

REVEREND GRAHAM MARK AND MYLEEN ARISIMAE (representing the Malaegnari landowning group) -v- MIODOBATU MAMATA, GABRIEL SEMA AND J. LULUMBATU (representing the Repaqa landowning group), REKO ENTERPRISES, MEGA ENTERPRISES LIMITED AND ATTORNEY-GENERAL

HIGH COURT OF SOLOMON ISLANDS
(KABUI, J.).

Civil Case No. 108 of 2004

Date of Hearing: 2nd September 2004

Date of Ruling: 3rd September 2004

G. Suri for the Plaintiffs.

P. Tegawata for the Defendants.

RULING

Kabui, J. The Plaintiffs are husband and wife. They represent the Malaegnari landowning group in North West Choiseul in the Choiseul Province. In the decision of the Western Customary Land Appeal Court (CLAC) in 1977, the boundaries of Malaegnari Land were stated as being Baga River to the east, the Paparasi and Vacho rivers to the west, the Hurama stream to the south and the coastline. The Commissioner of Forests Resources on 17th March 2003 granted Licence Number A10223 to Reko Enterprises allowing the felling and taking away of timber from Repaqa Land in North Choiseul in Choiseul Province. The Plaintiffs have alleged that the logging plan of the Defendants has included part of Malaegnari Land as though it is Repaqa Land which they deny is the case. They filed a Writ of Summons and a Statement of Claim on 24th March 2003, claiming ownership of Malaegnari Land as decided by the CLAC in 1977. In the meantime, they filed *ex parte* summons on 26th March 2003 in which they applied for injunctive orders and other orders to restrain the Defendants from proceeding to fell and remove trees from the part which they claim as part of Malaegnari Land, their land. The Defendants do not dispute the boundaries of Malaegnari Land as described in the CLAC decision in 1977. What they say is that where the Plaintiffs say is part of Malaegnari Land, being their land, is in fact, part of Repaqa Land and so they are entitled to fell and remove timber from there. There is therefore a dispute over the southern boundary of Malaegnari Land with Repaqa Land. The *ex parte* hearing intended by the Plaintiffs became an *inter parte* hearing on 31st March 2004, resulting in an adjournment. I ordered at the request of Counsel for the Plaintiffs', Mr. Suri that the Forestry Officer based in Choiseul carry out a survey to establish the common boundary by locating it and whether felling had in fact taken place etc. That report had been filed in Court as "GM3" attached to the joint affidavit filed by Rev. Graham Mark and his wife Myleen Arisimae Mark on 11th August 2004. The report is disputed by the Plaintiffs as being inaccurate and rather biased towards them. The author of the report was called by the Plaintiffs to clarify his report. In his evidence in chief and on being cross-examined, he confirmed that both parties did not agree the southern boundary of Malaegnari Land during the survey he carried out. Counsel for the Plaintiffs, Mr. Suri, however argued that the witness did say that pointing in the southern direction whilst standing during the survey did confirm that Hurana stream was located inland in the southern direction. Counsel also pointed out that Paparasi stream should be located westwards so that the map produced by the author of the report was at variance with the boundaries described by the CLAC in 1977.

The relevance of the evidence by the Forestry Officer.

The value of this evidence is that the southern boundary of Malaegnari Land is under dispute by the parties. Secondly, logging had taken place in the disputed area being shaded yellow in the officer's report. Other than that, the value of the evidence is null. It does not resolve the dispute over the southern boundary of Malaegnari Land. There is little value in trying to apply the description of the boundaries as described by the CLAC to the map produced by the officer because the officer admitted in evidence that he himself did not know where Hurama stream is located on the ground.

The case of disputed common boundaries between two areas of customary land despite determination of ownership by the court of law.

Very often, the boundaries of a disputed area of customary land are described by the Local Court or the Customary Land Appeal Court in the court decree but the position on the ground is another matter. I mean the boundaries on the ground have not been walked and marked by the parties before hand. An example of this was *Wuilyn Viulu, Raevyn Revo, Brown Lamu, Issac Napata and Seth Piruku v. Tui Kavusu, Molton Luma, Samson Saga, Peseti Kuiti, Hami Lavi, Gordon Young, Paul Kavusu, Ophiu Vendi, Steven Veno, Issac Nonga and Abraham Kumiti*, Civil Case No. 015 of 2002. In that case, the Marovo Local Court had determined that Kovutu Land belonged to the Plaintiff and the boundaries were said to be between Chochole and Sambunu rivers. However, the Defendants said Kavutu Land was outside the areas they allowed for logging to take place. There was confusion about the true boundaries, particularly the common boundary between Kovutu Land and the areas to be logged under the licence issued to the licence holder. On page 6 of my ruling I said-

“... The ownership of Kovutu Land by the Plaintiffs in custom confirmed by the Marovo Local Court in 1976 is obviously not conclusive in terms of its true boundaries as against those of the surrounding areas of land. The High Court cannot determine customary boundaries of customary land. The jurisdiction to do so lies in the hands of the relevant Chiefs and the Local Court...”

The second example was *Shakespear Galoboe, Simon Kebaku, Maeka Leokana, Jimmy Pitakaji and Posepoqe v. Jackson Galo*, Civil Case No. 283 of 2002. In that case, the common boundary between Repaqa Land and Kovarae Land was disputed by the parties. On page 3 of my ruling, I said-

“... The disagreement between the Applicant/Respondent and the Respondent/Applicants is one over boundaries delimiting the extent of ownership. The extent of ownership in each case will no doubt commensurate with outer boundaries delimiting the extent of ownership. Those are matters for the Chiefs to determine, and if necessary, later by the Local Court...”

In both cases cited above, the dispute over boundaries had not been referred to the Chiefs in the first place or to the Local Court in the second place. The exclusive jurisdiction of the Local Court or the Customary Land Appeal Court over customary land disputes is based upon the decision of the Court of Appeal in the *Simbe* case always cited in this jurisdiction. I extended this principle in *John Osiramo v. Mesech Aeounia*, Civil Case No. 020 OF 2002 to the Chiefs as a forum performing the same function as the Local Court or the Customary Land Appeal Court in the first instance.

However, Counsel for the Plaintiffs, Mr. Suri, argued that despite the fact that the Plaintiffs had not referred their dispute to the relevant Chiefs' forum, the High Court should still assist the Plaintiffs and grant the injunctive orders sought. He relied on the fact that the CLAC had ruled in favour of the Plaintiffs in 1977 with the description of the boundaries of Malaegnari Land. He said there was therefore a prima facie case of ownership of land and the Court ought to assist the Plaintiffs to protect their land and trees from destruction. According to the evidence given by the late Arasimae in the CLAC in 1977, Malaegnari Land lies west of Baga River. He said the other spear line was Paparasi River on the sea -side. The brother of the late Arisimae, Robinson Saevasi, however said in evidence that the Malaegnari Land had three rivers as boundaries, namely, Hurama River at the top, Baga River on one side and Paparasi River on the other side. The conclusion of the CLAC of the boundaries does not therefore seem to reflect accurately the evidence given by the late Arisimae and his witnesses. Therefore, the description of boundaries given by the CLAC can be no absolute guide for determining the true boundaries or at least the southern boundary in dispute. With due respect, the extent of ownership of Malaegnari Land in terms of its southern boundary is in dispute. This is the dispute which has not been put before the Chiefs in the first place in order to enable the High Court to act in aid of that forum before which the dispute is pending. The reason is that only the High Court may grant injunctions but to do so there must be a dispute before the Local Court or the Customary Land Appeal Court or the Chiefs in the first place. I brought this point out clearly in **Gandly Simbe and Others v. Harrison Benjamin and Others**, Civil Case No.205 of 2004 and the cases cited in my judgment delivered on 1st June 2004. I cannot see how the High Court can assist the Chiefs forum, the Local Court or the Customary Land Appeal Court in granting an injunction, if no dispute is pending in any of them. There is no status quo to maintain. There is no status quo to maintain in this case. The Plaintiffs do assume, I would think, that the Statement of Claim does raise serious triable issues for the purpose of applying for injunctive orders to maintain the status quo pending the resolution of the triable issues in the High Court. But if the triable issues are not issues within the jurisdiction of the High Court such as ownership of customary land in terms of boundaries, then the High Court can only act in aid of the Chiefs forum, the Local Court or the Customary Land Appeal Court, whichever is the case. The dispute over the southern boundary of Malaegnari Land clearly involves the extent of ownership of Malaegnari Land when that boundary is finally determined by the Chiefs in the first place. That is a triable issue of ownership of customary land outside the jurisdiction of the High Court but if it is before the Chiefs or the Local Court or the Customary Land Appeal Court, the High Court may act in aid of the relevant forum and grant injunctive orders. Regrettably in this case, the issue of the southern boundary has not been put before the Chiefs in the first place. There is no status quo to maintain by the High Court in the Chiefs forum. The status quo must be brought into the relevant forum and exist there for the High Court to consider and grant the injunctive ordered sought. That status quo does not exist here and therefore cannot be maintained. Counsel for the Plaintiffs pleaded with the Court that in the event the Court refused to grant the injunctive orders sought, the Court should grant the order seeking the royalties to be paid into an interest bearing joint account in the names of the Solicitors. I do not know on what basis I should do that in the event I do not grant the application. I suppose that is part of maintaining the status quo if there is a status quo to maintain. I find that there is no status quo to maintain in this case as the dispute between the parties has not been put to the Chiefs as yet and so I dismiss the Plaintiffs' application in whole. The parties will meet their own costs.

F.O. Kabui
Puisne Judge