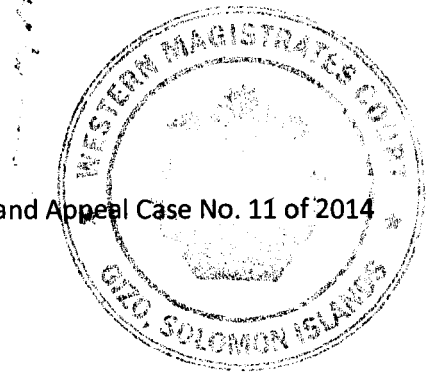


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IN THE CUSTOMARY LAND APPEAL COURT

WESTERN AND CHOISEUL.

Land Appeal Case No. 11 of 2014



AND IN A LAND DISPUTE over the ownership of

Oloko land situated in Choiseul Province;

BETWEEN: Robert Vaekesa (deceased), John Koro, Heinz Vaekesa and Lindley Lukisi Appellants

AND: Derald Galo, Nelson Cyril, Dilently Gideon and Poloso Mela
(Representing Dali Tribe of Choiseul) Respondent

AND: Penrose Ponisi
(Representing Pupurukana tribe of Choiseul Province) Respondent

JUDGMENT

This is an appeal against the decision of the Choiseul Local Court. The Local Court gave the right of ownership of Oloko Customary land to the Dali tribe. The Appellants having aggrieved by that decision, filed 16 grounds of appeal against that decision, seeking this Court to review the application of customary law.

Ground 1: In ground the Appellant contended that, the presiding chiefs failed or were wrong in custom in not recognizing the separate emergence and existence of the Vataroe tribe and the Volaikana tribe with their two separate and distinct genealogies, history and custom inheritance.

At the hearing of this appeal, the Respondent submitted by way of annexures several documents including, the Senga Council of Chiefs decision of 16 February 1999 and 30th September 1999, High Court Civil Case No. 205 of 2004 and Court of Appeal Civil No. 15 of 2004. These were referred to in the introductory part of the Choiseul Local Court judgment dated 7th March 2014.

When the matter was brought before the High Court in 2004, the present Appellants had already moved the dispute to the Local Court as a result of being aggrieved by the determination of the Senga Council of Chiefs of 16th February 1999. In both inquiries, the inquiries were conducted *ex parte* – in the absence of the defendants. Both chiefs' determinations were in favour of the Dali tribe, the Respondents in this appeal.

The High Court in Civil Case No 205 of 2005 and the Court of Appeal in Civil Appeal Case No. 15 of 2004 had affirmed both determinations in custom by the Senga Council of Chiefs were proper and were within the powers of the Chiefs to make under section 12 of the Local Court Act.

This Court noted from HC-CC NO. 205 of 2004 that the parties in that case before Justice Kabui as he then was were Gandley Simbe and Nathaniel Mela (representing the Dali tribe) -v- Harrison Benjamin and Peter Madada (representing the Volekana tribe) and Eagon Resources Development Company (SI) Ltd. Heinz Vaekesa filed an affidavit in that matter on behalf Volekana tribe. The matters before the High Court and Court of Appeal were litigated in the name of Volekana and not Vataroe.

In the opening paragraph of Robert Vaekesa's submission in the Local Court¹ he said "*Before coming to my Vataroe tribe's claim I would like to bring to your attention that in accordance with our histories and knowledge there are only three (3) main tribes exist in this area. These tribes are Magila tribe, Vataroe tribe and Sukuvai tribe.*" The question is, where was Volekana tribe, the tribe that appeared in most of the records before the Court below and this Court?

The history and inheritance evidence relied on at the Local Hearing were evidences intended to support the claim by Volekana tribe and not Vataroe tribe. The Local Court considered the existence of Volekana tribe and the customary evidences they relied on in support of their ownership claim to Oloko land but did not satisfy on the balance of probabilities that the Volekana tribe owns Oloko land.

The customary evidences relied on by the Appellant were considered but failed to satisfy the Court below as far as Lauru custom is concerned.

As part of their evidence in the court below, the Vataroe tribe relied on tambu sites that stored skulls of Volekana tribal chiefs. Vataroe tribe cannot use this piece of evidence to support its claim of customary inheritance of Oloko land if Volekana is a totally different tribe. This is one of the contradictions to Lauru custom that affected the credibility and reliability of the Vataroe claim to Oloko land.

The Court considered that the Choiseul Local Court was entitled to make that finding as it is wrong in Choiseul custom to for another tribe to use tambu sites belonging to another tribe. The Court below committed no customary error in not believing the existence of Vataroe tribe.

The changing of names for the Appellant tribe, has affected the reliability and credibility of evidence that the Appellant relied on to support their claim of ownership in the court below. The Court is satisfied that that was one factor taken into account in rejecting the Appellants' claim. Court documents produced at the hearing of this appeal by the Respondent and which the Respondent said were also produced in the court below, revealed the what the lower Court had discovered. There is no basis for this Court to intervene with the view held by the Choiseul Local Court that the changing of the name of the Appellants' tribe was contradictory to Choiseul custom.

This ground is dismissed.

Ground 2: The Appellant argued that the presiding Chiefs erred or failed to recognize the two separate lands owned by two separate tribes; *(a tract of land from Kozo stream to Lalaguti stream)* a portion of land of Sukuvai tribe given to Liukana of Sukuvai.

The basis of the Local Court decision is that it was satisfied on customary evidences relied upon by the Dali tribe to support their claim to Oloko land and the boundary of Oloko customary land as claimed by the Respondents. These two lands are in the boundary of Oloko land as claimed by the Respondents and believed by the Local Court. This Court believe that those lands were considered by the Local Court but given the failure by the Appellants to satisfy the Court below with reliable and credible customary evidences, the Local Court had not erred not to recognise those portions of lands.

This ground of appeal is dismissed.

Appeal grounds 3 and 7 can be conveniently dealt with together.

Ground 3: The Appellant submitted that the presiding chiefs erred or failed to properly enquired and apply the Motherland's land and portions of land in dispute. The presiding chiefs erred in accepting

¹ Appellants submission – Annex "V1"

the claims of the Dali tribe – as represented by Derald Galo, Nelson Cyril, Dilent Gideon and Poloso Mela as original discoverer and original giver of lands without any supporting evidence from the tribes/clans alleged to have received lands from them (Dali tribe). In ground 7 the Appellants argued that the presiding chiefs of CLC erred or failed to recognize motherland and given lands in dispute. More so the CLC erred in accepting the claims of Dali tribe as original giver of portions of lands in Oloko land without any credible supporting customary evidence such as land boundaries, genealogies, and land users including the clans alleged to have received blocks of land from Dali tribe.

The Local Court in its decision stated; *“The Court proved the defendant when they showed their sope, place they worshipped their god/crocodile, a place they put their custom money at Kakusaga and other places such as Panamona this confirm their claim of ownership to Oloko land.*

They showed NU-BU is the place they used to worship their crocodile gods; the court saw it and believed it. Sioro and Bani which the defendant showed the Court as it was according to Lauru Custom. The Court was satisfied since Sioro and Bani was only given with a small portion of land, but not big as motherland of its own which claimed by the plaintiff.”

According to the Local Court transcript of the proceeding, Jack Tamoko gave evidence in support of Dali’s claim to confirm that his clan received bani from Dali. We are satisfied that this was considered by the Choiseul Local Court, together with other customary evidences presented at the hearing and at site visit by the Dali tribe before finding Dali tribe as customary owners of Oloko land.

This Court fail to see any errors on the part of the Local Court. Grounds of appeal 3 and 7 are dismissed.

Ground 4: The Appellant argued under this ground that the presiding chiefs erred or failed to recognize that Oloko land its boundaries stretching from Nembe River to Kozo stream is the motherland of Vataroe tribe. Not as was incorrectly recorded in the CLC decision claiming that Robert Vaekeza – Vataroe spokesperson – his tribe’s boundaries is from Loanga River to Lalaguti stream. Loanga to Lalaguti is Defendant’s claim.

It is not in dispute that the Oloko land boundary claimed by the Appellants in the Court below was incorrectly recorded in the written decision of the Choiseul Local Court. The question is, is that sufficient ground for this Court to intervene with Choiseul Local Court’s finding?

Thus, it is important to look at the origin of this dispute. During the Senga Council of Chiefs’ inquiries in February and September 1999, the land boundary claimed by Dali and the focus of the two inquiries was from Longa to Lalanguti. It was, as a result of the Chiefs findings that the dispute was moved into the Local Court by the Appellants. At the Choiseul Local Court, Dali maintained the boundary of Oloko to be from Loanga to Lalanguti.

This Court is of the view that since the dispute is between the Respondents and the Appellants, the Choiseul Local Court was entitled and correct to consider the land from Loanga to Lalanguti. That is the disputed land between the Respondents and the Appellants. It was not customary necessary to consider the adjacent portion of land which Dali never claimed.

This Court is of the view that the incorrect recording of the land boundary as claimed by the Appellants in the Court below is not a sufficient ground for which this Court should intervene into the finding by the Local Court.

This ground of appeal is dismissed.

Grounds 5 and 6 can also be conveniently dealt with together. They submitted in ground 5 that he presiding chiefs of CLC failed or wrong in customs for not properly applying the worthy customs of

Lauru concerning the customary application of “Lua Bani”, “Lua Sioro” and “itingi”. Accordingly, in ground 6 they contended that the presiding chiefs of the CLC failed or wrong in customs for not recognizing those who received portions of land in Oloko land who stood witnessed at the Choiseul Local Court (but was not reflected in the decision’s analysis) confirming receipts of portions of land in accordance with the worthy customs in Choiseul, their genealogies, histories and inheritance.

This Court is of the view that the Choiseul Local Court chiefs who presided over the dispute had properly applied the Lauru custom in relation to “Lua Bani”, “Lua Sioro” and “itingi”. They are chiefs knowledgeable in Lauru custom. The Appellant has failed to demonstrate how the chiefs wrongly applied those customary principles.

This Court is satisfied that the Local Court after having heard evidences from both parties and after conducting a site visit, decided to believe the customary evidences - genealogies, histories, tambu sites, properties and old settlements produced by the Respondent to be credible and supported the Respondents’ claim of ownership. That finding inevitably affected the reliability and credibility of evidence of those who claimed to have received portions of land from the Appellants.

This ground is dismissed.

Ground 8: The Appellant alleges in this ground that the presiding Chiefs of CLC erred or failed to apply Choiseul Customs into the male descendants of the Dali tribe who according to Lauru Customs unless otherwise had authority and power to represent the Dali tribe. This is significant in custom for only the tribal chief has the power and authority to represent the tribe. Further, this is significant in custom for protection of the true genealogies, histories and tribal properties.

The Court is aware that both the Appellants and the Respondents are from a patrilineal society where ordinarily customary inheritances, power and authority are shared, inherited and commanded through male descendants. However, that is not rigid. The Court is satisfied that in Choiseul descendants of a tribe’s female lineage also have blood connection to land and tribe.

Circumstances sometime dictate who should represent a tribe’s interest. This Court is of the view that it is not customary wrong for a tribal member who descended from a female from the tribe to represent the interests of the tribe.

The Court is satisfied that in this case, the Respondents were authorised and appointed by their tribal chief and members to be their spokespersons. The decision as to who should be the tribe’s spokesperson is a decision that is best left to the tribe. This Court sees no error in custom for the spokespersons for Dali to represent Dali in the Court below and in this Court.

This ground of appeal is dismissed.

Grounds 9 and 10 can be discussed together. In ground 9 the Appellant argued that the presiding chiefs of CLC erred in not accepting or giving weight to evidences given by chiefs, elders and witnesses recognized by their clans and tribes to give evidences on behalf of their clans and tribes who witnessed for Vataroe tribe but was not even mentioned in the Court Decision records in Plaintiff’s Evidence and Analysis section. Accordingly, in ground 10, the Appellant further argued that the presiding chiefs of CLC erred in accepting or giving weight to evidences given by persons not recognized by tribe to represent and give evidence on behalf of their tribes.

The Local Court’s function was to hear evidence from witnesses who come to court with different backgrounds and standing in society. The fact that a witness was a chief, elder or someone recognised by their tribes or clan to give evidence on their behalf does not automatically qualify the evidence

given by that person to be given more weight than evidence given by an ordinary member of a tribe. The Court's duty is to independently assess every single evidence produced before it and weigh them against other evidence. It is not wrong in custom not to accept evidence given by chiefs and elders. Their standing in community may not necessarily qualify their evidence to be accepted by the Local Court. Whether to accept or reject any evidence is a matter for the Court after having weighed the evidence by parties. We see no error committed by the Local Court when weighing the evidence adduced before it and its subsequent finding.

This ground of appeal is dismissed.

Ground 11: The Appellants submitted that the presiding chiefs of CLC erred in not inviting Chiefs and Convener of in Avose locality (North and South) who are and is recognized by Luru Land Conference as chiefs and persons knowledgeable and competent to give evidence on land ownership and boundaries of lands within Kolomba Avose (Avose locality).

In relation to this ground, the Court is of the view that the duty to call witnesses to give evidence in support of its claim is solely the responsibility of parties. It is not the duty of the Local Court to call or invite witnesses. The Court was there to hear and see customary evidences produced by both parties in support of their claim of ownership and to decide on ownership based on proven customary evidences. The Court is satisfied that the presiding chiefs are recognised chiefs in Luru who had knowledge in custom to preside over the land dispute between the parties. It was never raised at the Local Court that the chiefs had no knowledge of the custom as applicable in the locality of the disputed land.

This ground has no merit and is dismissed.

Ground 12: The Appellant argued that the presiding chiefs of CLC erred or failed to not accepting or giving weights on clear evidences of continuing activities since our ancestors down to our generations that present in Oloko lands.

The Local Court not only heard oral evidence in court but also conducted a site visit to confirm customary evidences relied upon by both parties. This Court is satisfied that the Local Court had reached the ultimate decision in this case after weighing the entire evidence given at the hearing and witnessing at the site, physical customary evidences or features associated with landownership. Continuing activities may also assist in inferring customary land rights but, it alone, cannot in custom support landownership claim. It has to be weighed with other evidences and against the evidence of the opposite party.

This ground of appeal is dismissed.

This Court will discuss **Ground 13 and 15** together. In Ground 13 the Appellants contended that the presiding chiefs of CLC erred for ignoring the presence of clans who settled in Oloko land for more than 5 decades through the authorities and permissions of chiefs and elders of Vataroe tribe without any disturbances from Dali or Pupurukana tribes. Not one of the land users stood witnessed before the presiding chiefs of CLC witnessed that they sought or got permission from Dali tribe, instead they sought and got permission from chiefs and elders of Vataroe tribe.

In Ground 15 the Appellants submitted that the presiding chiefs failed or wrong in custom by ignoring matters that in customs confirmed land power and land authority vested upon chiefs and elders of Vataroe tribe both local and foreigners who sought permissions down throughout generations before conducting activities such as fishing, hunting, cutting trees for canoe and houses, prospecting and others.

Whilst granting of permission is a form of evidence from which the court below can infer tribal command of authority and power over the disputed land, it is only one form of customary evidence that has to be considered and weighed in addition to other forms of customary evidences that the Appellant relied on. All those evidences, together, have to be weighed against all the evidences that the Respondent party had produced to support their claim.

In this case, this Court is satisfied that the Choiseul Local Court had considered all relevant evidences regarding the seeking and giving of permission by both parties and other evidences before arriving at the decision it reached on 7th March 2014.

Grounds 13 and 15 have not been established and therefore are dismissed.

Ground 14: In this ground the Appellants submitted that the presiding chiefs erred or wrong in custom for not allowing the defendants whom in customs wrong to give evidences by using other tribe's genealogies resulted to unacceptable genealogies where brothers and sisters married to each other as in the case presented by the defendants. This is serious and does attract big compensations to settle.

The Respondent argued in response to that ground that the genealogies referred to were the genealogies fabricated by the Appellants in past proceedings. As said in ground 11 above, the Court was there to hear and see customary evidences produced by both parties, in support of their claim and or to discredit the claim by the other party and then decide on ownership based on proven customary evidences.

The duty to call witnesses to give evidence in support of a party's claim is solely the responsibility of that party and that include who to give evidence on its behalf. The Court's function was to receive evidence from witnesses, assess them and determine whether they are credible according to custom or not. The Court is satisfied that that was what the lower court did in this case. The Choiseul Local Court committed no error in custom when it allowed evidence to be given in relation to other tribe's genealogy.

This ground is also dismissed.

Ground 16: The CLC records on Plaintiff's claim were incorrect and confusing reflecting a very bias records from which the chiefs draw their conclusion/decision on.

This ground of appeal raises the issue of biasness which relates to law. This Court does not have jurisdiction to deal with this ground therefore this ground is dismissed.

ORDERS

The Court make the following orders:-

1. The Appellants Appeal grounds 1 to 16 are dismissed.
2. The Luru Local Court's Decision dated 7th March 2014 is upheld.
3. Parties to meet their own costs.



Dated this 20th day of November 2015.

Signed:

Jeremiah Kema

- President.....

Allan Hall

- Member.....

Willington Lioso

- Member.....

Tane Ta'ake

- Member.....

Ricky Iomea

- Clerk/Member.....

Right of appeal explained to parties.