS DING JANGAN & 4 OTHERS … APPELLANTS

AND

1. KERAJAAN NEGERI SARAWAK

2. PENGARAH PERHUTANAN

3. JABATAN TANAH DAN SURVEI BAHAGIAN KAPIT

4. PUSAKA KTS FOREST PLANTATION SDN BHD

5. SOP PLANTATIONS (BORNEO) SDN BHD

6. MU KEDOH TAJANG & 2 ORS …

RESPONDENTS

CORAM

ROHANA YUSUF, PCA

MOHD ZAWAWI SALLEH, FCJ

ABDUL RAHMAN SEBLI, FCJ

SUMMARY OF JUDGMENT

[1] This appeal is against the decision of the Court of Appeal allowing the cross-appeals by the 1st to 5th respondents and setting aside the whole of the decision of the High Court which favoured the appellants. The cross-appeals by the 6th to 8th respondents, who were interveners in the Court of Appeal but who were not parties to the High Court action, were also allowed by the Court of Appeal.

[2] The appellants obtained leave on 24.10.2018 for the determination of the following question of law:

> "Whether the Court of Appeal acted within its jurisdiction when it set aside the whole order or decision of the High Court, including that part which decided that "the Plaintiffs have acquired and/or created communal native customary rights over the said land and are still the lawful proprietors of the same for the specific patches of cleared areas labeled as No. 4, 5, 9, 16, 25, 36, 37, 38 and 39 in exhibit D80 and the cleared area labeled as No. 27 in exhibit D81" and which is not appealed against, in determining the cross appeals brought by the defendants and the interveners?"

[3] It is a jurisdictional challenge over the decision of the Court of Appeal to set aside the decision of the High Court on cross-appeals by the respondents/interveners although no appeal pursuant to rule 5 of the Rules of the Court of Appeal 1994 ("the RCA") was filed by the 1st to 5th respondents against the decision of the High Court to allow paragraph 25(i) of the statement of claim, which was adverse to them.

[4] The facts are set out in the full grounds of our decision and we do not propose to reproduce them in this summary. We shall go straight to the issues of law, which is whether the cross-appeals, which sought to reverse or set aside the decision of the High Court allowing paragraph 25(i) of the appellants' statement of claim, ought to have been dismissed by the Court of Appeal as they were unrelated to the appellants' appeal, which was only against that part of the decision of the High Court that dismissed their claim for the balance of the land areas.

[5] The Court of Appeal's decision to allow the respondents' cross-appeals and to dismiss the appellants' appeal was grounded on its finding that the appellants failed to establish not only their claim over the balance of the land areas but also over the cleared areas which the High Court had squarely found in favour of the appellants.

[6] The appellants proffered two main reasons why the leave question ought to be answered in the negative, as follows:

(1) The Court of Appeal's jurisdiction in determining a cross-appeal under rule 8 of the RCA is restricted to the substance or point in issue in the primary appeal brought under rule 5 of the RCA; and

(2) All the cross-appeals sought to challenge and set aside that part of the decision of the High Court which was unconnected to the substance of the appellants' primary appeal and were therefore incompetent.

[7] The position taken by all eight respondents was that the Court of Appeal was seized with jurisdiction to set aside the entire decision of the High Court allowing paragraph 25(i) of the statement of claim although the 1st to 5th respondents did not file any appeal against the decision pursuant to rule 5 of the RCA.

[8] In our jurisdiction, the law on cross-appeals and their restrictions had been laid down by this Court in *Leisure Farm Corp Sdn Bhd & Ors* [2016] 5 MLJ 557 ("Leisure Farm"), which was

endorsed by another decision of this Court in *Majlis Peguam v Cecil Wilbert Mohanaraj Abraham* [2019] 5 MLJ 159, albeit by way of *obiter*.

[9] In *Leisure Farm*, it was held, *inter alia*, that if the 1st defendant in that case wanted the Court of Appeal to reverse or set aside the High Court decision or its substantive finding of fact that there was a valid and binding contract between the parties for the sale of the golf course, it was incumbent on the 1st defendant to independently file a separate notice of appeal under rule 5 of the RCA to re-hear the issues which were not decided in its favour rather than to file a notice of cross-appeal under rule 8 of the RCA, which did not provide for a complaint to be re-heard. In other words, a cross-appeal cannot be recast as an appeal in itself to set aside the judgment of the High Court.

[10] Juxtaposed with the facts of the present case, the High Court's finding that the appellants have acquired and/or created communal NCR over the cleared areas, which formed the basis for its decision to allow paragraph 25(i) of the statement of claim, was a finding that was wholly adverse to the 1st to 5th respondents. It was therefore incumbent on the 1st to 5th respondents to file separate notices of appeal if they wanted the decision to be reversed or set aside. The decision cannot be reversed or set aside by way of cross-appeal under rule 8 of the RCA. It can only be done by way of a substantive appeal under rule 5.

[11] We have gone through the respondents' notices of cross-appeal and the appellants' notice of appeal. What is clear to us is

that although the notices of cross-appeal sought for a variation of the High Court decision allowing paragraph 25(i) of the statement of claim, the grounds in support of the cross-appeals in fact sought for a completely different order. Far from asking for a variation of the decision, the respondents were actually seeking for an order that the entire decision of the High Court allowing paragraph 25(i) of the statement of claim be reversed or set aside.

[12] We do not find it to be correct in law for the respondents to mount such collateral attack on the decision of the High Court without filing notices of appeal of their own under rule 5 of the RCA. A cross-appeal under rule 8 of the RCA is only for the purpose of varying the decision of the High Court that is appealed against by the appellant and not for the purpose of reversing or setting aside any decision of the High Court which no party to the action appeals against.

[13] The cross-appeal must relate to the appeal brought by the appellant and not otherwise and no variation order under rule 8 of the RCA can be made in respect of a non-existent appeal. What is more important in the whole scheme of things is that by not appealing against the decision of the High Court allowing paragraph 25(i) of the statement of claim, the respondents must be deemed to accept the High Court's substantive finding of fact that the appellants and/or those whom they represent have acquired and/or created communal NCR over the cleared areas.

[14] This substantive finding of fact cannot be reversed or set aside without being re-heard by way of a substantive appeal under

rule 5 of the RCA. By not appealing against the decision, the respondents are estopped from contending that the decision is wrong and ought to be reversed or set aside.

[15] The RCA differentiates between appeals and cross-appeals. Appeals under rule 5 are meant for re-hearing of the decisions appealed against, which may be reversed or set aside in their entirety. Cross-appeals under rule 8 on the other hand are only meant for variation of the decisions appealed against and not for their total reversal or setting aside. The objects of the two provisions are different. The forms to be used are also different. Appeals under rule 5 are to be filed using Form 1 whereas cross-appeals under rule 8 are to be filed using Form 2.

[16] Since the respondents' cross-appeals were directed at the decision of the High Court allowing paragraph 25(i) of the statement of claim which the appellants did not appeal against pursuant to rule 5 of the RCA, the cross-appeals were incompetent. Simply put, there was no such appeal before the Court of Appeal for any variation order to be made under rule 8 of the RCA, let alone for a setting aside order.

[17] If at all any variation order is to be made under rule 8, it will be in respect of the decision of the High Court that the appellants were appealing against, which is the decision to dismiss their claim for the balance of the land areas. It may of course be argued that there is nothing to vary with respect to that part of the decision as it was not a decision that the respondents were dissatisfied with. That may be so, but that is precisely the reason why the 1st to 5th

respondents should have appealed against the decision of the High Court allowing paragraph 25(i) of the statement of claim, instead of attacking it collaterally by way of cross-appeal.

[18] As for the 6th to 8th respondents, they were in a worse position than the 1st to 5th respondents as they were not even parties to the High Court action, either as defendants or as interveners. It would be grossly unfair to the appellants if a decision is made in favour of the 6th to 8th respondents when their claim for NCR over certain parts of the cleared areas, which had been decided in favour of the appellants after a full trial, was not even adjudicated upon by the High Court. Therefore the appellants have raised a valid complaint that the Court of Appeal was wrong in allowing the 6th to 8th respondents' cross-appeals.

[19] For the reasons aforesaid, our answer to the leave question is in the negative, that is to say, the Court of Appeal did not act within its jurisdiction when it set aside the whole order or decision of the High Court, including that part which decided that "the Plaintiffs have acquired and/or created communal native customary rights over the said land and are still the lawful proprietors of the same for the specific patches of cleared areas labeled as No. 4, 5, 9, 16, 25, 36, 37, 38 and 39 in exhibit D80 and the cleared area labeled as No. 27 in exhibit D81" and which is not appealed against, in determining the cross appeals brought by the defendants and the interveners.

[20] In the circumstances, the appeal is allowed with costs. The decision of the Court of Appeal is set aside and we restore the

decision of the High Court to allow paragraph 25(i) of the statement of claim.

ABDUL RAHMAN SEBLI
Judge
Federal Court of Malaysia
Dated: 7 July 2021.