THE COMPLEX REALITY OF LAND TENURE AND LAND DISPUTES IN PAPUA NEW GUINEA: THE CASE OF *KULA OIL PALM LTD v TIEBA*

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ABSTRACT

The complicated approach to land tenure and land disputes in Papua New Guinea can be attributed to the interplay between local customary law and the formal legal system in a legally pluralistic, post-colonial country. This is evidenced by the decision of *Kula Oil Palm Ltd v Tieba,* one of few cases heard before Papua New Guinean courts that specifically concerns environmental protection and anthropogenic climate change. Injunctive relief was ordered to prevent the defendants from causing further environmental damage to land within the ecological buffer zones of the plaintiff company's palm plantation. Despite the court's proactive approach toward ensuring climate change mitigation measures are enforced, this case note argues that the judgment lacks critical engagement with the underlying land dispute.

This case note provides a brief overview of Papua New Guinea's colonial history and contemplates its impact on the types of land tenure that now exist. It then considers *Kula Oil Palm Ltd v Tieba* against the broader context of illegitimate land-grabs that have occurred across Papua New Guinea via the legal mechanism of a State Lease. The case note concludes by examining the operation of Village Courts, a less formal dispute resolution method that successfully administers customary law. Overall, these discussions make apparent that overly formal, introduced approaches to land management are incompatible with local custom in Papua New Guinea.

1. INTRODUCTION

The 2021 judgment of *Kula Oil Palm Ltd v Tieba*[1] is one of few cases that has been heard before Papua New Guinean ('PNG') courts that specifically concerns environmental protection and climate change. The action was brought by a large-scale palm oil producer against PNG defendants occupying buffer zones on the plaintiff's palm plantation. Interestingly, the Court held in favour of the plaintiff company, citing the importance of its buffer zones to biodiversity conservation and reduction of greenhouse gas emissions. The Court set important precedent by emphasising the proactive role judiciaries should take to limit environmental degradation in light of climate change. Despite this radical position, critical consideration of customary land tenure issues in PNG is noticeably absent from the judgment. This case note takes the view that

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[1] *Kula Oil Palm Ltd v Tieba* (National Court, Papua New Guinea, Kandakasi DCJ, 16 August 2021) available via www.paclii.org at [2021] PGNC 611 ('*Kula Oil v Tieba'*).

land disputes in PNG are complicated by legal pluralism, as formal legal systems are incompatible with the customary law principles relating to land.

Part 2 of this case note delves into the *Kula Oil v Tieba* decision, highlighting the Court's emphasis on environmental protection and climate change. Part 3 provides commentary on the Court's omission of issues pertaining to customary land. Part 3.1 considers how colonial influence has resulted in legal pluralism in PNG today. This understanding informs the subsequent discussions. Part 3.2 outlines the different types of land tenure in PNG, followed by Part 3.3 which explores the contentious lease-leaseback scheme that has facilitated the illegitimate acquisition of customary land for large industrial users. Lastly, Part 3.4 explores the jurisdiction of Village Courts in resolving land disputes. Some concluding remarks are offered by Part 4.

2. THE CASE

Overview

Kula Oil v Tieba was a civil proceeding heard on 13 and 16 August 2021 in the National Court of Justice, one of the two higher courts in PNG. It was presided over by Deputy Chief Justice Ambeng Kandakasi, who handed down his decision on 16 August 2021. Kandakasi DCJ is a Papua New Guinean judge from the Enga Province.[2] He is currently the second-most senior judge in PNG.[3] Mr N Asimba was counsel for the plaintiff,[4] whilst Mr Brian Tieba represented himself and all the defendants.

The Parties and their Claims

The dispute concerns land in the buffer zone of the plaintiff's oil palm plantation.

The plaintiff's claim

The Plaintiff is Kula Oil Palm Limited (KOPL). KOPL is a subsidiary company of New Britain Palm Oil (NBPOL), a large-scale industrial producer of palm oil based in PNG. NBPOL is the largest private sector employer and the largest agribusiness operator in PNG.[5] It has over 146,000 hectares of land bank across PNG and the Solomon Islands, of which over 67,000 hectares is planted with oil palm in PNG.[6]

Relevant to this case is the large oil palm plantation KOPL operates on land in the Oro Province acquired by a State Lease. This land will be referred to as 'the Land'. A condition of the State Lease is that 'The Lease shall be used bona fide for Agricultural purposes only.'[7]

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[2] Julie Kessler, 'A Chance Judicial Encounter in Remote Papua New Guinea', *Asia Times* (6 January 2017).
[3] National and Supreme Courts of Papua New Guinea, *National Court* (2023) <https://www.pngjudiciary.gov.pg/national-court>.
[4] Mr Asimba's first name was not provided in the judgment.
[5] Paul Oeka, 'New Britain Palm Oil Limited Opens Corporate Headquarters in West New Britain Province', *PNG Business News* (8 March 2023).
[6] New Britain Palm Oil Limited, 'Our Operations' (2023) <https://www.nbpol.com.pg/operations.html>.
[7] *Kula Oil v Tieba,* above n 1, [5].

KOPL is a member of the Roundtable on Sustainable Palm Oil (RSPO). To remain certified as a 'sustainable' producer by the RSPO, KOPL must maintain a buffer zone around their palm plantations. Buffer zones are riparian forest corridors which are preserved with the aim of reducing the impact of plantation activities on neighbouring flora, fauna and river systems. Their high ecological value is attributed to their contribution to tropical ecosystem functioning which would otherwise be lost in an oil palm monoculture.[8] Although not considered in the judgment, background research reveals that RSPO has been criticised as a greenwashing tool. [9] Its certifications of 'sustainability' are considered merely an illusion that hides forest destruction and human rights abuses.[10]

The defendants' claim

The First Defendants are Brian Tieba, Tania Tieba and Amos Tieba ('the Tiebas'). The Second Defendant is Popondetta Institute of Higher Education, the tertiary education business the Tiebas operated in the buffer zone. Mr Brian Tieba represented all the defendants at Court after their request for an adjournment to secure legal counsel was refused.[11]

The Tiebas first entered Mitsero Estate, an estate in KOPL's buffer zone, in March 2020. In response to this intrusion, KOPL wrote to the defendants to vacate the area on two occasions in March 2020. However the Tiebas continued to clear trees within the buffer zone and built various permanent structures upon the land, including their residential home and the Popondetta Institute.[12]

The defendants claimed that they had purchased Mitsero Estate from its customary landowners and were therefore its lawful owners. To support this claim, the Tiebas obtained a preventative order from the Village Court against KOPL. The order restrained KOPL from 'breaching the peace and good order of their establishment on the land.'[13] Armed with this order and their claim of ownership, the Tiebas resisted KOPL's two further requests to vacate Mitsero Estate in December 2020. Evidence revealed that the defendants continued to cause substantial environmental damage to the buffer zone.[14]

The cause of action

In response to the defendants' continued intrusion on the buffer zone, KOPL sought injunctive relief from the National Court in the form of interim restraining orders. If granted, these orders would force the Tiebas to cease their entry, occupation and destruction of the buffer zone.[15]

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[8] Alex Horton et al, 'Can Riparian Forest Buffers Increase Yields from Oil Palm Plantations?' (2018) 6(8) *Earth's Future* 1082.
[9] Roberto Gatti and Alena Velichevskaya, 'Certified 'Sustainable' Palm Oil Took the Place of Endangered Bornean and Sumatran Large Mammals Habitat and Tropical Forests in the Last 30 Years' (2020) 742(1) *Science of The Total Environment* 140712.
[10] Roberto Gatti and Alena Velichevskaya, above n 9.
[11] *Kula Oil v Tieba,* above n 1, [3]-[4].
[12] *Kula Oil v Tieba,* above n 1, [6].
[13] *Kula Oil v Tieba,* above n 1, [7].
[14] *Kula Oil v Tieba,* above n 1.
[15] *Kula Oil v Tieba,* above n 1, [8].

The key question for the Court was whether the defendants were lawful owners of Mitsero Estate, and if so, whether this gave them the right to carry out activities on the buffer zone. This issue was considered as part of a broader enquiry as to whether KOPL had established a case for the grant of an interim injunction, pending determination of the substantive proceedings.[16]

Outcome and Findings

Having found that KOPL had registered title over the Land, including Mitsero Estate, Kandakasi DCJ granted an interim restraining order against the defendants.[17] The Tiebas were found to be prima facie 'illegal trespassers' encroaching on KOPL's land.[18] They were enjoined from causing further destruction to the buffer zones and prevented from interfering with KOPL's activities on Mitsero Estate.

The Court applied well-settled principles relating to interim injunctions and found that each element of the test was satisfied.[19] These findings are summarised below:

i. Whether the plaintiff had an arguable case

KOPL was able to produce evidence of their title of State Lease over the Land. Kandakasi DCJ stated that this presented a strong case in favour of KOPL, and not just an arguable or prima facie case at this stage of the proceeding.[20] Meanwhile, the defendants could not produce any competing evidence of ownership. The Court noted that the defendants are not the original landowners or descendants of the customary landowners prior to the creation of the State Lease.[21] Kandakasi DCJ did not enquire any further into the Tiebas' claim that Mitsero Estate was customary land, or their claim that they had purchased it from its customary landowners. This omission is critiqued in Part 3.2 of this case note.

ii. Whether damages were an inadequate remedy

The bulk of the Court's analysis concerned this second element. Generally, no injunction is granted where damages will adequately compensate an applicant.[22] It was recognised that KOPL's attempt to 'at least preserve' some of the land was a remedial action to counter their large-scale deforestation activities.[23] Kandakasi DCJ cited the Supreme Court case of *Rimbunan Hijau (PNG) Ltd v Ina Enei,* which stated that destruction of natural habitat is

[16] To date, the substantive proceedings have either not yet occurred or have not been reported. The author has attempted to contact the Court to enquire further but has not received a response.
[17] Pursuant to *National Court Rules 1983* (Papua New Guinea) ord 14, r 10(1) ('*National Court Rules*').
[18] *Kula Oil v Tieba,* above n 1, [14].
[19] *Kula Oil v Tieba,* above n 1, [11].
[20] *Kula Oil v Tieba,* above n 1, [13].
[21] *Kula Oil v Tieba,* above n 1, [14].
[22] *Kula Oil v Tieba,* above n 1, [15].
[23] *Kula Oil v Tieba,* above n 1, [16].

'immeasurable and might be continuous for many generations to come'.[24] Further, he referenced research which evidenced the immensely destructive effects of the global palm oil trade on other countries like Indonesia and Malaysia, and recognised the intent of buffer zones to counter them.[25] Taken altogether, the buffer zones were a 'priceless asset' not only for KOPL but also all other people and life dependent on it.[26]

His Honour summarised scientific data detailing the undisputable existence of climate change, concluding, obiter, that 'the focus has shifted to what adaptation and mitigation efforts we must urgently take [for] our global village'.[27] He then referenced his own comments in the landmark ruling of *Morua v China Harbour Engineering Co*,[28] reiterating that the implied right to life in s 57 of the PNG *Constitution* was dependent on a safe and clean environment.[29]

The ratio of the case was delivered at paragraph [26] of the judgment: given the urgency of climate change, courts should readily grant injunctive orders to enforce climate change mitigation and adaptation measures where there is a prima facie case of human activity that adversely impacts the environment. Examples include deforestation or the discharge of pollutants into waterways. The onus is then on the defendant to prove that greenhouse gas emissions related to its activities are within acceptable levels.[30]

Notably, Kandakasi DCJ did not expand on what is considered 'acceptable'. Despite its good intentions, the principle also appears to be incompatible with the contrast between the sheer size of KOPL's commercial activities and the Tiebas' comparably negligible activities within the buffer zone. The Court seems to have neglected their previous discussion of the significant environmental damage perpetuated by the palm oil industry.[31]

Nevertheless, his Honour applied this principle to the current proceedings. He found that by carrying on unauthorised activities in the buffer zone, the defendants had undermined KOPL's deliberate measures to reduce emissions.[32] Only an injunction could appropriately prohibit future harm to the buffer zone and limit its contribution to emissions. The court noted that this was in itself sufficient to warrant a grant of injunction. Additionally, damages could not compensate the irreparable environmental destruction already caused, nor reduce the foreseeable risk to KOPL's commercial reputation as a 'sustainable' producer if destruction of the buffer zone continued.[33]

The ratio was accompanied with important obiter that judiciaries have a duty to encourage and enforce climate change mitigation and adaptation measures in court. Having described climate change as the 'next pandemic' after COVID-19 if left unaddressed,[34] Kandakasi DCJ

[24] *Kula Oil v Tieba,* above n 1, [17]; *Rimbunan Hijau (PNG) Ltd v Ina Enei* (Supreme Court, Papua New Guinea, Salika DJC, Kandakasi & Toliken JJ, 25 September 2017), available via www.paclii.org at [2017] PGSC 36.
[25] *Kula Oil v Tieba,* above n 1, [17].
[26] *Kula Oil v Tieba,* above n 1.
[27] *Kula Oil v Tieba,* above n 1, [22].
[28] *Morua v China Harbour Engineering Co (PNG) Ltd* (National Court of Justice, Papua New Guinea, Kandakasi DCJ, 7 February 2020), available via www.paclii.org at [2020] PGNC 16.
[29] *Kula Oil v Tieba,* above n 1, [25].
[30] *Kula Oil v Tieba,* above n 1, [26].
[31] *Kula Oil v Tieba,* above n 1, [16].
[32] *Kula Oil v Tieba,* above n 1, [27].
[33] *Kula Oil v Tieba,* above n 1.
[34] *Kula Oil v Tieba,* above n 1, [18].

emphasised the role of judges as 'critical thinkers, decisionmakers and enforcers of the law' in these urgent times.[35]

iii. Whether the balance of convenience favoured a grant of injunction?

The balance of convenience favoured a grant of injunction. In addition to the reasons supporting inadequacy of damages, the court feared that allowing the Tiebas to continue their building and land clearing activities on the buffer zone would 'open the floodgate' to others doing the same.[36]

An interim injunction was ordered against the defendants. These orders are likely still in place given that no subsequent proceedings have been reported.

3. COMMENTARY

The decision of *Kula Oil v Tieba* can be assessed on two aspects: its consideration of climate change, and its consideration of the land dispute.

The judgment is commended for emphasising that climate change should be a critical concern for courts. It is important precedent which will facilitate the restraint of environmentally destructive activities that will come before the court. Also significant is Kandakasi DCJ's articulation of the duty of judiciaries to enforce positive climate change and mitigation and adaptation measures.

Nevertheless, the end result is that a large corporation is successful in evicting Papua New Guinean land users from land they claim is customary land. The key issue in *Kula Oil v Tieba* was whether KOPL or the Tiebas had better title to the land. The Court took KOPL's interests at their highest, prioritising their claim as they were the registered leaseholder of the State Lease. The judgment does not engage in analysis of the Tiebas' claim that they had purchased Mitsero Estate from its customary owners, nor does it address the Village Court Order awarded in their favour. It may have been appropriate for the Court to take a more critical approach informed by the fact that many State Leases in PNG have been illegitimately acquired.[37] Although it is important that buffer zones are preserved in the interests of biodiversity and climate change mitigation, it is also important that judiciaries are interrogative of the alarming prevalence of illegal land-grabs in PNG hidden under the guise of State Leases.[38]

[35] *Kula Oil v Tieba,* above n 1, [26].
[36] *Kula Oil v Tieba,* above n 1, [29].
[37] Colin Filer, 'The Formation of a Land Grab Policy Network in Papua New Guinea' in Siobhan McDonnell, Matthew Allen and Colin Filer (eds), *Kastom, Property and Ideology* (ANU Press) 169; William Laurance, 'Special Agricultural and Business Leases imperil forests in Papua New Guinea' (2011) 17(4) *Pacific Conservation Biology* 297.
[38] Colin Filer, above n 37.

3.1 Background

Overview of PNG

A brief overview of PNG is provided here to inform the subsequent discussion on legal pluralism and land tenure. PNG is a Pacific Island nation made up of more than 600 islands. It has a population of approximately 10 million people, the majority of whom are Melanesian.[39] The population is culturally and linguistically diverse, with over 800 known languages and 1000 distinct ethnic groups.[40] The country is rich in natural resources and home to almost 7% of the world's biodiversity.[41] Approximately 87% of the population lives in rural areas and is reliant on subsistence agriculture, fishing and hunting.[42]

Formal colonisation began with the establishment of German and British protectorates in New Guinea in the 19th century.[43] Following WWI, the two territories of Papua and New Guinea were granted to Australia for administration.[44] A gradual transition to independence began in 1960 in response to pressure from the international decolonisation movement and the indigenous population's growing desire for self-determination.[45] PNG achieved self-governance in 1973 and officially became an independent nation on September 16, 1975.[46] However effective governance of what was once 'hundreds of diverse, once-isolated local societies as a viable single nation' remains difficult.[47] The country continues to have heavy Australian influence in the form of foreign development assistance.[48]

Legal pluralism

Legal pluralism refers to a situation where 'two or more legal systems coexist in the same social field'. What constitutes a 'legal system' is construed broadly to include formal court systems as well as 'nonlegal forms of normative ordering'.[49]

Legal pluralism in PNG is vividly demonstrated through the simultaneous operation of formal state law and customary law. PNG inherited its formal system of law upon gaining independence. Statutes and judicial models derived from Australian and British common law jurisdictions were superimposed onto the 'active and vibrant system of restorative justice' of indigenous customary systems.[50] Like in other parts of Melanesia, 'the birth of the new 'nation'

[39] World Bank, *Papua New Guinea* (2022) <https://data.worldbank.org/country/PG >.
[40] World Bank, *Papua New Guinea Overview* (2022) <https://www.worldbank.org/en/country/png/overview>.
[41] Department of National Planning and Monitoring, *Papua New Guinea's Voluntary National Review 2020: Progress of Implementing the Sustainable Development Goals* (2020).
[42] World Bank, above n 40.
[43] William Standish and Richard Jackson, *Encyclopedia Britannica,* (23 August 2023) Papua New Guinea, 'The Colonial Period'.
[44] William Standish and Richard Jackson, above n 43.
[45] Charles Hawksley, 'Papua New Guinea at Thirty: Late Decolonisation and the Political Economy of Nation-Building' (2006) 27(1) *Third World Quarterly* 161.
[46] Charles Hawksley, above n 45.
[47] William Standish and Richard Jackson, above n 43.
[48] Australian Government Department of Foreign Affairs, *Development Assistance in Papua New Guinea* (2023) <https://www.dfat.gov.au/geo/papua-new-guinea/development-assistance>.
[49] Sally Merry, 'Legal Pluralism' (1988) 22(5) *Law and Society Review* 869, 870.
[50] Australian Government Department of Foreign Affairs, *PNG – Australia Law and Justice Partnership* (May 2008) 51 <https://www.dfat.gov.au/sites/default/files/law-justice-design-doc.pdf>.

occurred in the absence of any shared sense of identity among its 'citizens''.[51] As such, the country continues to grapple with harmonising its various legal systems to cater to its hundreds of disparate ethnic communities.

In practice, the formal court system remains largely concentrated in urban areas and its capacity is restricted by geography and a lack of resources.[52] However the inefficacy of these services may also be attributed to its innate irrelevance to the Papua New Guinean context or its refusal to work with communities.[53] Most local disputes in PNG continue to be governed by custom. However when these systems do collide, these overlapping bodies of law make competing claims of authority and impose conflicting demands or norms, meaning people face uncertainty as to what laws will be applied to them.[54] It also gives rise to 'forum shopping', where parties can choose the system of law that will best serve their interests.[55]

3.2 Land Tenure in PNG

At Independence in 1975, it was believed that 97% of land in PNG was owned by customary owners whilst the remaining 3% was alienated land owned by the State.[56] In 2013 it was found that land held under customary tenure had drastically reduced to 86%, representing an 11% decline.[57]

Alienated land

Alienated land refers to land that was purchased, or declared and removed, from customary ownership and regulation.[58] At Independence, the majority of alienated land was owned beneficially by the state, with the remainder being privately held freehold land.[59] This land had been alienated by colonial governments when they occupied New Guinea and Papua.[60]

Alienated land, also referred to as Government land, is administered according to the *Land Act 1996*[61] and related statutes. It can be leased to a person or company for a term up to 99 years for a specific purpose. These include agricultural leases, pastoral leases, business and residence leases, Mission leases, Special Purpose leases and Urban Development leases.[62]

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[51] Sinclair Dinnen, 'Building Bridges – Law and Justice Reform in Papua New Guinea' (2010) *Passage of Change: Law, Society and Governance in the Pacific* 277, 279.
[52] [52] Sinclair Dinnen, above n 51.
[53] Australian Government Department of Foreign Affairs, above n 50.
[54] Brian Tamanaha, 'Understanding Legal Pluralism: Past to Present, Local to Global', (2008) 30(3) *Sydney Law Review* 375.
[55] Brian Tamanaha, above n 54.
[56] Michael Trebilcock, 'Customary Land Law Reform in Papua New Guinea: Law, Economics and Property Rights in a Traditional Culture' (1983) 9(1) *Adelaide Law Review* 191, 194.
[57] John Numapo, *Commission of Inquiry into the Special Business and Agricultural Leases* (2013) 9 ('*Commission of Inquiry'*).
[58] Charles Yala, 'Rethinking Customary Land Tenure Issues in Papua New Guinea' (2006) 21(1) *Pacific Economic Bulletin* 129.
[59] Lynne Armitage, *Customary Land Tenure in Papua New Guinea: Status and Prospects* (2001) <https://dlc.dlib.indiana.edu/dlc/bitstream/handle/10535/589/armitage.pdf>.
[60] Michael Trebilcock, above n 56.
[61] *Land Act 1996* (Papua New Guinea) ('*Land Act*').
[62] *Land Act*, above n 61, div 3-6, 8, 10.

Alienated land can be freehold or leasehold, although only a very small proportion of alienated land is freehold land.[63] Statutory provisions restrict foreign ownership of freehold land. Section 56(1)(b) of the PNG *Constitution* states that only citizens may acquire freehold land.[64] Section 3 of the *Land (Ownership of Freeholds) Act 1976* further explains that non-citizens are precluded from holding land through absolute ownership, fee simple, or in any other equivalent forms of ownership.[65] But discussion in Part 3.3 will show that this has not prevented certain types of freehold land being converted to leasehold land so that it can be used by a non-citizen. Having adopted the Torrens Title system from Australia, alienated land tenure operates via title registration. This system is prescribed by the *Land Registration Act 1981,* which places significance on accurate folios and Certificates of Title.[66] Section 26(1)(a) requires that interests in land be registered for the property interest to pass.[67] Section 33(1) states that the registered proprietor of an estate holds it absolutely free from all encumbrances except in limited circumstances such as cases of fraud, earlier registered interests, and misdescribed land.[68] These features are based on European concepts of property ownership which view land as an economic good that can be traded and exploited for capital gain.[69] Other characteristics include written dealings, record-keeping, rigid land zoning systems and a reliance on formal courts and legislation. As such, the system has been criticised as unfamiliar and formal in the PNG context.[70] In particular, the legal potency of a registered proprietor's full, indefeasible title poses problems for customary landowners who have a legitimate challenge to the title.

Customary Land

Customary land is land owned collectively by a distinct clan or community. Land is vested in the social grouping, meaning individuals have user rights to the land but do not own it beneficially.[71] The land is administered according to local practices and custom which vary from region to region. However allocations are generally made with the primary objective of ensuring survival of the clan.[72] This means land is organised in ways that support subsistence lifestyles and communal village life.[73] Land is considered the basis of all facets of life, supporting social cohesion, food security, cultural reproduction and ecological management.[74]

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[63] Sally Andrews, 'Papua New Guinea: Where Property Is More Expensive Than Manhattan', *The Diplomat* (22 March 2016) <https://thediplomat.com/2016/03/papua-new-guinea-where-property-is-more-expensive-than-manhattan/>.
[64] *Constitution of the Independent State of Papua New Guinea* (Papua New Guinea) ('*Constitution'*).
[65] *Land (Ownership of Freeholds) Act 1976* (Papua New Guinea).
[66] Michael Trebilcock, above n 56.
[67] *Land Registration Act 1981* (Papua New Guinea) s 26(1)(a) ('*Land Registration Act'*).
[68] *Land Registration Act*, above n 67, s 33(1).
[69] Michael Trebilcock, above n 56.
[70] Michael Trebilcock, above n 56.
[71] Asian Development Bank, *Land Acquisition and Settlement: PNG* (2008) <https://www.adb.org/sites/default/files/linked-documents/CAPE-PNG-11-Land-Acquisition-and-Resettlement.pdf>.
[72] Lynne Armitage, above n 59.
[73] Lynne Armitage, above n 59.
[74] Tim Anderson, 'On the Economic Value of Customary Land in Papua New Guinea' (2006) 21(1) *Pacific Economic Bulletin* 138.

Rights to intensive use (such as gardening) can be contrasted to rights of extensive use (such as for the grazing of animals). The former is more likely to be held at the household level whilst the latter is a collective right at the sub-clan level.[75] Individual proprietary rights are usually inherited through lineage or by succession down matrilineal or patrilineal lines. But often there is no clear distinction between individual and communal property rights given the principles of mutual aid that underpin custom. [76] An example of this blurring is the gifting and loaning of land between extended families and members of a clan.

However custom has been eroded by a growing recognition of the economic value of land. Private developers and foreign companies have a vested interest in accessing resource-rich land under customary ownership. Although there is a lack of written record-keeping within institutions that administer customary law, anecdotal evidence suggests that the majority of disputes over customary land can be attributed to three main issues: the scarcity of arable land in rural areas with growing populations, the transfer of land use rights to private developers without the prior consent of all customary owners, and conflicts over perceived economic benefits from facilitating large-scale resource development on customary land. [77]

3.3 Customary Land Tenure Conversion: The Lease-leaseback Scheme

An overview

Mobilising customary land is a key issue for policy makers who are 'besieged by the tension between making land available for development while protecting the rights of Indigenous landowners'.[78] The notion that customary land is a major challenge to the development of the economy has never been dispelled.[79] Support for registering customary land titles has been consistently promulgated by international development agendas. [80] However critics of registration note that Papua New Guineans have a deep connection to land that 'transcend(s) the purely economic and legal arrangements of the super-imposed alien culture'. [81] The 'capitalist property logics' of the West are inconsistent with these understandings.[82]

Nevertheless, large amounts of customary land have been taken out of customary tenure since the 2000s. The PNG Government has been a key actor in mobilising customary land so that it can be commodified and leased as alienated land.[83] The State derives its powers to acquire customary land from the *Land Act 1996.* Permitted purposes include public purposes, wildlife conservation, economic and resource development and business and private purposes.[84] The State can acquire customary land via three methods: by agreement with customary landowners

[75] Tim Anderson, above n 74.
[76] Michael Trebilcock, above n 56, 195.
[77] USAID Land and Resource Government Division, *Country Profile: Papua New Guinea* (January 2021) Land Links <https://www.land-links.org/country-profile/papua-new-guinea/>.
[78] Michelle Rooney, 'We Want Development': Land and Water (Dis)connections in Port Moresby' (2021) 33(1) *The Contemporary Pacific* 1, 8.
[79] James Weiner and Katie Glaskin, *Customary Land Tenure and Registration in Papua New Guinea and Australia: Anthropological Perspectives* (ANU Press, 1st ed, 2007), 1.
[80] Michelle Rooney, above n 78.
[81] Michael Trebilcock, above n 56, 201.
[82] Michelle Rooney, above n 78, 8.
[83] *Commission of Inquiry*, above n 57.
[84] *Land Act*, above n 61.

(s 10), for the purpose of granting a special agricultural and business lease (s 11), and by compulsory acquisition (s 12).

The lease-leaseback scheme for SABLs

There is no evidence in *Kula Oil v Tieba* that suggests KOPL's State Lease was illegitimately acquired without customary owner consent. Nevertheless, it invites a broader discussion as to the operation of the lease-leaseback scheme for Special Agriculture and Business Leases (SABL). Situations where customary landowners are unaware of State Leases granted over their land have become more commonplace as large industries extract PNG's minerals, oil, gas, timber, fish and use its fertile land to grow cash crops such as coffee, palm oil and cocoa.[85]
Although foreign investors are prohibited from purchasing or leasing customary land directly from traditional owners, the lease-leaseback scheme facilitates indirect transactions of customary land. This arrangement permits the State to lease customary land from its customary owners, only to lease it back to industrial land users.
The lease-leaseback scheme operates through a two-step procedure as sanctioned by sections 11 and 102 of the *Land Act*. First, the State exercises its power under s 11 to lease customary land from its customary landowners, paving the way for the issuance of a special agricultural and business lease (SABL). An executed lease between the State and customary landowners is considered 'conclusive evidence' of the State's good title and results in the suspension of all customary rights, except those explicitly reserved, for the duration of the lease.[86] The State Lease is then registered under the *Land Registration Act,*[87] and the State issues the land to an industrial land user via an SABL pursuant to s 102.[88] The interpretation section of the *Land Act* notes that an SABL is simply a type of State Lease.[89]
SABLs were introduced by amendments to the *Land Act* with the aim of fostering customary landowner involvement in economic development.[90] The system was designed to create legal title over customary land so that it could be used as security for loans. The State's involvement as a middleman was to ensure that customary land was not permanently taken from its customary owners.[91] The maximum lease duration of 99 years specified by s 102(2), while designed to eventually return land to customary owners, effectively severs them from their land for three generations.[92] Despite its best intentions, this process has been co-opted to enable resource-intensive sectors to exploit the country's natural resources. This has led to the resultant exclusion of peoples from their customary lands and profound human rights violations.[93] Customary landowners in rural land 'markets' in PNG often do not know the real opportunity

[85] Sarwat Chowdhury, 'Valuation of Natural Resources in Papua New Guinea', *United Nations Development Programme* (Blog Post, 30 August 2022) < https://www.undp.org/asia-pacific/blog/valuation-natural-resources-papua-new-guinea>.
[86] *Land Act,* above n 61, s 11(2).
[87] *Land Registration Act*, above n 67.
[88] *Land Act*, above n 61, s 102.
[89] *Land Act,* above n 61, s 2(1)(x).
[90] *Commission of Inquiry,* above n 57.
[91] *Commission of Inquiry,* above n 57.
[92] Act Now and War on Want, *The SABL Land Grab*: *Papua New Guinea's Ongoing Human Rights Scandal* (2018) <https://waronwant.org/sites/default/files/SABL_PNG_LANDGRAB.pdf> ('*Act Now 2018 Report')*.
[93] Act Now and War on Want, above n 93.

cost value of their land, meaning the rents paid under SABLs are often extremely minimal compared to the value of resources extracted or the impacts experienced by customary landowners.[94]

A substantial surge in SABL allocations since 2003 has resulted in approximately 5 million hectares of customary land (equivalent to 11% of PNG's total land area) being granted to national and foreign corporations between July 2003 and January 2011.[95] Much of this land was granted to logging companies and palm oil producers that cleared vast tracts of rainforest.[96] Over time, these SABLs became labelled as 'land-grabs' by PNG residents.[97] Growing concern culminated in the Cairns Declaration in 2011. This called for a moratorium over new SABLs to 'limit rampant and often predatory industrial exploitation' of PNG's environment.[98] In response, the Acting Prime Minister Sam Abal announced an immediate moratorium on the issuing of any new SBALs until an official Commission of Inquiry (COI) into 75 SBALs issued between 2003 and 2011 was completed.[99] The COI report released in 2013 found that almost all of the leases were issued illegally and recommended that they be cancelled.[100] As anticipated, most of the SABLs were granted without obtaining the free, prior and informed consent of customary landowners, in direct violation of s 102.[101] This violated the rights of indigenous communities to participate in decisions that affect their land and resources. The Commission's findings also revealed widespread abuse, corruption, fraud and a lack of leaseholder compliance due to the lack of accountability and transparency in the SABL process.[102]

Since 2013, the Government has made various promises that illegal SABLs would be cancelled, and land returned to its rightful owners.[103] However not enough has been done. Investigations from 2018 reveal the persistent human rights abuses occurring on land under SABLs, extending into situations of modern slavery and police corruption.[104] As of 2022, only 20 of the 75 leases had been cancelled.[105] Leaseholders have resisted requests to surrender their title, meaning substantial portions of land remain in the hands of industrial users.[106] The violent realities of the SABLs breach several international conventions and encroaches upon fundamental human rights protected in the Universal Declaration of Human Rights.[107] As such, the current situation is best exemplified by this quote from Act Now, the main community advocacy group investigating SABLs: 'international trade is fuelling a relentless attack on customary

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[94] Tim Anderson, *Framework for Assessing Compensation for the Wrongful Loss of Customary Land in Papua New Guinea* (2017) <https://png-data.sprep.org/resource/land>.
[95] Colin Filer, 'New Land Grab in Papua New Guinea' (2011) 34(2/3) *Pacific Studies* 269.
[96] Colin Filer, above n 95.
[97] Rhett Butler, *Papua New Guinea suspends controversial grants of community forest lands to foreign corps* (6 May 2011) Monga Bay <https://news.mongabay.com/2011/05/papua-new-guinea-suspends-controversial-grants-of-community-forest-lands-to-foreign-corps/>.
[98] The Cairns Declaration, *The Alarming Social and Environmental Impacts of Special Agricultural and Business Leases (SABLs) in Papua New Guinea* (2011).
[99] *Commission of Inquiry*, above n 57.
[100] *Commission of Inquiry*, above n 57.
[101] *Commission of Inquiry*, above n 57.
[102] Commission of Inquiry, above n 57.
[103] Act Now, *Broken Promises* (2019) <https://actnowpng.org/issue/campaign-issue-broken-promises>.
[104] *Act Now 2018 Report*, above n 92.
[105] Act Now, *Government Has Failed Over Cancellation of Illegal SABL Leases* (26 January 2021) <https://actnowpng.org/blog/blog-entry-government-has-failed-over-cancellation-illegal-sabl-leases>.
[106] *Act Now 2018 Report*, above n 92.
[107] *Act Now 2018 Report*, above n 92.

landowners' forests in PNG, and the discredited but ever present SABL process is holding the door open.'[108]

3.4 The role of Village Courts

Disputes over customary land ownership are generally resolved according to traditional dispute resolution methods and according to custom. However PNG's pluralistic legal landscape means that a combination of legal mechanisms may be used to resolve disputes. An interesting aspect of *Kula Oil v Tieba* is the Village Court Order granted to the Tiebas before proceedings were commenced in the National Court. Kandakasi DCJ does not address the preventative order at any point in his judgment.

Preventative orders are issued by Village Courts when there is a perceived threat of harm or disturbance. These are orders which prevent parties from engaging in certain behaviours in order to reinstate harmony within the community. KOPL ignored the preventative orders and sought relief from the National Court instead. This reveals the impotency of Village Court orders in addressing disputes with large commercial entities, as well as KOPL's disregard for custom. Unresolved customary land disputes can be escalated through successive tiers of the court system, beginning at the Village Court and progressing to the Local Land Court, Provincial Land Court, or ultimately, the National Court. With each ascending level, the procedures become more formal, and its practitioners demonstrate increased legal expertise.

Nevertheless, Village Courts play a significant role in mediating disputes at the local level. They were established at the end of the colonial period with the aim of improving access to justice in rural areas. At Independence PNG's new leaders strongly supported Village Courts as they were 'essentially indigenous and would ensure the involvement of the people in the legal system.'[109] Their creation accordingly reflects 'to some degree a rejection of the British common law traditions previously adopted.'[110] Underpinned by s 172 of the *Constitution,* Village Courts derive their statutory authority from the *Village Courts Act 1989.*[111] This statute specifies that Court's primary function is to 'ensure peace and harmony in the area for which it is established by mediating in and endeavouring to obtain just and amicable settlements of disputes'.[112] Village Court proceedings are held in local languages, with less formal procedures, without lawyers and seek to incorporate local 'custom' where appropriate.[113] These village courts are 'positioned in the nexus of introduced law and a local community's sense of what is fair and just'.[114] As such, Village Court Officials do not need to have formal legal training. Rather, Magistrates are selected by their local communities based on their good standing in the

[108] *Act Now 2018 Report*, above n 92, 2.
[109] George Westermark, '*Court is an Arrow: Legal Pluralism in Papua New Guinea'* (1986) 25(2) *Ethnology* 131, 133.
[110] Australian Law Reform Commission, *Papua New Guinea Village Courts* (2010) <https://www.alrc.gov.au/publication/recognition-of-aboriginal-customary-laws-alrc-report-31/30-indigenous-justice-mechanisms-in-some-overseas-countries-models-and-comparisons/papua-new-guinea-village-courts/>.
[111] *Village Courts Act 1989* (Papua New Guinea).
[112] *Village Courts Act 1989,* above n 111, s 52.
[113] Melissa Demian, 'Innovation in Papua New Guinea's Village Courts: Exceeding Jurisdiction or Meeting Local Needs? Legal Innovation: Part 1' (2014) *State, Society and Governance in Melanesia In Brief.*
[114] Michael Goddard, *Substantial Justice: An Anthropology of Village Courts in Papua New Guinea* (Pandanus Books, 2009) 2.

community and knowledge of local custom.[115] This localised approach contributes to the courts' effectiveness in resolving disputes at the local level. As such, Village Courts are considered a 'primary interface between the formal and informal systems'.[116] They have been applauded for their ability to prevent the escalation of local disputes into more serious law and order problems, especially in land mediation matters.[117]

Village Court methods of dispute resolution are aligned with Melanesian notions of justice.[118] Parties are heard in a familiar community setting and local custom is applied.[119] In contrast to top-down, centralised approaches that prevail in Western societies, Melanesian authority is dispersed throughout the social body.[120] Accordingly, a greater emphasis on kinship and social harmony influences the determination of an individual's rights and obligations in respect of others.[121] These notions of communal harmony and restorative justice are absent from formal legal systems based on Western legal individualism.[122]

Village Courts have been criticised due to reported irregularity of processes across PNG, however inconsistent practices and excesses of jurisdiction do 'not necessarily indicate a failure or breakdown of the system'.[123] Instead they can be seen as the 'vernacularisation' of an introduced court system.[124] This vernacularisation refers to 'processes whereby 'global' institutional values become adopted, translated and transformed at the local level'.[125] Over time, these Village Courts have adapted to the unique justice needs of their communities in a way that higher courts have not achieved.

4. CONCLUSION

Kula Oil v Tieba is an important decision in Papua New Guinean environmental litigation that reveals the readiness of the formal court system to enforce measures that mitigate climate change. It sets important precedent for judiciaries to be more proactive in preventing environmental degradation.

However an exploration of the complexities of land tenure, as well as the failed SABL scheme, reveal the flaws of PNG's pluralistic legal systems. As previously stated, the judgment of *Kula Oil v Tieba* does not suggest that KOPL's lease was illegitimately acquired. However an analysis of the broader context of PNG's leaseback scheme reveals the risks inherent in relying on registration under the *Land Registration Act* without a further inquiry process to confirm an

[115] Australian Aid, *Evaluation of Village Court Officials' Training, Summary of Findings* (2016) <https://www.dfat.gov.au/sites/default/files/png-evaluation-village-court-officials-training-march-2016.pdf >.
[116] Australian Aid, above n 115, 51.
[117] Nitze Pupu and Polly Weissner, 'The Challenges of Village Courts and Operation Mekim Save Among the Enga of Papua New Guinea Today: A View From Inside' (Discussion Paper No.1, Department of Pacific Affairs, 2018), 16.
[118] Sinclair Dinnen, 'Building Bridges: Law and Justice Reform in Papua New Guinea' (Discussion Paper No. 2, Australian National University State, Society and Governance in Melanesia, 2002).
[119] Australian Law Reform Commission, above n 110.
[120] Sinclair Dinnen, above n 118, 3.
[121] Melissa Demian, above n 113; Nitze Pupu and Polly Weissner, above n 117.
[122] Michael Goddard, 'Keeping the Sky Up: Papua New Guinea's Village Courts in the Age of Capacity Building' *Grassroots Law in Papua New Guinea* (1st ed, 2023) 131.
[123] Melissa Demian, above n 113, 2.
[124] Melissa Demian, above n 113, 2.
[125] Melissa Demian, above n 113, 2.

agreement has been made legitimately. The current approach fails to adequately address new types of land disputes between large commercial actors and customary landusers. PNG should be hesitant to further push systems of title registration based on concepts of individualised land tenure and alienability when these concepts are culturally inappropriate for Melanesian people. [126] Instead, developments in land law should recognise and reconcile indigenous notions of justice with contemporary legal frameworks.

[126] Michael Trebilcock, above n 56, 201.