IN THE ISABEL CUSTOMARY
LAND APPEAL COURT

C.L.A.C CASE NO. 13/98

IN THE MATTER OF SAREAI CUSTOMARY LAND DISPUTE, LR 681

BETWEEN:	1. ANTHONY ENESEA	1st Appellant
	2. HUBERT SELE	2nd Appellant
AND:	1. NELSON KILE	1st Respondent
	2. DORAH KIKOLO	2nd Respondent

JUDGEMENT

This is an appeal against the decision of the Isabel Local Court dated the 7th day of September 1998, to the Isabel Customary Land Appeal Court, over Customary Land known as SAREAI CUSTOMARY LAND.

We remind ourselves as usual that it is for the appellant to show that the decision of the Local Court is erroneous in law, or in fact or in custom or the balance of the evidence in the Local Court out weighs the decision of the local court so that the court could not have come to the decision it had infact made.

Unless and until that is proved on the balance of probability, this court cannot intervene on the decision of the local court.

We now turn to the grounds of appeal taking point by point.

The appellant submitted 5 grounds of appeal:
GROUND 1 (a)

This ground has been withdrawn.

GROUND 1(b)

Ground one (1) alleges that the learned Justices of the local court erred in their judgement when they failed to carefully consider and apply custom usage and practice that were and still are applicable in the inheritance of land in Isabel, that is, owning land through the Matrilineal system (mothers side) when they failed to consider the following factors:-

(b) That there is no conclusive evidence from the respondents and their witnesses as to their original discovery of Sareai land since most of their history was and is not related to Sareai land at all.

On this ground, we are of the opinion that the local court has already properly addressed the issue on the question of discovery of the land in dispute on page 2 of its judgement. This dispute here is not between the Baehai clan and all the other clans in Isabel, but specifically between Baehai clan and the Sesehu clan. As between these two parties, what are or were the basis of their respective claim of ownership of the land in dispute in custom.

Bachai clan claimed ownership by first discovery of the land. That the land was owned by the Baehai clan at the time when Chief Nabulu II married Vurutina of Sesehu being one of his three wives. It was from Joses Lote (being the son of Nabulu by Vurutina), that the Sesehu clan claim Customary ownership of SAREAI LAND. (See also page 5 of the Local Court judgement).

GROUND 1 (C)

Ground 1(c) alleges that the history relied upon by the respondent is not history of Sareai land and not of their clan, (Kokolo Baehai) but belonging to other clans of Ysabel. This is including the Chiefs mentioned in the Local Court. This also applies to the rivers as well as the nomadic settlements and pieces of land given by Baehai clan to others. These settlements and lands were not situated on Sareai land except Toelegu which was given to the settlers by Sesehu clan.

On this ground, we note from the local court record that there was no dispute if the history relied upon by the respondents was not that of Sareai land. It was not an issue addressed by the Local court. The defendant in the local court never questioned the plaintiff if the history claimed and relied upon by the plaintiff was that of other clan in Isabel.

The same is true about the chieves mentioned, the rivers, the nomadic settlements and pieces of land given by Baehai clan to others except Toelegu settlements. However questions raised in relation to Toelegu are in relation to the question as to which of the two clans received the feast given by the settlers from Maringe district in December 1981.

What we are now saying in this court is this, the appellant should have challenged those facts when produced by the plaintiffs in the local court. By allowing those facts to go into evidence without being questioned is to say by implication that those facts are generally accepted and therefore why questioned the plaintiffs or their witnesses about them.

Further, the local court would be the best court to address those issues if raised. To now raised those question in this court would not be proper.

GROUND 1 (d)

Ground 1(d) alleges that the tambu sites referred to by the respondents as their tambu sites on Sareai land LR 681 is not true and the court should have conducted a land survey to ascertain who is the true owner of Sareai land.

On this ground, we make the same comment as in Ground 1 c above. There was no challenge put up by the defendant in cross-examination in the local court. As such, the truth about those tabu sites was not an issue in the local court. The court generally accepted them to be the truth.

Further, there was no request made by either party for a tabu site visit.

We are therefore of the opinion that the appellant cannot now raise this ground and make it as an issue before this court.

On the whole, ground 1 must be dismissed.

GROUND 2

Ground 2 alleges that the local court erred in allowing the hearing to proceed when the said court disallowed an application by the appellants for an adjournment on the ground that no sufficient notice was given to the appellants to prepare their case and call their witnesses who are in and around Ysabel and Western Province. The impartiality of the local court is in question. Section 10(8) of the constitution required an impartial tribunal. The local court were not impartial in allowing the case to proceed and accordingly, the Principles of Natural Justice were breached or not observed by the local court. The appellant's were deprived of their right to a fair hearing.

The appellant submitted that they did not receive the notice for hearing sent on the 2nd of July 1996. His application for adjournment to another date was not granted. Thus he submitted that they were denied the right to a fair hearing. He submitted that the Notice was address to Kia village whereas the appellant lived at Samasodu village.

That he was forced by the plaintiff (who took a policeman with him) to come in a canoe with him to Baolo for the hearing.

The respondent submitted in response that there was ample time to prepare since the chief's hearing on 26/1/1997.

He submitted that the Sesehu clan has avoided hearing.

They are using delaying tactic so as to prolong the hearing. In the meanwhile, they continued with the logging operation and are collecting big money. They were afraid to come to court for the hearing.

On the 24th June 1997 at Buala they objected to a local court sitting Justice and refused hearing.

The respondent submitted that he was worried about his land and checked all the time at the Central Magistrate's Court for a hearing date. However, the appellants did not bother. They knew they had no proper history and are happy with the money and therefore tried to avoid hearing.

He said that the letter was written a month before the hearing. Services messages was also sent. He submitted that he was also at Honiara but arrived at the place of hearing.

He submitted that the defendant in the local court was about to board M V Ligomo, but he radioed in the morning before he went.

He admit being angry with the defendants but he apologies in the local court. Also during the journey, they were making jokes.

He also submitted that the documents they intend to present in the local court were presented. The spokesman (Ene) arrived when he was beginning to talk.

Furthermore, Ene is not of Sesehu and Lote is not also of Sesehu. The dispute was between Seschu clan and Bachai clan. Ene was merely a spokesman.

On this ground we studied the sequence of events leading up to the hearing on the 25th of August 1998.

We found the following:-

1. Chiefs hearing at Baolo by Kia Chiefs dated 25th August 1996 (infavour of the Sesehu clan).

2. A further hearing by Maringe chieves on 28/1/1997 (infavour of the Bachai clan)

3. Letter to H. Sele Kia village dated 18/3/97 for L/C hearing at Kia on 23/4/97. By letter 15/5/97 by Solomon Kari indicated that his party all turned up at Kia but the hearing was cancelled.

4. By letter from Chief Magistrate dated 13th May, the hearing was rescheduled for 2/6/97 at Kolotubi.

   By letter for S.Kari dated 15/5/97 requested for adjournment to further date on the ground that it was short noticed.

5. Given the request for adjournment the hearing was adjourned by letter dated 22/5/97 from Chief Magistrate, for hearing on 23rd June 1997 at Buala.

6. At the local court session on the 25th June 1997 at Buala, the defendant objected to Justice F. Kana as a sitting justice of this case and the local court accepted the objection.

7. By letter dated 2/7/98 the parties were notified of the date, time and place for the hearing. It was about 1 month and 19 days notice before the hearing on 21st August 1998.

8. Further, service messages were sent on the 17th August 1998 and the hearing took place on the 21st of August 1998.

Following our finding on the sequence of events leading up to the hearing, we must also dismiss this ground for the following reasons:-

1) Since the dispute arose between the two clans, the parties should have been put on notice and should have thought about their customary history, evidence of tabu places, genealogy etc. It suppose to be something which the oldman should already have known.

   Preparation for schedule hearing on 23/4/97 at Kia, further reschedule for hearing on 2/6/97 at Buala, should be sufficient to have the evidence put together.

2) Further letter of notification was dated 2/7/98 for the hearing on the 21/8/98. That in our view was sufficient time.

3) Even if the letter of notification was not received, the service messages were sent on 17th August 1998 for the hearing which actually took place on the 21st August 1998.

4) Further, it was submitted that the defendant was informed from Honiara by radio message not to attend the Local Court hearing. If this is true then surely he must have been notified of the place & time for the hearing.

5) Also, it was submitted by the respondent that the defendants who were knowledgeable about the Sesehu history were in court on the 21st August, 1998 and have given evidence.

In our view, taking all the above points into consideration, we must also dismiss this ground for those reasons given above.

GROUND 3

Ground 3 alleges that the Honourable Court erred in not considering the documents tendered by the appellants as evidence especially those relating to the acquisition of land (Sareai LR 681) as well as the Timber Rights determination by the appellants under the Forestry Act. In this respect, the Court erred in law in failing to apply the law laid down by the High Court of Solomon Islands in the case of Lilo -v- Panda, Lilo -v- Ghotokera SI LR (1982) 155 when the High Court stated that the findings in acquisition proceedings which are not completed should be taken into regard by the courts as of persuasive authority.

In support of this ground, the appellant submitted that the local court failed to take into consideration. Those decisions made by the acquisition officer and also the determination of the area council for timber rights agreement.

There were other documents tendered before the local court listed on page 5 paragraph 5 of the local court judgement.

On the acquisition document, it was an agreement between the purported Customary land owners and the Commissioner of lands dated the 17th October 1973, and Marked "APPENDIX B(3)" in the local court.

The land in dispute remains as Customary land up to this present day other-wise the local court would not have jurisdiction to hear disputes over registered land. Further the doctrine of indefeasibility of title would apply which means the person have Legal title to the land has the legal interest, and legal interest binds the world.

When one looks at this document (App (B)(3) there is nothing to suggest that the issue of a dispute over customary land ownership between the Sesehu tribe and any other tribes or the Baehai tribe has been addressed by the acquisition officer.

The only question would be, why the acquisition notice was not responded to by the Baehai tribe. The respondent responded to that question by saying that the acquisition procedures were not proper and if they were, no one was knowledgeable sufficiently to know that time the contents of the notice and of what to do.

On the timber rights determination by the Havulei/Kokota area council dated the 16th January 1995, there was nothing again to suggest that the issue over Customary land ownership between the Sesehu clan and the Baehai clan have been addressed.

The determination seems to be all by default. Simply put, the decision was simply made either by hearing customary evidence from one clan, or by declaring that the clan present to be the true owner as there were no other clan present to dispute.

The question would be again why the Baehai clan fail to dispute within the given period of time.

We note that it was because of this logging operation that this dispute came before the Chieves, the local court and to this court.

The question for us to answer is, would the Baehai clan be barred from taking up the dispute against the Sesehu clan for failing to put up a dispute both at the acquisition hearing and the area council hearing?.

Our view is, since the land in dispute is still customary land, it is open for any Clan to take up the issue of Customary ownership before the Chieves and the Local Court.

The only time the issue of Customary Ownership has been addressed before the Local Court as a competent court of law and custom was on the 21st of August 1998.

Thus the taking into consideration by the local court of the acquisition determination and the area Councils resolution would be of some significance if the acquisition officer or the Area Council addressed the issue of Customary land ownership between the Sesehu Clan and the Baehai Clan.

We must therefore also dismiss this ground.

GROUND 4

Ground 4 alleges that the local court erred in not taking into consideration that Toclegu settlement which is situated on the Disputed Land was given to the settlers from Maringe by the appellants of Sesehu Clan.

This ground, like ground 3, expresses the doctrine which says that "he who has not cannot give". The Sesehu Clan is saying here that they own the land and therefore they have the right to give.

It is this same right to give that is being challenged by the Baehai Clan.

It is not in dispute that the right to give must be based on the right of ownership in custom.

The proper court to determine the right of ownership in custom is the local court after customary means of solving the dispute had been exhausted.

It is not proper to base customary ownership on the default of one party not putting up a dispute over the giving of the land to a third party. But ownership in custom should be the basis for the right to give although the question may arise as to where the Baehai Clan was when the land was given. If they were knowledgeable about the transaction, why they did not put up a dispute.

But as I have said, one cannot prove customary ownership by proving that one have given the land because the other party would question what right one has to give. But if one proves ones right in custom to own the land, then no one can question your right to give.

Where one proves his right of ownership, is in the local court.

On that basis, we cannot allow this ground also.

GROUND 5

Ground 5 alleges that the Local Court Justices had failed to consider all evidence of custom fairly and diligently in accordance with their own knowledge, skill and ability and decided the land dispute against the weight of the evidence.

On this ground Stephen Manehavi also submitted for the appellant concerning the feast made by his people from Maringe in December of 1981 again in relation to the settlement at Toelegu.

We are of the opinion that we have covered this point sufficiently on ground 4.

In all, having dismissed all the grounds of appeal, we cannot now interfere with the decision of the local court in their finding of evidence in custom.

We therefore up holds the decision of the local court dated the 7th day of September 1998.

President: Philemon Kongakile

Member: 1. George Caulton
2. Paul Kokomana
3. Alfred Koli

Magistrate/Secretary Nelson Laurere

Dated the 28th April 1999

CENTRAL MAGISTRATE COURT
HONIARA, SOLOMON ISLANDS