IN THE SOLOMON ISLANDS COURT OF APPEAL

NATURE OF JURISDICTION:	Appeal from Judgment of the High Court of Solomon Islands (Chetwynd J)
COURT FILE NUMBER:	Civil Appeal Case No. 5 of 2012 (On Appeal from High Court Civil Case No. 172 of 2009)
DATE OF HEARING:	~~???~~ 23 April 2013
DATE OF JUDGMENT:	26 July 2013
THE COURT:	Justice Edwin Goldsbrough P., Sir Albert Palmer CJ, Sir Gordon Ward JA
PARTIES:	**Samlinsan** (1st Appellant) **And** **Rarahu Land Holding Group** (2nd Appellants) **- V -** **Ta'amora (representing the Waii Tribe)** (Respondents)
Advocates: Appellants: Respondent:	M. Pitakaka for Samlinsan & Rarahu Land Holding Group P. Afeau for Ta'amora (representing the Waii Tribe)
EX TEMPORE/RESERVED:	**RESERVED**
ALLOWED/DISMISSED	**DISMISSED**
PAGES	**1-10**

JUDGMENT OF THE MAJORITY OF THE COURT

Goldsbrough, P. and Ward, JA.:

[1] The respondent, Cyprian Ta'amora (Ta'amora), in this appeal represents the Waii Tribe of West Are'Are in Malaita who are the owners of Waii customary land. The first appellant, Rarahu Land Holding Group (RLHG), is a business entity undertaking business in the logging industry and the second appellant, Samlimsan (SI) Ltd (Samlimsan), is a company undertaking business in that industry. RLHG had a Timber Licence covering specified customary land in West Are'Are and signed a Logging and Marketing Agreement in September 2007 with Samlimsan by which it undertakes felling and harvesting operations within RLHG's licence area. That area does not include Waii land but does include Sui land which partly abuts Waii land.

[2] The Waii people claim that, whilst carrying out logging operations, Samlimsan extended its logging operations beyond Sui into Waii land and, on 22 June 2009, Ta'amoro filed a claim in the High Court for a permanent injunction, inter alia, restraining Samlimsan and RLHG from entering and/or carrying out any logging operation on Waii land, an order directing them to provide a statement of account detailing the timber, log shipments and value of all logs of economic value felled on Waii land, a claim for the full FOB value and damages for trespass.

[3] A defence was filed by the defendants on 19 June 2009 denying any encroachment onto Waii land. On 2 October 2009, Ta'amoro made application for an interim order restraining the defendants from entering, felling and removing logs and timber from Waii land and for an account. This application was supported by an affidavit sworn by Aloysio Awairaro which referred to correspondence which had been sent by the claimant to the defendants between 19 September 2008 and 8 April 2009 preceding the claim and which had been ignored by the defendants. During this time, Ta'amoro referred the dispute to the Po'oikera House of Chiefs and they considered the case in July 2009.

[4] At the Chiefs' hearing, RLHG and Samlimsan were represented by Silvester Akoai. The record of that hearing shows that Akoai challenged the composition of the panel of Chiefs with partial success and then advised the panel that he could not take part in the hearing because his key witnesses were not present. The panel decided that, as he had been given 23 days clear notice of hearing, it should continue. On the resumption, Akoia said he would not attend because two members of the Hutohuto House of Chiefs which had previously presided over the same boundary dispute were to be called as witnesses by Ta'amora. The Po'oikera panel continued with the hearing in Akoia's absence.

[5] After a lengthy hearing, the House of Chiefs' 'Decision' acknowledged that the absence of Akoia meant "it was one-sided hearing" and then found:

> "Po'oikera House of Chiefs is satisfied therefore has no other option but to declare Rarahu Land Holdings have illegally trespass into Waii through Sui to do logging activities".

[6] The hearing of the claim in the High Court was on 11 November 2011 before Chetwynd J and a reserved judgement delivered on 31 January 2012. The way the matter had progressed is described by the learned judge:

> "Nearly 2 years after the Chiefs' decision Akoia on behalf of the first defendant seems to have lodged something in the Malaita Local Court. What it is he has lodged must remain a mystery because no copies have been provided to this court and that is despite directions and orders made on 4 July 2011 giving leave to introduce such material into evidence. The order (of 4 July) also set the matter down for trial on 7 October 2011. At the mention hearing it became apparent that nothing further had been filed on behalf of the defendants. In fact nothing further had been done to comply with the order of 4 July. It was a similar story back in April 2011. Goldsbrough J gave directions in February. Despite those directions, agreed facts and issues were not filed until 23rd of May 2011. It took two further hearings and the possibility of the defence being struck out before they were filed. The court book was filed on the same day. These delays were caused by the defendants."

[7] The nature of the mysterious item lodged in the Malaita Local Court is central to the issue in this appeal. The judgment of Chetwynd J shows that the defence advised the court that they had "appealed" the decision of the Po'oikera Chiefs to the local court. As the learned judge pointed out, the only evidence of that produced to the court was a letter from the Local Court Clerk in Malaita which was insufficient to explain what was the matter referred. Without it, the judge had nothing on which to decide if the matter referred to the local court was such that he must await that court's decision before he could conclude the action he was hearing.

[8] There is no dispute that all questions as to ownership and boundaries of customary land must be heard in the Local Court. If such an issue should require determination in the course of High Court proceedings, those proceedings must be adjourned pending determination of the matter in the Local Court.

[9] The appellants have appealed the trial judge's decision on four grounds but Mr Pitakaka for the appellants summarises them as raising two issues; (1) that determination of the ownership of the disputed land was necessary before the judge could decide whether the logging operations in that area amounted to trespass and (2) that the judge's refusal to send the case back to the Local

Court wrongly deprived the appellants of the opportunity to present their case about the ownership of customary land in the appropriate forum.

[10] In his judgment the judge pointed out that there was no dispute that the High Court had no jurisdiction to decide ownership of customary land. He continued:

> "The jurisdiction to decide the ownership of customary land is reserved to the Local Courts. However, in this case the issue was whether there has been trespass over customary land. That is of course related to ownership of the land but here the court is not being asked to decide who owns the land, it is being asked if the claimant [Ta'amora] has sufficiently proved his ownership as opposed to anyone else's. That is a different question, it is one of evidence".

The defendants [RLHG and Samlimsan] submit there has been no final decision about the ownership of Waii land. ... The claimant can point to a decision of the Chiefs. The defendants say they have "appealed" that decision to the Local Court. The only evidence is a letter from the Local Court Clerk in Malaita. That is insufficient evidence. The Chiefs' decision was made in July 2009. The letter is dated May 2011. The representative from the first defendant did nothing for nearly two years. Even ignoring the delay, the defendants have been given ample opportunity in these proceedings to provide evidence about the Malaita Local Court case but they have produced nothing. There is no copy of the unaccepted settlement form, no copy of the statement required by section 12 (3) of the Local Courts Act [Cap 19]. There is nothing, apart from the Clerk's letter, to indicate there is actually a case before the Local Court and even less to say what that case is about. The claimant is entitled to rely on the decision of the Chiefs to establish his rights and those of the Waii tribe over the land. Until it is set aside or otherwise disposed of the decision of the Chiefs is perfectly valid and incontrovertible evidence of where the boundary of Waii and Sui land is."

[11] The Court Book is attached to the Appeal Book and the index shows three letters from the Malaita Local Court all addressed to Ta'amora. The first is dated 25 August 2009 and acknowledges receipt of the Po'oikera Chiefs decision and is copied to the chairman of Chiefs and to Akoia. The second, dated 5 May 2011, is from the Local Court Clerk in answer to a request for documents for the High Court hearing. The clerk confirmed the following documents were in the Local court:

> "An LC Civil 3 "Unaccepted Settlement" Form by the Po'oikera House of Chiefs of West Are'Are with a covering letter by one of the Chiefs ... dated 19 August, 2009 and received on 20 August, 2009.

A letter addressed to you and copied to one Sylvester Akoia and the Chairman of the Po'oikera House of Chiefs, written by the then Local Court Officer (Malaita) and dated 25 August 2009.

Since receipt of the Unaccepted Settlement form, the matter had never been registered for hearing by this Local Court (Malaita)."

[12] The letter continues by explaining the requirements for registration of a dispute with the Local Court and that it is for the aggrieved party to refer the dispute to that Court.

[13] The third letter is dated 10 May 2011, copied to Akoia, and states, "Be informed that the above indicated subject matter had been registered at this Local Court (Malaita) for hearing." There is also a copy of a Government receipt dated10 May 2011 for "Court Fee (Wai/Sui Rarahu Boundary plus summons service fee." The receipt is issued to Akoia.

[14] The judgment indicates that the letter presented to the learned judge was that of 10 May 2011. The judge points out that, at the time of the application for an interim order in October 2009 before Goldsbrough J, the supporting affidavits had annexed a copy of the record of the proceedings before the Chiefs. Chetwynd J's judgment continues that despite knowing the claimant was relying on the Chiefs decision, it took over 18 months before the defendants supposedly involved the local court. As indicated above, the defence said they had, "reported the dispute to the Malaita Local Court" but produced no evidence of that apart from the letter referring to a boundary dispute between Wai and Sui Rarahu.

[15] Faced with the House of Chiefs' decision in support of the claimant and with no evidence to contradict it except the Local Court Clerk's letter that a boundary dispute between these lands had been registered, the judge had no option but to accept the Chiefs' decision. He then concludes:

> "I am satisfied the claimant has established that the defendants crossed the present and proven customary boundary between Sui and Waii land. The defendants had no ostensible or actual authority for permission to enter Waii land. They have trespassed on Waii land. The claimant is entitled to judgment."

[16] Sections 12, 13 and 14 of the Local Courts Act deal with the jurisdiction of the local court in customary land disputes. Section 12 sets out the limitations on the local courts' jurisdiction to hear such disputes and provides:

> "12 (1) notwithstanding anything contained in this Act or in any other law, no local court shall have jurisdiction to hear and determine any customary land dispute unless it is satisfied that -
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> (a) the parties to the dispute had referred the dispute to the chiefs;
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> (b) all traditional means of solving the dispute have been exhausted; and
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> (c) no decision wholly acceptable to both parties has been made by the chiefs in connection with the dispute.

(2) It shall be sufficient evidence that the requirements of paragraphs (a) and (c) of subsection (1) have been fulfilled if the party referring the dispute to the local court produces to the local court a certificate, as prescribed in Form 1 of the Schedule, containing the required particulars and signed by two or more of the chiefs to whom the dispute had been referred.

(3) In addition to producing a certificate pursuant to subsection (2), the party referring the dispute to the local court shall lodge with the local court a written statement setting out –

(a) the extent to which the decision made by the chiefs is not acceptable; and

(b) the reasons for not accepting the decision."

Form 1 in the Schedule is the Unaccepted Settlement form referred to in the judgment.

[17] It is clear, as the marginal heading states, that section 12 is intended to limit the local court's jurisdiction to cases which satisfy the requirements of the section. Before the local court can have jurisdiction in a customary land dispute, it has to be satisfied of the three matters listed in subsection (1)(a) – (c). The provisions of subsection (2) provide a complete means of satisfying paragraphs (a) and (c) and the written statement required by subsection (3) could be expected to cover paragraph (b). However, whilst the Local Court may accept a customary land dispute for determination, it is clear that, until the requirements of subsection (1) are satisfied, the local court does not have jurisdiction in the matter and, further, there will be no information before it of the nature and extent of the dispute, the location of the customary land actually in dispute or of the Chiefs whose decision is not accepted. Those were the details the judge required and the letter of 10 May 2011 did not provide them. It was possible evidence of no more than that a boundary dispute between Waii and Sui Rarahu land had been registered. The judge gave the defendants' time to bring evidence to prove it challenged, if it did, the boundaries of the disputed lands and the Po'oikera chiefs' decision. They did not and, without it, the judge was obliged to hold that the chiefs' decision was valid evidence of where the boundaries of the disputed land lay.

[18] Mr Pitakaka, relying the case of *Ponisi v Piko and others* HCCC 382 of 2006, 19 May 2010, points out that subsections (2) and (3) are matters of evidence and lodging Form 1 is not, therefore, a mandatory requirement to commence a reference to the local court. We accept that is correct and the matters required under subsection (1) (a) -- (c) may be presented in any form so long as they are sufficient to satisfy the local court that it will have jurisdiction.

[19] The question in this appeal is whether or not the judge was correct to continue with the hearing in the High Court or whether he should have adjourned to allow the local court to determine the customary land dispute first.

[20] The law is clear that, if it becomes necessary during a High Court proceeding to determine any disputed issue of ownership of customary land, the High Court cannot decide it and must allow the local court to determine that issue by adjourning the proceedings in the High Court pending the local court's decision; *Simbe v East Choiseul Area Council and others* CAC 8 of 1997.

[21] Chetwynd J pointed out in his judgment that the issue in the case was whether there had been trespass over customary land. Clearly that required evidence of ownership of the land for which the claimant could rely on the decision of the Chiefs. The defendants challenged that decision but produced no evidence to support their contention that, as a result of that challenge, the High Court had to send the case to the local court to determine ownership. Had the defendants produced evidence that the Chiefs' decision was challenged by the defendants and due to be heard in the local court, the judge would clearly have had to decide whether it was necessary for the local court to make its determination first. In order to do so, he needed to be satisfied on the evidence that the areas under challenge in the local court were the same as, or sufficiently related to, areas which were the subject of the High Court action and that the local court decision was a necessary ingredient of his determination of the case before him.

[22] However, as the judge pointed out, he had no evidence that was the case. On the one hand, he had proof of the Chiefs' decision that the disputed land upon which the defendants had extended their logging operation was Waii land and therefore the defendants' logging operations were trespass. On the other, he had a mere assertion by the defendants that the disputed land boundary had been reported to the local court supported only by a letter of little, if any, probative value. The judge clearly appreciated the importance of this assertion. He not only gave the defendant time to produce evidence but explained, in the passage set out in paragraph 10 (above), what would have provided the evidence he considered necessary. Although the local court clerk's letter alone could not prove its contents, it appears the judge was willing to accept it to that extent without the writer being called. Despite all this, the defendants produced nothing else.

[23] The history of the case in the High Court was one of delay caused by the defendants. There was evidence before the court that the claimant had tried to stop the logging in the disputed land but his letters were ignored. The judge pointed out:

> "The High Court claim was filed in June 2009 before the hearing in front of the chiefs. However, in October 2009 the matter came before the High Court (Goldsbrough J) on an application for an interim order. His Lordship granted the interim order. It is noted from the recital in the order the defendants were served personally with the application and supporting documents but chose not to attend. The sworn statement from Mr Awairaro in support of the application for the interim order (filed on 1 October 2009) had annexed to it a copy of the

record of the proceedings before the chiefs. Despite knowing the claimant was relying on the Chiefs' decision, it is over 18 months before the defendants, in the shape of Mr Akoai, supposedly involves the local court. As indicated above it is said he has, "reported the dispute to the Malaita Local Court" but he has produced no evidence of that apart from the letter referred to earlier."

[24] The result was that the only evidence of ownership was the decision by the Po'oikira Chiefs that the disputed land belonged to the Waii people. That was a decision about a matter over which the judge had no jurisdiction. He appears to have accepted that the clerk's letter was evidence that a dispute over the "Wai/Sui Rarahu boundary" had been registered with the local court but, apart from that single fact, the judge was given no evidence upon which to decide if that dispute was the same as, or relevant to, the issue he was trying and/or whether it was one which needed to be resolved before he could determine the High Court matter.

[25] The judge needed to be satisfied on the evidence adduced before him that the boundary dispute which had been referred to the local court included the lands over which the alleged trespass had occurred. All he had was a letter from the local court clerk confirming reference of a dispute over the Waii/Sui Rarahu boundary. The letter went no further and no evidence whatsoever was adduced to demonstrate whether all or part and, if so, which parts of the boundary were disputed.

[26] In many cases where reference to the local court of a dispute over the Chiefs' decision is not in dispute, a letter from the local court clerk can be accepted as an admitted fact. Where the relevance of the customary dispute to the High Court action is similarly undisputed, there may be no further issue that it should be sent to the local court. However, where those matters are challenged, a letter such as that in the present case alone is not proof of either issue. The party asserting that the matter should go to the local court must produce evidence of both the contents of the letter and of their relevance to the issue before the High Court. Once that is done, the judge can decide whether it is necessary to have the local court decision before he can complete his case. Parties to a High Court case may dispute ownership of customary land but, if determination of that dispute is not necessary to the judge's decision in the action, he would not need to adjourn to obtain the local court's decision.

[27] In the present case the judge made it clear he needed more evidence in order to decide that question. He was entitled to require such information and to expect the party bearing the burden to comply. Prudent counsel will heed such an indication from the Bench and appreciate that his failure to do so is likely to lead to the failure of his case. Although the defence referred to a challenge in the local court and produced the letter of 10 May 2011, they ignored the judge's advice of what was needed and produced nothing to assist him. Having delayed the High Court litigation, as Chetwynd J found, they took steps only at the eleventh hour to challenge the Chiefs' decision of which they had been aware

for well over a year and a half. It was done during the High Court proceedings and for the High Court proceedings. Being so close to the hearing, it should have been a simple matter for the defendants to have produced the evidence the judge required. They failed to do so.

[28] In that situation, the judge could do no more than accept the Chiefs decision as to the ownership of the disputed land and find for the claimant in trespass, as he did. He then passed on to ascertain an appropriate award of damages about which there is no appeal.

[29] The appeal is dismissed with costs to be taxed if not agreed.

[30] We should add a further comment. The Local Courts Act imposes few time limits on customary land matters. Many cases have, as a result, dragged on without resolution for years. Such delays benefit the interloper, not the owner. During that time, considerable harm may be done to the true owners' interests especially when logging is involved. Both parties should be ever conscious of the need for diligence in pursuing such actions.

[31] This case was decided on its own particular facts. It establishes no novel rule on the application of section 12 of the Local Courts Act. What it emphatically demonstrates is the need for the parties to such disputes to pursue their case with due diligence. In this case, that would have included registering a prompt challenge to the Chief's decision.

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Goldsbrough, P.

President

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Ward, JA.

Member