

IN THE CENTRAL ISLANDS

CUSTOMARY LAND APPEALCOURT

CLAC Case No. of 2005

IN THE MATTER OF:

MALEIALI WATER SOURCE LAND

BETWEEN:

ISHMAEL TAVASI & JOHN LOKU

(Representing Kaukaubala Clan)

Appellants

AND:

PETER MEKE & CHARLES F. MEKE

(Representing Gaubata Tribe)

Respondents

APPELLANTS' SUBMISSION OUTLINE

Preliminary Points

[1] Can Mr Louna confirm to the parties that although his name was mentioned in the transcript he did not in fact sit as a justice in the Local Court. If my recollection is correct his presence was objected to by the Respondents in the Local Court so he was replaced by Gehi. This is important because a judge hearing the matter in the first instance cannot sit to rehear a matter he has judicially disposed of.

[2] Apart from the Mr. John Louna, I have no other corrections to be made in respect of the transcript. If the Respondents wish to highlight some errors then they are welcomed to do so. In view of this I want to seek clarification if this court can confirm that the transcript reflects the true record of the proceedings of the Local Court.

[3] If the transcript is the true records of the local court proceedings then I seek leave for this court to adopt that transcript to be read as part of the records of this proceeding.

[4] In this proceeding, the Appellants will apart from the transcript and the local court judgment will rely on the Notice of Appeal filed on 7 April 2005 and the Affidavits of John Loku and Thomas Wilson Gue sworn and filed on 7 April 2005.

[5] Justices, because we were just furnished with the transcript we wish to further add additional appeal grounds. These are as follows:

- (i) That the local court failed to give due weight and/or properly consider the evidence of the Appellants given in the Local Court in particular the evidence of Ishmael Tavasi as to **first settlement, boundaries and tabu sites** which in Ngella custom considered the most important features of ownership claim of land;
- (ii) That had the local court consider the evidence of Tavasi in its context, the local court would have appreciated that the boundaries mentioned marked clearly the boundaries of Maleiali land;
- (iii) That the local court failed to properly consider the evidence of Thomas Ngen gere (appellant witness) and Charles Fox Meke in its context especially as to sacrificial places. Had the local court carefully considered their evidence, their evidence as to places named clearly depicts the common boundaries between Maleiali and Valevila;
- (iv) Furthermore, the local court failed in its duty to carry out a survey or failed to exercise their discretion properly whether or not to carry out a survey to properly identify the landmarks to ascertain their whereabouts.
- (v) That the local court failed to properly consider the evidence of the Respondents in the light of the express statements recorded in the transcript. Had proper weight is given, the local court would have discovered that the main evidence was given by Charles Fox Meke, no evidence was given by Peter Meke;
- (vi) That the local court failed to appreciate the inconsistencies of the statements given by the Respondents' principal witness Mr Charles Fox Meke (see pp. 36-44 of transcript);

- (vii) The local court erred in custom when it failed to consider the nature of landownership in Ngella, in that land is owned by the clan or line and not a tribe as claimed by the Respondents;
- (viii) Alternatively, the court failed to acknowledge that in Ngella custom land is owned by the line or clan and not tribe. In that it is not a custom in Ngella for a particular land to be owned by all members of the Gaubata Tribe from all over Ngella;
- (ix) Further in the alternative, in Ngella custom no two clans can worship or make sacrifice in the same place;
- (x) That the local court failed to give due weight to the acquisition of the part of Maleiali land which includes the area where the dam is currently situated, proceedings and registration of which is public record where judicial notice can be given. In any event, documents adduced were more than sufficient to conclude that the water source was acquired by the government from the Appellants' sub-clan;
- (xi) The local court failed to give weight to the evidence of the Appellants' evidence that in 1937, Paolo and Horuni of the Kaukaubala clan grant permission to the Colonial Administration in Tulagi permission to use the water source to supply its irrigation at the Maleiali Plains (now known as LR 306); and
- (xii) The local failed to give proper weight or failed to consider the evidence of the Appellants that Frank Gue of the Kaukaubala clan grant permission to the US Marines in 1942 to expand the water dam.

Maleiali water source or Valevila water source

[6] It is clear that the dispute is about the Maleiali water source. Valevila water source does not exist until 1997 when the Respondents claim the water source and renamed it

Valevila water source. It does not make any sense to claim ownership of the water source within another clan's land. In his statement (see p.4) Charles Meke stated that he is not interested in Maleiali but only interested on the part from the dam to the water source. In other words he only claimed interest of the strip of the land that follows the water source. However, Maleiali land boundary extends beyond the water source.

Customary law in Ngella

[7] Since tabu sites, boundaries and first settlement are the most important features to prove ownership in custom in Ngella, it was wrong for the local court not to carry out any survey of the landmarks. Alternatively, the local court wrongly exercised its discretion not to carry out any survey because in CUSTOM tabu sites must be proved. Without survey and inspection both parties would not be able to contradict each other and prove their case.

[8] It must be borne in mind that the burden of proof in customary law is vested on both the Appellant and the Respondent. This is a point of law stipulated in the *Custom Recognition Act*, and in various decisions of the High Court (see **Annexure 1 - *Sasango v Beliga* [1987] SILR 91**, cited in Jennifer C Care et al (ed.), Introduction to South Pacific Law). The local court cannot rely on the survey carried out by the chiefs because there was no survey carried out at all from the dam to the top of the water source. Furthermore there was no map or sketch of the areas claimed by the Respondent being adduced or provided to the Appellants and the local court despite making references to a map (see p. 41). There is therefore absolutely no evidence at all about the tabu sites presented by Meke for the local court to rely on. Nor is there any mentioned in the transcript or the local court ruling about the tabu sites. On the other hand the Appellant did furnish to the local court a sketch of the land showing its tabu sites, settlements and movements during the first discovery (see p. 13-15) (See **Annexure 2 – sketch map of Maleiali land**).

[9] Furthermore, proving customary law is based on oral evidence handed from generation to generation. For this reason any reasonable court exercising their function properly must carry out an inspection of the boundaries. This is clearly stated in Section 16 of the Local Court Act (Cap. 19) [see **Annexure 3- excerpt from Local Court Act**]. In the absence of any evidence of the survey or of the maps mentioned by Meke how would one expect the local court to accept evidence of Meke as part of the records of the local court as

required by Section 14 (1), (2) and (3) of the Local Court Act. It is submitted that for these reasons the local court exercised its discretion not to survey the land wrongly.

[10] The local court failed to exercise its discretion properly because it failed to give due weight to the evidence adduced by Ishmael Tavasi in particular the evidences of their journey, settlements, tabu and sacrificial sites from Valevila to Maleiali. If due consideration is given to the evidence as recorded in the transcript, the local court would have discovered that Kaukaubala first went to Lologana after they left Valevila and from there proceeded down the disputed river and settled in a place where it meets the Maleiali river (“the Junction”). From there Tutukoivo went up again to the disputed river and placed a peg at a cave known as Vatuluma Na Koimeramera at the head of the disputed water source. From the junction Tutukoivo went to settled at the Maleiali plains. After receiving the clan’s identity at Holo, Tutukoivo went to make his sacrifice at Base. From Base, Tutukoivo went to Tutumahegana and made another sacrifice and later went to Toetore. From Toetore Tutukoivo went to Kolakuta and established another settlement and further went up to Mount Pata. After Mount Pata, Tutukoivo went to Beti Sautila (see pp. 13-15).

[11] It is obvious had proper inspection were taken one would find the water source and the dam within the four corners of the pegs mentioned in Mr Tavasi’s evidence.

Evidence of Tavasi v. Meke

[12] The local court further failed to consider the fact that during the cross-examination of Tavasi (a total of 9 questions), the Respondent failed to find any contradictory statement made by Tavasi (see pp. 18-19). In comparison, one would find that Meke gave a lot of contradictory statements (see pp. 40-45). At page 40, Meke said that he got his power to unify the whole of Gaubata Tribe at Holo. This contradicts his evidence in chief when he said that Holo is the motherland for Kaukau tribe. At page 41, when asked “are you making a custom feasting to indicate you are unifying?” Meke’s reply was... “*the first one is at Holo and the sharing sacrifice was done in Pakapaka*”.

[13] There are at least 3 observations which can be made on this statement. The first is that nowhere in his statement in chief did he say that Gaubata tribe went to Holo. In fact his statement was, “Sir Valevila land is the mother land to the Gaubata tribe.” He then continued,

“there was no tribal grouping in Valevila. Tribal grouping come about after individual disperse and go to their respective centres to get their separate sacrifices which is sukaghi varihada and kakau tribe got sacrifice place at Holo”. At page 37, Meke continued, *“Sir only my tribe Gaubata stay back performed all their secret sacrifices...”* The second observation is that there was in fact no sacrifice made in Valevila by Gaubata tribe because their sharing sacrifice was at Pakapaka. The third observation is that **Pakapaka is not at Valevila**.

Evidence of Melkio Moha

[14] The local court failed to the properly and give due weight to the evidence of Melkio. Nor was his evidence in chief properly considered by the local court. For example, all what the court say is that the evidence of Melkio only talked about his own journey. With due respect to the local court that was clearly an error. Melkio’s evidence provides a strong corroboration of first settlement of Maleiali. He supports the fact that there were no other clans. If is to looked in detail to this evidence, this also strengthened the evidence given by Ngengere. We submit that it is not for another clan to know the details of the genealogy and history of another clan. This is generally the rule in custom of Ngella. However, it is sufficient for another clan to witness who first settled there.

Evidence by Thomas Ngengere

[15] The local court failed to give proper weight to the evidence of Thomas Ngengere. In its ruling the local court held that Ngengere only talk about his journey but failed to talk about boundary. The local court was clearly in error. The local court failed to give due weight to the fact Ngengere is a member of the Gaubata tribe of Rusua clan. His statements were therefore crucial because it is the measuring stick insofar as the evidence of Meke is concern. His evidence was virtually unchallenged (see p. 24). Meke only asked him 2 questions. The first was “what is your clan”; the answer was “Gaubata”. The second question was “who are we”, the answer was “you are from Gaubata tribe”.

[16] Furthermore, the local court failed to consider the evidence of Ngengere in its proper context. Firstly, in its context his evidence is consistent with the evidence of Meke, in that Gaubata tribe was the last tribe to live Valevila. This is confirmed by Ngengere during his

cross-examination by the local court (see p.24). Secondly, in its context the only logical conclusion why Ngengere's tribe did not come to Maleiali was that when he came down from Ligolau to Tanadoga and looked across he saw that the land below had been occupied so he went passed it and went to Kamukauila. Thirdly, in its proper context, Ngengere did in fact mention his boundaries (see p. 23). Because the Kakaubala clan had already settled at Maleiali one cannot expect another clan to claim the same land. That would bring tribal war. Finally a proper inspection of the boundaries indicated by Ngengere one would find that they were in fact outside Maleiali land and in fact the boundaries provide the dividing line between Maleiali and Valevila.

Evidence of Lionel Bogulu

[17] Again the local court failed to give proper consideration and weight to the evidence given by Bogulu. Bogulu is Gaubata man. Considering his evidence holistically (in whole) his evidence is very important. Why would a gaubata man give evidence against his tribe? In fact he is a relative of Francis Meke. He called him brother. Let me explain the reasons. Firstly, it is NOT the custom in Ngella for the whole Gaubata tribe to claim a particular land. Like I said earlier, land is owned by the sub-clan or the line. This is clearly stated in his evidence in chief when he said (at p. 25), "this is why I don't want anybody to talk about Kogere as the *tribesmen of Gaubata in this case did not own that Kogere*" (emphasis mine). Secondly, it is clear that Meke did not unify all the Gaubata sub-clans. Thirdly, it is clear that Gaubata sub-tribes cannot own the same land. Fourthly, there is simply no evidence adduced by Meke as to what particular sub-clan of the Gaubata tribe is he representing. The only evidence given was that he represents Gaubata tribe. This is clearly contradictory to Ngella custom.

Evidence of Sosi

[18] The local's court's account of Mr Sosi's evidence was summed in two sentences (see p. 2 of the judgment). What a summary! But it clearly shows little consideration being given to his evidence. Sosi is a member of the Hongikiki clan and a member of the Gaubata clan by blood. His evidence is crucial because it supports and corroborates the evidence given by Bogulu. In addition it shows the court how other tribes recognise the claim by the Kakaubala clan over Maleiali and the water source. In comparison, the Respondents although appear to

have given consistent evidence, there is really no detail evidence given by any of them other than to say “that Peter Meke said was true”. What did Peter Meke say? If I am correct there is no record of any evidence given by Peter Meke! The proper weight to be given by this kind of evidence is provided by the High Court in *Sasango v Beliga Case*. In that case the High Court said:

“I can only give a decision on the basis of customary law if that law is proved by evidence of the relevant custom. Such evidence should be impartial and unbiased. In this case, the defendant has not produced any such evidence. He did call a number of his brothers as witnesses, who all said that in custom the husband’s property must pass to them, not the woman...There is no impartial evidence of customary law before me to prove that a widow must give up all her personal property to the husband’s brothers” (at p. 106)

The acquisition proceedings

[19] Justices, it is somewhat surprising to note that the local court failed to acknowledge the acquisition proceedings in 1973 of part of Maleiali customary land which the current water dam was situated (see **Annexure 4 – Map of Maleiali water source**). That acquisition was commenced in 1973 and the public notice was gazetted on 5 April 1973 (Gazette No. 82) (see **Annexure 5 – declaration that land is required for public purpose and Annexure 6 – Offer to pay compensation**). That area acquired is now known as perpetual estate number 181-004-1, Lot 1 & 2 of LR 739 (see **Annexure 6 – certificate of title**). Furthermore, there is a certificate of no appeal lodged and filed on 10 July 1974 (see **Annexure 7 – Certificate of No Appeal**). As a court established by law, there is no need to prove the acquisition when it can simply be accepted by way of judicial notice. There is strong evidence both documentary and oral given by the Appellants. The proper weight to be given for this evidence is twofold:

- (a) whether or not the water source was given to the crown by the kakaubala clan?; and
- (b) whether or not the acquisition of part of Maleiali land provide a strong evidence of ownership by the Appellants.

[20] It is clear that the local court failed in many respects to apply customary law properly in the light of the evidence given. It is clear that the findings of the local court are one that no reasonable court could have reached.

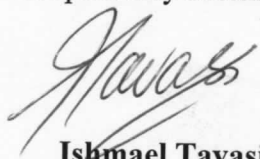
[21] On the other hand there are strong evidence given by the Appellants and their witnesses. Those evidence were impartial, unbiased and true. Whereas the evidence given by the Respondents and their witnesses were not partial, biased and have no weight at all.

Conclusion

[22] In concluding, given the compelling evidence adduced by the Appellants in the local court and given that local court had clearly given undue weight to the evidence by the Appellants, we submit that judgment should be given for the Appellants, in the following:

- (a) that the decision of the local court be substituted and award the ownership of the Maleiali water source to the Appellants with cost;
- (b) alternatively, this matter be remitted to a differently constituted local court for re-hearing.

Respectfully submitted



Ishmael Tavasi
for and on behalf of the Appellants

13 April 2010.