PAPUA NEW GUINEA

[IN THE DISTRICT COURT OF JUSTICE

SITTING IN IT'S LOCAL LAND COURT JURISDICTION]

LLC 01 of 2011

BETWEEN

In the Matter of Tabubil Plateau and Surrounding Customary Land Dispute

WANANG SENGUN CLAN
Complainant

AND

NINGKALIN CLAN
First Defendant

AND

AWONKALIM CLAN
Second Defendant

TABUBIL : ***FRANK MANUE – Chairman***
: ***K. BOKDAP - Mediator***
: ***R. KISAU - Mediator***

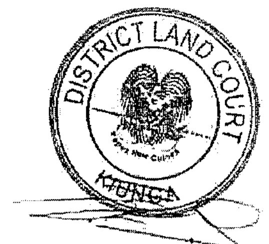
2012: 21st, 22nd, 23rd May, 30th July

CIVIL - Local Land Court – Practise and Procedure of Local Land Court - Not bound by any law or rule of law – application of General Law – Origins of the parties – Traditional methods of land acquisition – whether land was conquered – maintenance of interest in land (a Possessory Acts) - Principles of law interests in land – Principles of law by Professor Cooter – Adverse possession – Earmarks of ownership – No unqualified right to return – Application of Section 40 – Land Disputes Settlement Act.

Held: 1. Principles in *Hide Gas Project case*, not applicable
2. Consideration of *Section 40 of Land Dispute Settlement Act*, given dominant consideration

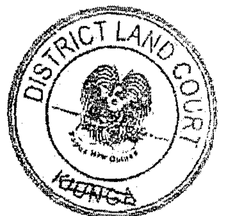
Cases Cited - **1. Hides Gas Land; RE (1983) PNGLR 309**
2. WAK –vs- WIA NO. 3356 (WS NO. 818 OF 2006)

References – **Sections 35, 69, 39 & 40 of Land Disputes Settlement Act.**



Counsel – By Spokes persons

Complainants:	Mr. George Firam Mr. Ogi Kulayok Mr. Levi Aturam	Wanang Sengun Clan
First Defendants:	Mr. Mereng Okdimeng Mr. Jack Mafu	Ningkalin Clan
Second Defendants:	Mr. Timothy John Mr. Sepik Kameseng	Awonkalim Clan



REASONS FOR DECISION

Local Land Court Magistrate FRANK MANUE: The land dispute was registered as Local Land Court No: 01/2010 and was first mentioned on the 10th December, 2010, before Senior Magistrate Patrick Monouluk. Representatives who first appeared were:- For the complainant , Wanang Sengun Clan – Mr. Kenny Aturam. For the first defendant- Ningkalin Clan – Mr. Henry Akesim, Mr. Mereng Okdimeng, Mr. Lee Yakim. For the second defendant – Awonkalim Clan – Mr. Borok Pitalok, Sepik Kamenseng.

The Court was to have commenced hearing, but that the whole matter was withdrawn as the representative of the complainant clan Mr. Kenny Aturam was not formally appointed by the complainant clan to appear for it and because he is of the maternal descend of the Wanang Segun clan which is contrary to the Min Society custom, he had no locus standi.

The case was reinitiated and registered as Local Land Court No: 01/2011 and first mentioned on 18th of October, 2011. Between the 08th of October, 2011 to 15th of May, 2012, various adjournments were made for various reasons, one of which is to allow mediation to take place.

On the 05th August, 2011, the Senior Magistrate P. Monouluk disqualified himself and thus arranged for another Local Land Court Magistrate to preside over this matter.

Most importantly from the date the case was first registered and before hearing by this Court, there has been attempts to mediate the dispute, but those attempts failed.

ON THE HEARING DATE:

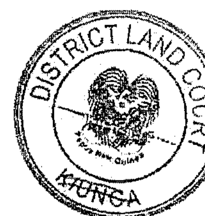
At the commencement of the hearing on the 21st May, 2012, the complainant, Wanang Sengun clan was represented by Mr. George Firam and Mr. Oki Kulayok, Mr. Levi Aturam (joint later).
First defendant, Awonkalim clan was represented by Mr. Mereng Okdimeng and Mr. Jack Mafu. Second defendant, Awonkalim clan was represented by Mr. Timothy John and Mr. Sepik Kamenseng.

Before hearing witnesses and admitting evidence, the parties agreed on certain issues which were that :-

1. *That the Court Party and disputing parties visit the boundary of the disputed land by road transport, which was done that day.*
2. *That the parties agreed that the dispute is over land ownership other then land right usage.*
3. *That the parties agreed for the court to sit after hours if need be.*
4. *The parties agreed to use the compiled affidavits and documents compiled both in 2008 and 2011 – four Volumes of documents, as evidence.*

The court then outlined the court procedures before calling of the witnesses.

The court then adjourned and visited the boundary from the westerly direction to the Easterly direction in a convoy of vehicles by road. Due to cost factor both parties agreed that, the Court would not be able to do an Arial visit of the total land disputed area. After the visit, the parties agreed to adjourn hearing to the next date.



PRODUCTION OF EVIDENCE

Evidence was produced and heard commencing the 22nd day of May 2012. In the hearing, the Court had in mind the application of Sections 35 and 69 of the *Land Dispute Settlement Act* in that the Local Land Court *"is not bound"* by any law other then this Act *"and exercised the procedure of the Court"* in accordance with *"substantial justice"*, fairness and rules of natural justice.

Sections 35 and 69 of the Land Dispute Settlement Act is here under stated:-

35 Practice and Procedure of Local Land Courts

(1) A Local Land Court –

(a) is not bound by any law or rule of law, evidence, practice e or procedure other than this Act; and

(b) may call and examine, or permit the parties to call and examine, such witnesses as it thinks fit; and

(c) may otherwise inform itself on any question before it in such manner or it thinks proper; and

(d) subject to Section 40, shall endeavour to do substantial justice between all persons interested, in accordance with this Act any relevant customs.

(2) Where a Local Court informs itself on any question in accordance with Sub Section (1)(c) it shall:-

(a) make this available to the parties; and

(b) call for and hear argument on the information.

(3) Not withstanding subsection (1) and (2), where a Local Land Court proceeds to hear and determine a dispute under Section 29(1)(a)(ii) it is bound, as far as practicable by the same rules of law, evidence, practice and procedure as those by which the Village Court or Local Court having jurisdiction in the matter would be bound.

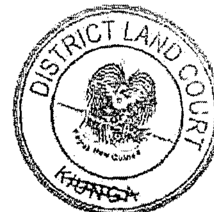
*69 **GENERAL LAW TO BE APPLIED***

In exercising its jurisdiction under this Act, A Provincial Land Court or Local Land Court is not bound by any law other than this Act that is not expressly applied to it, but shall, subject to Section 68, decide all matters before it in accordance with substantial justice.

In line with these provisions we conducted the case and did the following things, including what transpired at the commencement of the hearing and at the conclusion of the case.

On the 22nd of May, 2012, the Court proceeded in hearing, and taking down evidence. Levi Aturam was the first witness for the complainant. He said, he had compiled the volume of statements by the Wanang Sengun Clan and had it tendered in Court.

The other volume compiled in 2008 was also tendered. The court also heard oral evidence from Gisok Bisaklim, Ato Titak, Lowoim Itulaim. They each and severally also tendered written statements.



On the 23rd of May, 2012 the Court heard from the defendant clans. Interestingly, the defending clans did not call separate witnesses, but joint witnesses, who were, Mr. Mereng Okdineng, Mr. Meki Manmaning, Mr. Bruce Nokim Faewolok, Mr. Sila Kadomo and Mr. Manop Dekonong Kenop. Mr. Mereng Okdineng tendered compiled documents of 2011 and 2008. The other defence witnesses gave oral evidence and tendered written statements.

After hearing witnesses from both parties, the court, was of the view that, the parties were now not only disputing the 19.5 hectares of land as earlier indicated but disputing the whole land area as per the map of the land at page 39 of Volume 1A of 2008 compiled documents. This was also indicated at the time the land boundary was first visited, as well as in oral evidence and the documents filed in the four (4) volumes of evidence.

Due to those factors the court invited both parties to call any other witnesses who may be of relevance in their respective claims. Only the complainant decided to call one more witness, who was Mr. Obert Soti. Both parties rested their cases. The Court then adjourned for a decision by consent to 27th July, 2012, but is now pronounced on 30th July, 2012.

ISSUE:

The parties are disputing ownership of the land and so the issue is over ownership, rather than land usage right. Initially, as indicated in our introductory discussion, the disputed land was over some 19.5 hectares of land, which covers the corridor of the road, on Kiunga/Tabubil highway and as spelled out on page 5 of the 2008 volume 1A of documents:-

According to the defending clans:-

"The disputed portion is the one whose boundary begins from the Abimengbir plateau from where the hospital, through the Awon road until it meets up with the Eastern Bank of the Ok Tedi River.

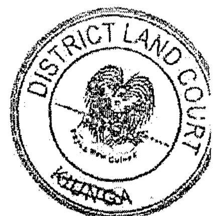
From there it follows the river bank down until it joins with the Uman Creek at Kilometre 128. Then it follows the Uman creek up the Mt. Aknor across Mt. Digek down to Wangbin Lake. From there it cuts across the centre of the lake Wangbin and follows the lake outlet which is known as the Lugum creek until it comes to where it started at the Hospital (Refer Map for details)".

We assume the map indicated is attached on page 39 of the same volume 1A document. We further verified the description in our actual orders.

The ownership dispute has now extended to the whole land area as per the map on page 39 of the volume 1A of 2008 complied documents.

OVERALL EVIDENCE

We have received, heard, and read all the evidence that have been presented to us by both parties to the Court. We would now analyse these evidences, which were given orally and through the four (4) volumes of documents presented by the parties. Evidence presented, covered, the parties history, genealogy, or family tree, their origin, migration routes, their social behaviours, their tribal fights over issues relating to social behaviour, their customs in resolving those disputes and fights, their ancestors and settlements etc. until the first explorers and civilisation settlement arrived, to date.



THE ORIGINS OF THE DISPUTANTS

The three (3) clans i.e., the Wanang Sengun clan, - the complainant and the Ningkalin clan and the Awonkalim clans, - the defending clans, in their historical back ground story say that they initially originated from Telefolip or traditionally known as Mt. Isam, in Telefomin, Sandaun Province.

According to the defending clans, there were three (3) brothers by the names in the order of birth as "FIK" whose descendants are the Fikalin clan, "IP" whose descendants are the Awonkalim and "NING" whose descendants are the Ningkalin clan.

From these clans others sub – clans came about including the Wanang Sengun clan, the Awonkalim clan and the Ningkalin clan.

This version was also conferred by the Wanang Sengun clan of their clan history and origin.

The court therefore concludes that the three (3) clans in the registered dispute did exist before civilisation exposed the unknown in this part of the Country, and had their origins from Telefolip, in Telefomin, Sandaun Province.

ANCESTORIAL SETTLEMENTS OF THE DISPUTANTS IN SUMMARY

WANANG SENGUN CLAN

Wanang Sengun clan is a sub-clan of the Fikalin clan which settled at Bultembib village and later at Bultem village. From the clan it grew and multiplied in population. It is common in the Min Society that a Chief of the clan rules and distributes or allocates land to the clans. The disputed land area was allocated to Wanang Sengun sub-clan by the Chief of Fikalin clan.

When the Finkalin settled in Bultembip, the Chief allocated land to the various sub-clans including Wanang Sengun clan.

NINGKALIN AND AWONGKALIM CLANS

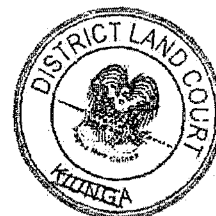
These two (2) clans initially settled in Olsobib, when their ancestor migrated from Telefolip in Telefomin, Sandaun Province. They multiplied and grew not only in population, but became fierce warriors.

Evidence shows, that, they fought among themselves over some social issue, and from there they disintegrated. Some moved back to their ancestral origin place and others to Bultembip area etc, through intermarriage.

May we say this, that it was at this point in their (the three (3) disputing parties) history that decided where they are now.

We think it was at this time in history that the defending clans took advantage of their superiority in terms of being fierce fighters and numerical strength over the complainants who were a minority clan in terms of population and strength, thus an inferior clan.

This was when the Faiwols attacked them at the **"lay down or sewerage"** site where the minority of the Wanang Sengun clan settled.



From then on the complainant clan members fled to various locations. Some went to Imigabib village and settled there, while others went to Bultem village and settled there. Other clan members moved to other places and intermarried with other clans.

The defending clan's clansmen intermarried with other clans including those of Fikalin clan and Wanang Sengun sub-clan, some of whom now currently reside at Wangbin village.

TRADITIONAL AND ANCENSTORIAL METHOD OF LAND ACQUISITION

According to evidence, there are various ways in which land is acquired. These have been the accepted practices in the Min Society until the Colonial Administration helped to cease some of those practices and tribal war fare.

METHOD ONE (1)

LAND DISTRIBUTION BY THE TRIBAL CHIEF

From evidence by the complainants, this land acquisition process was done at the initial stage when land was explored and occupied by either, hunting, gardening, fishing or settlement. This process was done when no one else occupied, hunted, fished etc on the land concerned. The tribal chief had the prerogative of dividing and allocating land to his clans.

METHOD TWO (2)

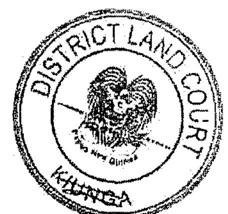
LAND CONQUEST BY TRIBAL FIGHT

This method requires fighting over land where the victorious clan conquests the land from the loosing clan.

From evidence this method was a traditional practice, but, there was no clear example of land being fought over and conquered from tribal enemies. That is, no examples were given.

Even in this particular method land is not simply conquered and occupied. When the victorious clan is to take over, a feast is normally held, where the rival clan, neighbour clans and villages are invited to a great feast. At the feast, certain ceremonies are held, where pigs, cuscus and such other animals are slaughtered and given to the loosing clan. Such valuables as dogs teeth, pigs tusks, stone axes were also given as payment. Women were also given away in marriages to mark the occasion of one clan taking over ownership of the land from the loosing clan. Those ceremonies even went to the extend of offering humans as sacrifices for the land.

And so the land is not only said to be conquest land by tribal fight, but by way of purchase as well. When this is done, then, it is customary that, land cannot be returned unless it is either fought over again and re-conquered by the original land owners.



METHOD THREE (3)

RECONQUEST LAND

According to evidence the traditional practice of re-conquering land lost in a tribal fight is by two (2) means.

First is the way of physical confrontation, after re-enforcement and the re-population of the loosing clan. That is it will normally take some time, for the clans population to grow and get alliance re-enforcement to attempt re-conquering of the lost land. They then go for tribal fight to re-claim their lost land.

The second method is by way of practicing sorcery and witchcraft against the conqueror clan and wipe out their population, depleting their numbers and weakening them before reoccupying and re-claiming the land in terms of ownership.

WAS THE CURRENT DISPUTED LAND CONQUERED BY TRIBAL FIGHT?

The question posed is very important or crucial in deciding the current land dispute. The stories of both parties are not compromised. While the complainant clan says the land was left unattended to for reasons of their ancestors escaping attack by the defending clans ancestors, for abetting or aiding warring clans men of Faiwol, the defending clans say that the disputed land was conquered by tribal fights and by purchase, as in accordance to customary practice, as earlier discussed or outlined.

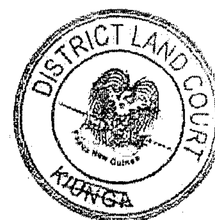
The complainant clan (Wanang Sengun Clan) says that the tribal fights between the tribesmen were not relating to land or over land ownership, rather those fights were over social problems. The defending clans (Ningkalin and Awonkalim clans) were a social nuisance in the community and so the fights were over those social matters or social evils.

The clan further says that the rituals and ceremonies of taking over the land in dispute was not made public in accordance to customary practice. Other tribesmen and neighbouring villagers were not invited to witness the occasion. It was rather done secretively. Their clan was not present as they were not invited to mark that land ownership take over or transfer.
We are tasked to decide this uncompromised position of the parties.

PERCEPTION OF THE COURT OF THE TRIBAL FIGHTS

There is evidence by the defending clans that there were tribal fights. This was not denied by the complainant clan. The evidence of Mr. Faewolok, a Fikalin tribesmen of Bultem village, and Mr. Meki an Imgar clansmen, a sub-clan of Fikalin clan of Migalsim village, clearly shows that there were tribal fights.

In our humble view the fights were not over land ownership, but over social issues. This is clear from Mr. Faewolok's evidence. In his evidence, he stated that, the main Fikalin clan had issue with the defendant's clans. When the Fikalin clans by misconception and misleading plan of the Awonkalims and Ningkalin clansmen, fought the Sypiyan clan, a sub-clan of Fikalin clan, and chased them out of Bultem village.



This fight probably resulted on other related fights.

Consequent to these fights, in our view resulted in the ceremonies of reconciliation etc of the tribesmen. This evidence is clear from Mr. Faewolok and Mr. Meki.

In our view, all these happened in the absence of the complainant clan (Wanang Sengun Clan). They were not present possibly because, firstly the paternal Wanang Sengun clan was at Imigabib village, Olsobib, which is two (2) days or so walking distance from the disputed land (Tabubil). Distance could have been a factor for their non attendance.

Secondly, may be due to communication problem they were not informed or invited. Interestingly, we note that although there are some Wanang Sengun clansmen at Wangbin village and Migalsim and other villages, they did not come forward to testify of what had transpired. We are sure their grand parents may have witnessed those reconciliation ceremonies, but have refrained from coming forward to give evidence.

Thirdly, the complainant's clan and more particularly the Spokes person's parents and grand parents were not in great number to attend, even if they were invited or informed. And they may have remained at Imigabib for safety reasons.
We particularly, take note that all the representatives of Wanang Sengun clan are from Imigabib village, and are Wanang Sengun clansmen.

In answer to the question of whether the land was conquered, by tribal war fare, we humbly answer it in the negative.

Having stated that, the next question we are to consider is:-

WAS WANANG SENGUN GIVEN RECOGNIZANCE BY THE ADMINISTRATION?

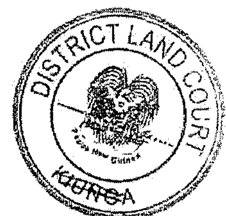
We said earlier, that, we believe there are Wanang Sengun clan members in Migalsim, Wangbin and Bultem, villages, but for reasons known to themselves and the complainant clan, they have not come forward to testify and help the court to decide the disputed land issue.

However, we have noted from documents tendered to us to assist us in answering the question that has been posed. On Page 10 of volume 1B, and on Page 33 of volume 2B and on Page 9 of volume 2A, we see the documents.

We noted the same General Expenses form used to purchase the Kiunga-Tabubil Road Corridor from approximately Km 128 to Km 134.5 consisting of 175.89 hectares at K75.00 per hectare. The payment was made to the Agents of "Wanasem" clan of Wangbin village, Kiunga, WP.

The Agents who signed out for the "Wanasem" clan were Borok Bitalok, Sepik Kamensiung and Kungim Uneng.

In our humble view "Wanasem" was intended to be Wanang Sengun , but it was either misspelled or mispronounced and written as it states. And signing was recorded as on 18th July 1983. The amount paid for is stated as K12,891.75.



We now know from evidence that the so called Agents of "Wanasem" clan are not of Wanang Sengun clan but are of Awonkalim clan and Ningkalin clan.

Whether the payment was actually given to the Wanang Sengun is not known, as no evidence was lead to who received the payment and benefited.

Prior to this purchase agreement there was a sketch plan (map) which both parties included in the four (4) volumes of evidence.

The sketch plan appears on:-

Page 49 of volume 1B; and
Page 8b of volume 2A.

These sketch plan also identifies Wanang Sengun on it. The sketch plan was done on 18th May1982.

From these pieces of evidence, we now can safely conclude that there are some Wanang Sengun clan members in Wangbin village as we alluded in our earlier discussions.
Whether they (the Wanang Sengun clan members) are of patrilineal or matrilineal decent is something we cannot safely conclude.

Certainly, the Surveyors could not have taken it from else where to insert on the sketch plan but from Wanang Sengun clansmen living in Wangbin village or probably from leaders in the village who are now the spokesperson of the defending clans.

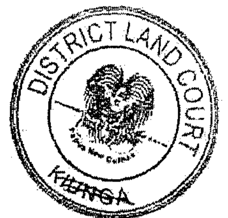
We therefore conclude with certainty that Wanang Sengun clan was recognized by the District and Provincial Administration of Western Province.

WHAT OF FETOK TALBUYAB?

We have posed to the above question because the defending clans claim, that, Fetok was a Wanang Sengun clansmen and who divided up the land now in dispute and gave different portions to the defending clans. He had no sons, so his daughters who married into the defendant's clans inherited the land now in dispute. This is explained on Page 56 of volume 1A of the 2008 compiled evidence.

The complainant clan however deny that this particular ancestor is of Wanang Sengun origin but was a clansmen of the Faiwol. (See page 68 of volume 1B of the compiled volume.)

We have considered this issue and the opposing claims. In our view Fetok was probably not Wanang Sengun clan but a Faiwol. We have come to this view because of the following circumstances:-



First; it is clear from evidence that the origins of the parties are from Telefolip, Telefomin, West Sepik Province. The ancestors of the defending clans then migrated to Olsobib area, where they settled. While being settled there, a fight broke out due to social problems created by the ancestors of the defending clans. Then their settlement became unstable, unsafe and they moved out. Some moved to Bultembib village through an intermarriage. From there, another social problem erupted, caused by the ancestors of the defendant's clan. These social evils which lead to fights continued and the Wanang Sengun clan ancestors were attacked, when they harboured, aided or hosted the Faiwols who were on an attack mission. And because, the Wanang Sengun clan was a small and weak clan they fled from their settlement. Thus abandoning their land, now in dispute.

In their absence, the defending clans continued their misbehaviour of social evils with the Fikalin clan and during which the defending clans intermarried with Fikalin clan and the remaining sub-clans.

In our humble view it was at this stage, that the defending clansmen's ancestors came to the knowledge that there were possibly no descendant of Wanang Sengun claiming ownership of the land now in dispute, living and using the land.

We believe that, Fetok probably married a Wanang Sengun women and was allowed to use the land now in dispute. Before he died, he allocated the land to the defending clans.
The argument by the defending clan saying that the land has been paid for, through ceremonies and deaths and giving away of women, in our view is based on the settlements, and ceremonies of the fights that erupted over social issues, and not over the land

We unanimously believe that the fights that occurred were not over the land in dispute, but arose out of the social issues and the ceremonies that followed were over settling those social issues and in the process, marriages were given to quell the continuous fighting's caused by the social issues, which also resulted in several deaths.

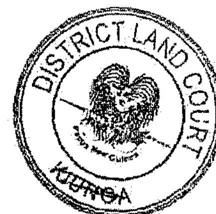
WHY HAS IT TAKEN SO LONG TO REGISTER THE DISPUTE OVER THE OWNERSHIP OF TABUBIL PLATEAU AND THE LAND IN DISPUTE?

This question was raised by the Court to the witnesses of the complainant and the defendant.

To our dismay, no one had any explanation to offer. We had to be satisfied, why, the complainants had taken so long to claim ownership in a lawful way and in a lawful form if they claim to be the true land owners.

Not being satisfied, we perused into the compiled volumes of documents as tendered. From these volumes, we discovered the following:-

1. The attack on the Wanang Sengun clansmen at the "Lay down" site disbursed them and they escaped to other villages including Imigabib.
2. That was some 60 years or so ago, from our estimation.
3. Attempts were made to fight the ancestors of the current occupants of the land, which the defendant's clan ancestors, but without success.
4. Then Mineral Explorers came after the Colonial Masters settle in the area, and quelled the warring clansmen of their tribal fights.



5. This was when the Wanang Sengun of Imigabib began to have some interest in the land now in dispute in a civilized way. Spokes person as Irinakeng who attempted to see the Patrol Officer at Olsobip to assist him in claiming land ownership of Tabubil.

Thereafter Direkim followed suit approaching Government Officers at Kiunga to facilitate mediation over the land ownership issue. He went to the extend of mediating to strike a deal with the leaders in Wangbin village, but to no avail.

Direkim's son Firamganeng in 1992 continued in pursuing their interest in the land in dispute by way of writing to the defendant's clan to include the complainant clan to receive benefits. This request seems to have been absolutely ignored.

In 1995 – 1996 Mr. Levi and Kenny Aturam made further attempts by approaching Government Officers, responsible for Land mediation at Kiunga to accommodate land mediation over the current land dispute. That request was not accommodated, for reasons known only to Government Agents in Kiunga, Western Province.

From these analyses we are reasonably satisfied that the complainant's clan did attempt to lay claim of "interest" over the land in dispute ever since, since the exploration stage of the Ok Tedi Mine and prior to that stage.

The Law:

Sections 39 and 40 of the Land Dispute Settlement Act sets out some guides and circumstances in which a Local Land Court having heard a dispute is bound to make an order.

39. ORDERS GENERALLY.

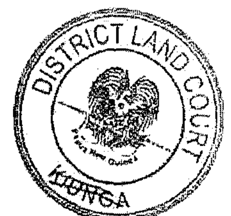
(1) On the completion of a hearing under this Part, the Local Land Court shall make an order in accordance with this section.

(2) In making an order under Subsection (1), a Court shall, subject to Section 68, apply the customs of the area concerned, and in particular shall consider the customs of the area in so far as they relate to–

(a) interests in land that are recognized by custom; and
(b) the process by which such interests are allocated or re-allocated by custom.

(3) Subject to Subsection (2), the customary interests in relation to land that a Court may take into consideration include customs as to–

(a) the exclusive use or possession of land; and
(b) the disposal of land or an interest in land; and
(c) the use or possession of land for limited purposes; and
(d) the growing or harvesting of garden crops or tree crops; and
(e) the exclusive use or possession of trees or improvements on land; and
(f) the use or possession of trees for limited purposes; and
(g) the fishing, farming or grazing of animals; and
(h) the hunting or gathering of animals or vegetable matter; and



(i) the collecting or mining of earths and minerals permitted by law; and
(j) passages or landing places.
(4) An interest referred to in Subsection (3) may be–
(a) in relation to a particular class of things or of a general nature; and
(b) for a definite or indefinite period or subject to a contingency.

(5) Without limiting the generality of the preceding provisions of this section but subject to Subsection (6), an order under Subsection (1) may include provisions that–

(a) the parties be allocated interests in the land in dispute in accordance with the order; or
(b) the land in dispute be divided, or a boundary to the land be declared; or
(c) the land in dispute or an interest in the land be held in common by the parties with or without conditions or limitations as to use; or
(d) none of the parties has established any interests in the land in dispute; or
(e) one or more of the parties have established interests of a limited nature only in the land in dispute, but none of the parties has established an interest in the exclusive use or possession of the land; or
(f) compensation or customary tributes be paid; or
(g) a feast be given
or any other provision that the Court thinks appropriate.

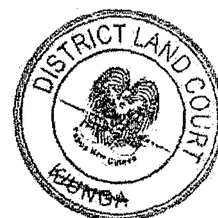
(6) Notwithstanding Subsection (5), an order shall not include–

(a) a provision regarding an interest that did not form the subject-matter or part of the subject-matter of the dispute over which the order is made; or
(b) a provision regarding a person or group who was not a party to the dispute.

40. ORDERS RELATING TO RETURN OF FORMER INTERESTS.

Notwithstanding this Act, if a Local Land Court is satisfied in relation to an application under this Part that–

(a) one of the parties to the dispute is short of land and another party has an abundant supply of land; and
(b) the party that is short of land has within 100 years before the making of the application held an interest or interests in the land or part of the land of the other party; and
(c) the return of all or part of the interest or interests in the land referred to in Paragraph (b), or the grant of some other equivalent interest or interests by the other party, will lead to a peaceful and effective settlement of the dispute; and
(d) the party deprived of land will still have an abundant supply of land after the return or grant of the interest or interests has been made, the Court may order that–
(e) all or part of the interest or interests previously held by the one party be returned to it by the other party, or that the last-mentioned party grant to the first-mentioned party some other equivalent interest or interests in its land; and
(f) such compensation or customary tribute be paid or feast given as in its opinion is just, subject to such conditions and limitations as the Court determines.



The leading precedent on what considerations to give in customary land ownership is set out in the case of ***Hides Gas Land, RE – (1983) PNGLR 309***

This was a case where a Land Titles Commissioner was appointed and presided by Amet J. (as he then was) over disputes among various clans in the Gas Project area in Komo, Southern Highlands Province. The Court had to decide ownership over areas of land covering main road project from the Tari-Komo road into the main camp site, main camp site and water line easement, plant site and its easement and the gas trunk pipeline from Girebo water to the well heads.

In that case the Court heard competing genealogies from the disputing parties. This was acknowledged by the Court. The Court also acknowledged the importance of names that are associated to the origins of those who discovered different places.

This is not uncommon to other parts of Papua New Guinea,

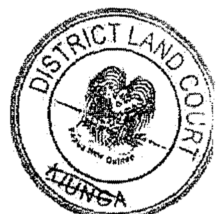
In accepting fully all that each of the competing parties had described their genealogies of their ancestral origins, refute or decide which is more correct and which is more superior, the Court said these factors should not be the only factors to be relied on. When arriving at a decision, the Court further stated that... *"it is not sufficient to rely upon genealogical ancestral history and the supportive land marks descriptions by name as being conclusive evidence of ownership, if that oral history traces the origin of a particular tribe or people back thousands of years or hundreds of years without taking into account many other factors since that time to the time of dispute, it would make determination of ownership of land totaling meaningless if there had been numerous other intervening factors between the origin of that group of people to what the present circumstances are.*

It is important to state what other factors ought to be taken into account in a changing, developing nation and land tenure system, such as happening in Papua New Guinea at the present time.

In my view, as a matter of principle, the tribunal determining disputes of this nature, such as land mediation tribunals, Local, District Land Courts and, finally superior tribunals such as the courts and the Land Tittles Commission, ought to begin to develop a system of determining ownership of land which takes into account both the traditional values and methods of determining ownership as well as the development aspirations and interests of a wider Provincial and National Community to arrive at principles which will be uniformly utilized and applied, consistent with the constitution's directive to develop a consistent and coherent system of indigenous jurisprudence.

This means that the very traditional and ancestral methods and values are not to be exclusively relied on, but to take them into account together with what are required of the modern development interests of the local people as well as the Provincial and National Governments on behalf of the people of the nation as a whole".

Having stated that, the Court quoted from Professor R.D. Cooter's book titled **"issues in customary land law"**. He wrote *"The problem is not to declare what people know but to discover what is implicit in what they do. Melanesian Legal Principles are to be discovered while deciding cases in customary law, which can only be done by Courts, not Parliament".*



The Court then restated some principles which were derived from the Professor's studies which we will refer to in our discussions later.

In ***Hides Gas Project Land Case***, the defending clans (Hiwa) are the incumbent on the land who had been indentified in a quasi-census land investigation, conducted by the investigation team that they were determined to be owners for the purposes of compensation. The complainant clan (Tuguba Tribe) are generally resident in Komo. In conclusion, the Court said that because Tuguba Tribe generally living in Komo area had accepted the Hiwa people's possessory rights to occupy and use the portions of land in dispute and finally practical purposes as owners.

DIFFERENCES AND SIMILARITIES

The ***Hides Gas Project case*** has some similarities and some differences to the current case.

In the ***Hides Gas Project case***, the parties commenced disputing when development commenced, thus the dispute was ignited by development interest, while in this case, there was an ongoing interest the Wanang Sengun clan to re-occupy the land, from prior to colonization and even at the time of exploration stage of Ok Tedi and even thru, Independence period and to date, by way of attacks on the defending clans and attempting to register their dispute with Government Authorities.

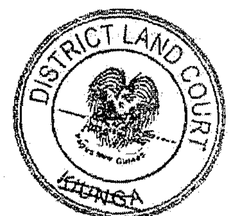
Second noticeable factor, is that, in the ***Hides Gas Project land-case***, the incumbent residents were the only ones except for a clan of Tuguba, were in possession and occupying the land, whilst in the current case, the occupants and possessory rights were of the defending clans and some of the complainants clansmen.

Thirdly, the Investigation Team in the ***Hides Gas Project land case*** identified the Hiwas, the defending clans to be owners for the purposes of compensation and other legal transactions between the land owners, the developers, and the National Government, where as in the current dispute, Wanang Sengun was identified to be also an owner for the purposes of compensation and legal transactions, as per the sketch map and the General Expenses prepared and compensation paid.

Notably also is that, in the ***Hide Gas Project case***, the disputes were over land which had gas field sites, and road corridors, whilst in the current case, the dispute is over land on which the Tabubil township stands and the corridor of the Tabubil-Kiunga Highway and the whole land area, as indicated during the land boundary visit.

An obvious similarity in the ***Hides Gas Project Case*** and this case is that rest of the land apart from where the *"Tabubil Township"* sits and the *"Corridor of land along the Tabubil-Kiunga Highway"* runs, the (19.5 hectares) is not being disputed, although the parties indicated by showing the boundaries of the whole land under dispute at the time of land inspection by the Court party. This dispute not only was incited mainly by development interest, for compensation purposes, but due to land shortage.

Having said that, are we, as a Local Land Court bound by the statement of Principles outlined by Professor R.D. Cooter?



We take it that as they were adopted by the Court and thus form, part of the Court judgement as a precedent, we are bound. However the ***Hides Gas Project*** case was heard and determined by the Court under the *Land Title Commission Act*, whereas this dispute is being heard and be determined under the *Land Dispute Settlement Act.*

INTERESTS IN RELATION TO LAND

Section 39(3) of the *Land Dispute Settlement Act*, as cited above, outlines various features and usages of the land to be considered.

On our two (2) visits of the land boundaries, both by road and air, and oral evidence, and even from the compiled volumes of evidence, both disputing parties were silent over the aspects stipulated in *Section 39(3) of the Act.*

We were told during boundary visits only of the names of mountains and creeks and old and new Wangbin village sites and an old village site at *"Lay down" which* the ancestors of the complainant clan settled.

We were only told also of houses in old Wangbin and new Wangbin villages which are occupied by the defending clan members and Wanang Sengun clansmen of Wangbin village.

In applying the principles adopted from *Professor Cooter's book* in the *Hides Gas Project Case:-*

1. Adverse Possession:

   A group that resides upon or improves land for a sufficient time without the permission or active opposition from others thereby now owns it.

   A group that uses land for a sufficiently long period of time without the permission or active opposition from others, but does not reside upon or improve it, thereby acquires a use right in it.

2. Earmarks of Ownership:

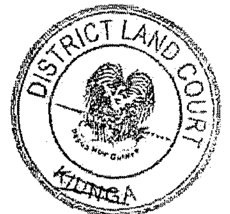
   Land can only be said to "belong" to a group when it is shown that either neighboring groups acknowledge their claim by not challenging it or; by their ability to occupy and use the land, and to stop others from doing likewise, they show that they exercise controlling interest over it.

3. **Maintenance of interest in land (a Possessory Acts).**

   An interest in land is maintained by building houses and settling on it and by gardening, cutting and burning if off, hunting and collecting from it or forbidding others from occupying and using it.

4. ....;

5. **No unqualified right to return:**



Once a group abandoned it's ancestral land by cutting all ties and associations with it, they cannot return and claim it, at a much later date without the agreement of those who, prior to that date, have assumed controlling rights to it.

6. ....,

7. ....,

8. ....,

However, there is no clear evidence that the Wanang Sengun clan members at Wangbin village had **NO** Adverse possession, ear mark of ownership, over the land in dispute nor can they be said to have had a *"no unqualified right of return"* to the land.

Application of the Principles:

1. **Adverse Possession:**

In applying this principle to the current case, we find that, there was opposition by the ancestors of the spokes persons of the complainant clan when the attempted to organize allies and attacked the defending clans ancestors by physical confrontation and by other means such as sorcery and witchcraft causing a lot of them to die. Eventually Migalsim villagers came to their rescue. They took refuge there. In any case, Wanang Sengun clan members in Wangbin village also attributed to using the land without much opposition from those of Imagabib village, Olsobip, now the decedents of now the spokes persons of Wanang Sengun clan, or the defending clans of Wangbin village.

2. "Maintenance of interest in land (or Possessory Acts); (above)

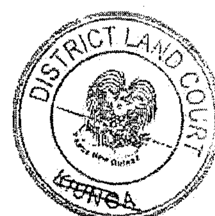
An interest in land is maintained by building houses, settling on it and by gardening, grazing or burning it off, collecting from it, or forbidding others to occupy and use it...,

We find that none of the parties testified of how they had an interest on the land. Neither did they show any evidence of gardening, grazing, burning off etc. on the land.

3. Earmarks of Ownership (above)

As regards to this principle;

We find that there were attempts made by the complainant clan to occupy the land either by attacks on the defending clan or by other means and there were continuous fights on the land. The attempts by the complainant clan to claim "interest" of the land continued, until colonization and even after Independence in 1975. We are therefore unable to say that the defending clans were occupying the land earmarked of ownership.



4. No unqualified Right to Return; (as above)

As to the Principle of **<u>NO</u>** unqualified right to return.

We find that, although a faction of the Wanang Sengun clan abundant the land after the attack at the *"Lay down or sewerage"*, site, and resided at Imigabib, factions of the Wanang Sengun clan living now at Wangbin village, and those who live at Bultem and Migalsim villages and particularly those at Wangbin village maintained ties and interest on the land, as we infer from evidence.

We therefore are unable to say that the principles outlined by Professor Cooter are applicable in this scenario. May we also, say that, we did not have the opportunity of referring to Anthropological Studies, carried out of the Min Society, if any, in deciding this dispute, whereas the *Hides Gas Project Case* had that opportunity. Had we had that opportunity, it would have been a privilege and of much help to the Court.

ARIAL VISIT OF BOUNDARY OVER ALL DISPUTED LAND.

At the conclusion of our decision on the 30th of July, 2012 we said we would do a bit of policing of our decision. This we do now. We conducted two (2) visits over the land in dispute. First, was done on the 21st May, 2012 by road and the second time was on the 30th of July, 2012, before the decision was pronounced in the afternoon.

On Arial visit we noted some permanent fixtures or development on the land.

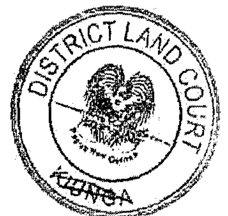
We flew around the whole land area and around Wangbin lake and the flew around the initial disputed portion of land described on page 52 of Volume 1A of documents. The sketch plan on page 39 of Volume 1A of documents was also copied with the initial disputed portion of land according to the defending clan on page 52 of the Volume 1A documents. They were given to the parties, for them to translate, the described portion of land onto the map or sketch plan and have them given to the Court before decision. Only the defending clans did it while the complainant clan did not as they probably misunderstood.

We further verified ourselves the described portion as per page 52 of Volume 1A of the documents. And we would describe them the features in the actual boundary to be set by the court in the orders (that is the features in the Tabubil Township).

CONCLUSION IN INTEREST TO THE LAND AND ORDERS.

In view of the alluded findings in applying the principles to the facts, we are unable to say that the defending clans have exclusive right of ownership over the disputed land. Having considered, all that has been discussed, we propose to consider applying the guidelines given in Section 40 of the *Land Disputes Settlement Act*, which has been quoted above.

In arriving at our decision, we have considered all that has been raised and discussed. And we had also considered the adverse and the positive effects of our decision.



We have also considered as to how we would exercise this Court's powers under Section 40(e) and (f) of the *Land Disputes Settlement Act* which says:-

"the Court may order that:-

> *(e)* *all or part of the interests previously held by the one party be returned to it by the other party, or that the last-mentioned party grant to the first – mentioned party some other equivalent interest or interests in its land; and*
>
> *(f)* *such compensation or customary dispute be paid or feast given as in its opinion is just"*

In deciding, which land interest to be awarded to which party, we consider that, the initial disputed land area should be the focus of our decision.

The Court Orders are a reflection of all the Sectors given under Section 40 of the Land Dispute Settlement Acts and based on fairness and substantial justice to both parties.

In deciding accordingly, we are also guided by the case of *WAK –vs- WIA No: 3356 (WS No: 818 of 2006)*, in view of the fact that a portion of the disputed land is now owned by the Independent State of Papua New Guinea, on which the Tabubil township sits and leased by Ok Tedi Mining Limited, as well as the corridors of the land along the Tabubil/Kiunga Highway.

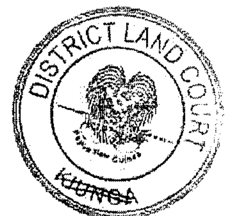
The scenario in that case is much similar to this dispute in that the respondent party was getting benefits from the State. The complainant/plaintiff in that case was not receiving any of the benefits so the applicant applied to be recognized as land owner to also receive some benefits from the State.

The Honourable Court held that the plaintiff had to first resolve land ownership over the land by custom before the Local Land Court, under the *Land Dispute Settlement Act*, before claiming compensation from the State.

Although, not discussed in our earlier discussions, when applying whether a party to the dispute is short of land; we note from evidence of Gireng Motok of Alkalin clan of Faiwolmin tribe in Bolangun village, Olsobip District, Western Province that the complainant clan does not own land at Imigabib village, Olsobip District. They only have usage rights. Gireng Motok's evidence was not rebutted nor was it tested in any way. We accept his evidence to have creditability.

In applying whether the complainant clan has held interest in the disputed land, we find that there are some Wanang Sengun clan members in Wangbin village, from the exploration stage of Ok Tedi Mine to date who have had interest on the land implicitly. This is so by the fact that there are Wanang Sengun clansmen living in Wangbin village.

In applying *Section 40(c) of the Act*, we believe substantial justice will be done to both parties and will lead to peace. And in applying *Section 40(d) of the Act*, the defending clan would not be deprived of their interest on the land as there is abundance of supply of land.



In line with *Section 40(e) and (f) of the Land Disputes Settlement Act,* we unanimously make the following orders:-

ORDERS:

1. The whole land in dispute shall be divided in the following description:-

Note: (This is the description on page 52 of Volume 1A of the Documents).

(a) *From Abimengbir plateau from where the hospital is, through the Awon road until it meets up with the Eastern bank of the Ok Tedi River. From there it follows the river bank down until it joins with the Uman creek at Kilometre 128. Then it follows the Uman creek up the Mt. Aknor across Mt. Digek down to Wangbin Lake. From there it cuts across the centre of the Lake Wangbin (from the Northerly direction) and follows the Lake outlet (on the Southerly direction) which is known as the Lugun creek until it comes to where it started at the hospital. (Refer map for details) is awarded to Wanang Sengun Clan.*

Note: *(This is the Courts translation of the above description)*

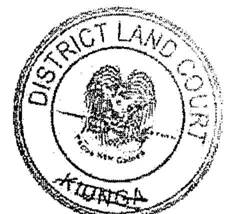
From Abimengbir, where the hospital staff hourses are, it runs through, FAIWOL STREET, (Not AWON road) across to the Papua New Guinea Bible Church (PNGBC), straight across to the tallest of communication tower on the Western end of the "white House" (Ok Tedi Mining Offices) and to the Western side of Star Mountains Hash Club to the Eastern Bank of the Ok Tedi River. From there it follows the river bank down until it joins with Uman creek at Kilometer 128. Then it follows the Uman creek up the Mt. Aknor across Mt. Digek down to Wangbin Lake. From there it cuts across the centre of the Lake Wangbin (from the Northerly direction) and follows the Lake outlet (on the Southerly direction) which is known as the Lugun creek outlet until it comes to where it started at the hospital. (Refer map for details) is awarded to Wanang Sengun Clan.

(b) *Any interests of the defending clans on the afore said land areas, (as per Order 1(a)) such as grazing, gardening, etc. shall be maintained until, these improvements rundown but that no new gardening, grazing or improvements etc be made, there after and here on after.*

(c) *Any permanent development or structure may be maintained or renovated within the current boundaries.*

(d) *The old Wangbin and new Wangbin village sites to remain as they are without new improvements or developments outside of the village boundaries by the defending clans, unless permission is sort and granted by Wanang Sengun clan.*

(e) *In view of order 1 (d) the current improvements or developments of the defending clans may be maintained within the old and new Wangbin village boundary sites.*



2. The remainder of the land on the Westerly side shall be awarded and maintained by the defending clans. (*NINGKALIN AND AWONKALIM CLANS*)

3. Wanang Sengun clan shall host a big feast for the defending clans in accordance to custom within two (2) years, but excluding human sacrifices.

ORDERS ACCORDINGLY.

Complainants:	Mr. George Firam Mr. Ogi Kulayok Mr. Levi Aturam	Wanang Sengun Clan
First Defendants:	Mr. Mereng Okdimeng Mr. Jack Mafu	Ningkalin Clan
Second Defendants:	Mr. Timothy John Mr. Sepik Kameseng	Awonkalim Clan