

**PAPUA NEW GUINEA
[IN THE DISTRICT COURT OF JUSTICE
SITTING IN ITS LOCAL LAND COURT JURISDICTION]**

LLC 10 OF 2012

In the Matter of the Land Disputes Settlement Act Chapter 45
AND:

In the Matter of a Dispute over the Customary Ownership of YALELENA

BETWEEN:

GAUPANA BAUDOLO OF GOMILA KAPOKAPOUNA CLAN, MUTUYUWA, ALOTAU
Complainants / Applicants

AND:

MANUEGA GUNABEI OF GOMILA KAPOUKAPOUNA CLAN , MUTUYUWA, ALOTAU
Defendants/ Respondents

**ALOTAU: Leonard Mesmin – LLC Magistrate
George Perua – Land Mediator
John Baptist – Land Mediator**

CUSTOMARY LAND DISPUTE – Land Dispute Settlement Act –Section 69, Section 35(d)(1), Section 27(4) – Court to satisfy itself that no previous order has been made in relation to the land in dispute – dismissal for raising same cause of action over same portion of customary land..

Cases Cited

Telikom PNG Ltd v. ICCC SC1716

References

Land Dispute Settlement Act

Representation

Dorothy Gaupanua (Spokeswoman) for Complainants / Applicants
Nalugu Manuega (Spokesman) for Defendants/ Respondents

2016: 19th FEBRUARY

**DECISION ON DETERMINATION OF OWNERSHIP AS TO
CUSTOMARY LAND**

BY THE COURT:

1. This matter was remitted back to the Local Land Court (**LLC**) for rehearing by the Provincial Land.
2. The primary interest in dispute is ownership. However, the decision today is for this court to be satisfied of its jurisdiction to hear the rest of the case arising out of the courts findings from pre-trial conference that there were two earlier decisions that were made over portions of customary land generally in the same vicinity.
3. An important pre requisite for a dispute regarding ownership of customary land to be heard before a Local Land Court is whether or not s.27 of the Land Dispute Settlement Act has been complied with.
4. Both parties claim to belong to the same Gomila Kapokapouna sub-clan of Mutuyuwa village that they said own Yalelena which is the name of the land in dispute.

FACTS

5. This matter was remitted back for re-hearing at the Local Land Court by the Provincial Land Court on 10th July 2015 where the Provincial Land Court Magistrate Mr Vincent Linge ordered that:
 - 1) The Appeal be upheld;**
 - 2) Matter be remitted for re-hearing in the LLC in the following directions:**
 - (a) Before hearing is commenced, the Local Land Court is to enquire into and confirm on the parties relationship and their interest on the land and the cause of the dispute;**
 - (b) The hearing be strictly confined to customary interest over the land Yalelena.**
6. The Appeal was against the decision of the Local Land Court chaired by Magistrate Billy Pidou and assisted by Messers Henry Gaiari, George Perua, John Baptist and Ganuana Rustus.
7. The decision was generally awarding ownership to Gomila Kapokapouna clan and declaring Gaupanua Baudolo the sole surviving member of that clan and therefore the current custodian of the ownership rights to the land named as Yalelena.
8. This court is strictly to comply with the directions given by the Provincial Land Court.
9. The dispute before us was heard on the following dates:
 - 28th August 2015;

- 16th and 30th October 2015;
 - 4th December 2015;
 - 29th January 2016 and
 - 5th February 2016.
10. We proceeded to hear the dispute and held a directions hearing to consider:
- Representation;
 - Filing and service of affidavits or statements;
 - Manner of presentation of arguments/submissions at hearing;
 - Determination of any preliminary matters;
 - Possibility of settlement through mediation;
 - Date and time of Pre-trial Conference;
 - Any other matters to assist the speedy resolution of the dispute.
11. A pre-trial conference was conducted where both parties filed written statements of their own oral history and their respective family trees.
12. Written responses were filed and served on each other as directed by the court.
13. The court reminded parties that in opening their case each party was to make an opening statement setting out:
- The nature of interest claimed;
 - General description of the area claimed;
 - The rules of customary tenure relied on to support the claim;
 - How and by which witnesses the claim will be proved;
 - Any other such matters as may be necessary to assist the court in our determination.
14. When the matter commenced before us we tried to elicit from each disputing party what exact interests they were claiming over the disputed land. It was explained to them that not all of them may have ownership rights and that some of them may in fact only have usage rights which they may hold of other clans.
15. It was at this stage where it came to our notice after perusing the files before us in court that there were two other LLC cases, over customary land in the same general vicinity as the land in dispute before us. These matters are:
- (i) In 1980 a Local Land Court made a decision dated 22nd October 1980 as to ownership chaired by Magistrate Leslie Asimba; and
 - (ii) In 1993 a LLC made a decision dated 13th July 1993 as to ownership chaired by Magistrate Ignatius Kurei.

ISSUES

16. These are the issues before this LLC to deliberate on:

1. Whether this court is satisfied that no previous order has been made in relation to the subject land by a Provincial Land Court, Local Land Court or the Lands Titles Commission in compliance with section 27(4) of the Lands Dispute Settlement Act?
2. Whether the boundaries of the land known as Yalelena fall within the boundaries of a disputed portion of land known as Haumo Gravel Pit that was decided on by a the Local Land Court made earlier in time awarding ownership to a disputing clan?

LAW

17. The Land Courts are not bound by any other law except the *Land Disputes Settlement Act* itself and relevant custom i.e. the custom of the disputing parties.

S. 69 GENERAL LAW TO BE APPLIED.

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

18. They are, however, charged to do “substantial justice” between the parties under s. 35(1)(d) of the Act.

S. 35(d) (1) A Local Land Court–

(a).....; and

(b).....; and

(c).....; and

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

Section 27(4) States:

(4) A Local Land Court shall not proceed to hear and determine a dispute, other than an application under Section 44, unless it has first satisfied itself that no previous order has been made in relation to the land by–

(a) a Provincial Land Court or a Local Land Court; or

(b) the Land Titles Commission.

BACKGROUND ON TWO PREVIOUS LLC CASES

1980 LLC CASE

19. In 1980 a Local Land Court Decision was handed down by Local Land Court Magistrate Leslie Asimba and Messers Tuwehu Kakai, Tilaka Debolamina and

Moses Niala for the land known as “Haumo Gravel Pit” which is described in the following terms:

Haumo Gravel Pit, located in Haumo Creek adjacent to bridge and downwards to the coast and upstream up to Hawawinau.

20. The parties named on file to this dispute are Gamahali Kanatupa of Dedadebamalina Gomila Clan and Manuega Ganubei of Gomila Clan.
21. It states in the Record of Proceedings dated 22nd October 1980 that the Administration had previously surveyed the boundaries of the disputed area for gravel collection with the Gomila Clan and the following is the Decision of the Local Land Court:
- 1. Gomila clan originally and communally own the land disputed, Administration surveyed boundary marks to be observed and respected by both parties as they are blood relatives.***
 - 2. Groups under the Gomila clan already represented for group account signatories for deposits and withdrawals for gravel payments collected from Administration.***
 - 3. Due to stricken age of the Complainant Bilawei Mahuge an advance payment of K30.00 from the gravel payments because she has right interests and onwards sum of K5.00 to be paid to her from each collection of gravel payments from Administration til she dies.***
22. The details below are of that survey done by the Administration referred to in the Record of Proceedings as set out on page 2 of a Deed dated 16th April 1967 between Ituwabo Hilawa of Rabe Village, Dosiele – Delawiwi of Kilabo Hamlet Rabe Village, Labasisi – Simona of Rabe village and the Administration of the Territory of Papua New Guinea for the land named on the Deed as Yalelena.

“Commencing at the iron picket Point A at the intersection of the right bank of the Haumo River and the inland edge of the Alotau to Gurney road;

- thence bearing 14 degrees for 167 links to point B;***
- thence bearing 9 degrees for 270 links to point C;***
- thence bearing 87 degrees for 144 links to point D;***
- thence bearing 105 ½ degrees for 183 links to point E;***
- thence bearing 199 ½ degrees for 300 links to point F;***
- thence bearing 202 ½ degrees for 460 links to point G;***
- thence bearing 197 ½ degrees for 327 links to point H;***
- thence bearing 285 ½ degrees for 206 links to point I;***
- thence bearing 18 degrees for 327 links to point J;***

- ***thence bearing 14 degrees for 280 links to the point of commencement.***

The whole being the gravel bed of the Haumo River for a distance of 1084 links upstream from the high water mark on Milne Bay and containing approximately 2.62 acres.”

23. It appears from the evidence on file that Mr Ituwabu Hilawa was assisted by Dosiele Delawiwi and Labasisi Simona to act as joint custodians of the Gomila Kapoukapouna clan property including Yalelena.
24. An appeal was filed in 1994 but was dismissed by Provincial Land Court Magistrate Iova Geita (as he then was) for being out of time. The LLC order of 1980 is therefore still in effect and applies today and the surveyed boundaries appear to fall within the boundaries of the sketch maps produced by parties of the land in dispute.
25. This then becomes a matter for the current LLC to verify the boundaries to ascertain whether or not the demarcated boundaries in the 1980 decision are one and same as the boundaries in this case.

1993 LLC CASE

26. A Form 8 referral dated 10th March 1993, was made by Mediators J. Duigu, Gilipasi Philip, D. Douglas, T. Deboyamina, K. Sibebetei for the Huhu Mediation Division stating that they had attempted to mediate between Mathew Papai of the Bagumani and Gwalabanai Clan Groups and Manuega Gunabei of the Gomila Clan Group over a dispute of ownership pertaining to a portion of customary land described as *“Haumo Gravel Area”*.
27. The decision was that there was no likelihood of an agreement being reached and therefore the dispute was referred to the Local Land Court.
28. The dispute was registered as LLC 4 of 1993 and came before Magistrate Ignatius Kurei and Messers Duneba Douglas and Tilaka Deboiyamina who conducted a trial whereby a decision was reached on 13th July 1993 in the following terms:
- 1. “We declare that the area known as “Haumo Gravel Area” be awarded to Bagumani/Gwalabanai Clans.***
 - 2. The area be surveyed and markers be made on the boundaries.***
 - 3. If there is no appeal lodged within 3 months from the date of decision, work can be started on the said area.”***
29. The reasons for that decision are:

- 1. On the balance of probabilities, no clan can on the weight of the evidence before us firmly claim ownership, even though past decisions were in favour of Gomila Clan.**
- 2. Benefits from limited resources ought to be shared by all and not by one person or one group only.**
- 3. As already stated, the decision should minimise land disputes by this particular groupings from same locality.**

30. We note from the map the court relied on to make this decision on file highlights an area approximately 1084 links upstream from the high water mark which is in fact 222 metres from the shoreline.

31. It does not indicate that the area in dispute is the whole of the gravel river bed for a distance of 222 metres upstream from the high water mark but rather the area beyond the 222 metre mark which is marked at the 4 corners by the following land marks:

- Okari Tree
- Okari Tree
- Mogoru Tree (Laulau)
- Coconut Tree.

32. On the map it clearly shows that the border running across the river bed is the same boundary with the land known as Wanagabadi.

33. This appears to be in line with the area described in the decision as the area in dispute where it was stated:

“Land Location

The land in dispute, that is Haumo Gravel Area is located less than a kilometre from the outskirts of Alotau town about 5 minutes drive along Charles Abel Highway towards Gurney Airport.

The actual area in dispute is about one hundred meters upstream on the river bed from the causeway. It is actually an artificial river bed,”

34. Our understanding of the phrase ***“about one hundred meters upstream on the river bed from the causeway”*** means the area just beyond the 100 metre mark from the high water mark. So if you measure starting from the causeway upstream for 100 metres, the land in dispute begins after that 100 metre mark which as a matter of fact reflects the highlighted area on the map used and relied on by the court which does not fall within the description as set out on the sketch maps produced by both parties.

35. On the 21st October 1993 Manuega Ganubei of Gomila Clan filed a Notice of Appeal and the appeal was heard on 19th April 1994 and 4th May 1994 respectively.

36. Mr Orim Karapo sitting as a Provincial Land Court Magistrate made a decision on 4th May 1994 where he affirmed the order of the Local Land Court of 30th July 1993. This LLC order is still in effect today but the boundaries of this portion of customary land related to land further upstream and therefore, we find it falls outside the boundaries of the land in dispute before us.

DESCRIPTION OF THE LAND IN DISPUTE

37. Description of land known as Yalelena situated towards the beach area of Haumo Creek, Mutuyuwa Ward, Huhu LLG Area, Alotau, Mine Bay Province.

38. Yalelena comprises the portion of land upon which a ford or course way made of cement is sitting over a creek called Haumo approximately 2 minutes drive out of Alotau town along the Charles Abel High way as you drive towards Gurney Airport.

39. The dominant topographic feature of the land surrounding the ford is gravel, a range of rocks and pebbles, which form the main river bed running down to the sea.

40. The land areas consist of approximately 3 Acres or 12,140.6 square metres or 1.21 Hectares, of which more than 80% is made up of gravel whilst the remainder of the land consists of fauna growing along the river banks all the way to the sea.

BOUNDARY WALK CONDUCTED ON 5th FEBRUARY 2016

41. We decided to conduct a land boundary inspection to verify whether the customary land in the 1980 decision is the same as the land in dispute before us.

42. Pursuant to s.36 of the Land Dispute Settlement Act the Local Land Court shall inspect the land with the parties and their representatives at a time prior to the decision that the Court deems necessary.

“36. INSPECTION OF LAND IN DISPUTE.

(1) A Local Land Court to which an application has been made under this Part, shall, before giving a decision on the matter, inspect, with the parties to the dispute, the land in dispute and shall satisfy itself as to–

(a) the scope and extent of the land, where the dispute concerns interests in the use or possession of the land; and

(b) the scope and nature of the produce of or improvements to the land, where the dispute concerns the produce or improvements; and

(c) the location of alleged boundaries, where the dispute concerns a boundary to land; and

(d) any other aspect of the land that will assist the Court in reaching a just decision,

as the case requires.

***(2) Subject to Subsection (3), all the members of the Court shall inspect the land in accordance with Subsection (1)
(3) Subsection (2) does not apply.....”***

43. In the course of inspection we took particular note of:

- The boundaries of each party and the features demarcating such boundaries;
- The scope and nature of improvements on the land, by whom such improvements were made;
- The existence and location of each parties ancestral and sacred sites;
- The extent to which the parties are knowledgeable or familiar with the land;
- And other aspects of the land that may assist this court reach a just decision.

44. As we walked the boundaries we were mindful to:

- Plot the boundaries as accurately as possible on the sketch map;
- State the approximate size of the area claimed; and
- Describe in detail the names of natural features by which a boundary was marked.

45. Ms Gaupanua’s Group started from Point A being the fallen Lalaua Tree near which stood a Hiaga (Chest nut) tree and proceeded down to the high-water mark at Point B. *(refer to map on page 13)*

46. From point B we followed the high-water mark to point C near the Driftwood Lodges fence where a Lentuli (Rain) Tree stands.

47. From Point C we walked up to point D being another Hiaga Tree just before we crossed the Alotau to Gurney road on the Charles Abel Highway.

48. Point D to Point E being on the other side of the road is 13 metres.

49. From point E we walked further on to the Iwenawena Tree at Point F.

50. From Point F we walked across the dry river bed to the Goigoi (Mango) Tree at Point G and then down to Point A again.

APPROXIMATE MEASUREMENTS IN METRES

51. We measured the distance from each point in metres.

- Point A to Point B – 44 metres
- Point B to Point C – 76 metres
- Point C to Point D – 116 metres
- From the Causeway to Points D and E is 15 metres.
- Point D to Point E – 13 metres

- Point E to Point F – 92 metres
 - From the High-water mark to Point F is 222 metres.
 - Point F to Point G – 72 metres
 - Point G to Point A – 178 metres
52. The Boundary walked with Mr Manuega and his party was almost the same except that they started from the Rosewood tree about 16 metres away from the Goigoi tree marked as Point G.

ASSESSMENT OF THE EVIDENCE AND FINDINGS

53. After considering all the evidence covering the separate land court cases related to this one, and the findings from the land boundary inspections and the law we arrived at the following findings of facts-
54. We find that the boundaries of the land in dispute in the 1993 LLC Case **are not the same** as the boundaries demarcated from the walked conducted on 5th February 2016 by this court.
55. We accept that the area inspected and walked by the Court and both disputing parties appear from the measurements to be identical to the survey done in the 1980 case that the Court then, relied on and we accept and are satisfied that the decision made in 1980 by Magistrate Asimba and his Local Land Court over that portion of land is the same portion of land that is in dispute today before this Local Land Court.
56. We find that the principal owners of the portion of customary land in dispute known as Yalelena today are one and the same owner as declared in the 1980 decision, being the Gomila Clan of Mutuyuwa Area.
57. We find that the land described as Yalalena now in dispute before this court is one and the same portion as described in the 1980 case as Haumo Gravel Pit.
58. We find that the 1980 decision is a final decision pronounced by a judicial tribunal being a Local Land Court having competent jurisdiction over the cause of matter and over the parties therein.
59. It disposes of once and for all the matters decided and therefore pursuant to s.27(4) of Land Dispute Settlement Act this issue of ownership cannot afterwards be raised for re-litigation between the same parties or their privies.
60. We find that the boundaries of the disputed land in this case are the same as the boundaries describing the portion of land in a decision made in 1980 by Magistrate Leslie Asimba and Messers Tuwehu Kakai, Tilaka Debolamina and Moses Niala.

61. We accept and are satisfied that ownership of the same portion of land in the present case, was awarded earlier in term by a LLC to the Principal Land Holding Clan of Gomila generally.

62. We find that in this case the common law doctrine of res judicarte which is recognized and adopted as part of the underlying law of the Constitution, Sch. 2.8 of which issue estoppel is an extension of res judicata, will apply. And depending on the circumstances it may also constitute an abuse of process.

63. To support this finding we rely and adopt the common law position enunciated in the case of ***Telikom PNG Ltd v. ICCC SC1716*** where it stated from Halsbury's Laws of England, 4th Ed. at par 973as follows:

“The most usual manner in which questions of estoppel has arisen on judgments inter partes has been where the defendant in an action raised a defence of res judicata, which he could do, where former proceedings for the same cause of action by the same plaintiff had resulted in the defendant's favour, by pleading the former judgment by way of estoppel.”

64. This court is now satisfied that there is indeed a previous Local Land Court decision made in 1980 by Magistrate Leslie Asimba and Messers Tuwehu Kakai, Tilaka Debolamina and Moses Niala in relation to a dispute over ownership of land known as Haumo Gravel Pit where:

- Even though the parties are not the same, they are direct relatives of the original clans disputing in 1980;
- the issue of ownership that was contested is the same issue being contested in the current case;
- the previous judgment or decision extinguishes the foundations of the claim or the right to set up an action by the current parties and the result is therefore final and conclusive and it binds every other Court; and
- a Court of competent jurisdiction being the Local Land Court chaired by Magistrate Leslie Assimba made the first decision declaring the Gomila Clan of Mutuyuwa as owners.

65. On that basis, in relation to the present dispute before us, we cannot therefore proceed to hear the entirety of this case.

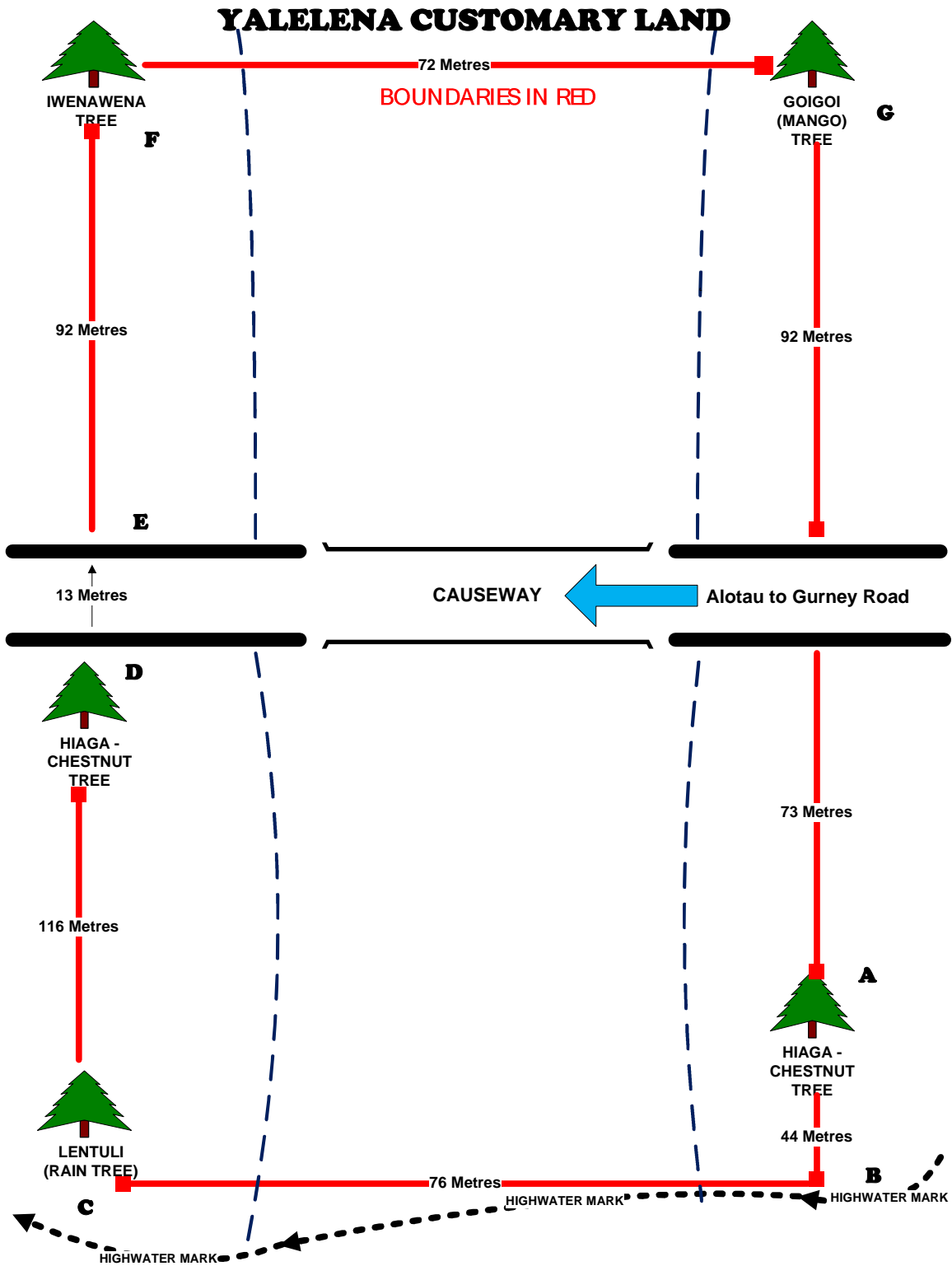
ORDER

66. Upon the Local land court findings that:

- 1) The boundaries of the disputed land in this case relating to the land called Yalelena **are the same as the boundaries** describing the portion of land in a decision made in 1980 by Magistrate Leslie Asimba and Messers Tuwehu Kakai, Tilaka Debolamina and Moses Niala sitting as a Local Land Court awarding ownership of the same portion of land called, Haumo Gravel Pit to the Gomila Clan generally; and
- 2) There is indeed an existing previous Local Land Court decision made in 1980 in relation to the present dispute before it and cannot therefore proceed to hear the entirety of this case as it would be contrary to s.27(4) if the Land Dispute Settlement Act;

67. We make the following order that:

The Local Land Court matter registered as a dispute under LLC 10 of 2012 being in the Matter of a Dispute over the Customary Ownership of YALELENA between GAUPANA BAUDOLO OF GOMILA KAPOKAPOUNA CLAN, MUTUYUWA, ALOTAU as the Complainant/Applicants and MANUEGA GUNABEI OF GOMILA KAPOUKAPOUNA CLAN , MUTUYUWA, ALOTAU as Defendant/Respondents **be dismissed for Re Judicarta** as it raises the same cause of action and the same issues as to ownership that was determined in 1980 awarding ownership of the same portion of land to the Gomila Clan generally.



Dorothy Gaupanua (Spokeswoman) for Complainants / Applicants
 Nalugu Manuega (Spokesman) for Defendants/ Respondents