

**IN THE MALAITA CUSTOMARY]
LAND APPEAL COURT]**

MCLAC NO: 4 of 1998

Sitting at Auki on 14th/10/11.

Before: Adam Kwaeria - President
Stanley Toata - Member
Philip Otoahu - "
Joseph Sihiu - "
Smith Ragi - "
Jacob Rahe - "
Davis D. Vurusu - Secretary/member

BETWEEN: PLASID SADE - Appellant
(Representing Late Raphael)

AND: CHRISTIAN DIAU - Respondent
(Representing Patrick Lone)

IN THE MATTER OF: TAKWA CUSTOMARY LAND APPEAL.

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JUDGMENT
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This is an appeal against the decision of Malaita Local Court on Takwa Customary Land filed by Raphael Afuno (deceased) now represented by Plasid Sade, the deceased son.

The Malaita Local Court decision was dated 18/5/98 and we quote;

- “1. Defendant Patrick Lone and his line have primary right of ownership over Takwa customary land. Boundary line as defined in defendant’s map.
2. Any new development to be done, seek permission from primary owner.
3. No order of costs. Each party to bear their own costs.
4. Appeal within three (3) months”. End of quote;

Being an aggrieved party to that decision the Appellant filed eight grounds of appeal before the Malaita Customary Land Appeal Court having jurisdiction to the land in question. Their grounds of appeal are as follows:-

Grounds 1. That the Local Court decision was against the weight of the evidence.

2. *That the Local Court erred in putting more weight on the evidence of the Respondent's witnesses when there is no customary principle or fact to support or collaborate their oral evidence in Court.*
3. *That the Local Court erred in placing emphasis on the fact that no objection was raised by Appellant when a piece of land within Takwa was given to Catholic mission on lease basis by failing to consider the fact that that the said piece of land was alienated in the late 1930's and that it was the Respondent's father who signed the lease documents whilst both the Appellant and Respondent do not at that point in time know the laws or nature of alienated land and procedures involve in acquisition of land to be alienated land.*
4. *That the Local Court have no jurisdiction to apply a doctrine on the nature and procedures pertaining to alienated land as a basis to determine the ownership or otherwise of customary land.*
5. *That the Local Court erred in accepting the Respondent's boundary when it accepts the principle that "boundary in custom usually follows river to river, stones, valley or mountains" when there is no oral evidence from persons whose land bordered Takwa customary land to support the above principle or contention.*
6. *That the Local Court erred in custom to apply the principle "If someone is the discovered, then he should continue to live in his land", as this is not necessarily correct in custom.*
7. *That the Local Court erred in accepting the Respondent's 20 generations.*
8. *That the Local Court erred in accepting the Respondent's six tambu sites in the disputed area.*

We will now turn to consider grounds of appeal. To consider these grounds of appeal, we will consider both parties' submissions before this court, and examine the Malaita local court record of proceedings. We will deal with the grounds of appeal one at the time.

Appeal ground No: 1 and 8;

Appeal grounds No: 1 and 8 raises same issue, we will therefore deal with them together.

The Appellant in these grounds submits that the Local Court failed to give weight to his oral evidences in court and that of which he gave during the site visit. In his evidence before the local court he mentioned that his tribe has Principle

tambu site within Takwa land namely BOLOU. He submits that the Respondent though claimed to have tambu sites within Takwa land; however, he did not name any of his principle tambu sites.

Appellant further submits that the local court erred in putting more weight on Respondents witness number ones evidence. Appellant submit that his tribes genealogy presented by Respondents witness number one before the local court was not correct therefore the local court should not put any weight on.

In reply to these grounds, Respondent submits that the responsibility of weighing of evidences before the court is the sole responsibility of the court. The Local court have properly weigh the evidence before them and arrived at their decision.

The Court:

We consider both parties evidence and examined the local court record of proceedings. The Appellants oral evidence before the local court commence from page 1, to 9, of the local courts proceeding. The Appellant in his evidence state that his tribes Principle tambu site within Takwa land is called BOLOU. Beside this principal tambu site there are other tambu sites belong to his tribe. He states that the respondents destroyed their tambu sites. He also presents his tribes genealogical evidence.

The Respondents oral evidence can be found commencing from page 12 to 17 of the local courts proceeding. Though Respondent claimed to have tambu sites within the disputed land, he did not name his Principle tambu site. When asked by this court as to what is the name of his Principle tambu site, he

The Court believe that according to our custom, discoverers must have a Principle Tambu site. The local court fails to discuss issues on genealogy in their judgment. It is important to note that court carry out site visit just to prove what was said in court. The Local court fails to properly weigh evidence before them.

Appeal ground no. 1 & 8 are upheld.

Appeal ground No. 2:

This ground raise issue on genealogy. The Appellant submit that the Local Court erred in putting more weight on the respondents witness number

ones evidence. Appellant submit that his tribes genealogy presented by respondents witness number one before the Local Court was not correct therefore the local court should not put any weight on.

Respondent in reply submit that there is nothing wrong with the local courts determination. The local court weighs evidence that comes before them.

The Court:

This court upon considering both parties' submissions and examining the local courts record of proceedings found that both parties claimed ownership over Takwa Customary Land thru Patrilineal descendant. When questioning the respondent whether the Appellants and Respondents have any genealogy connection, the respondent told the court that there is no genealogy connection between them. However, when we examined both parties genealogical table presented before the local court we find that the possible connection between the two parties is from Saufo (f) and Afehau (m). Refer Respondent evidence at page 13, para. 3 and we quote;

"The girl where plaintiff side claim is the girl on my generation, she is the daughter of Ora. The name of that girl was Saufo who married Afehau" end of quote.

Afehau is the son of Tama whom Appellant claimed to be their discoverer.

Appeal ground no. 2 is upheld.

Appeal ground No: 3 and 4;

These grounds raise issues on registered land, the portion of land within Takwa customary land in which the local court may have based its findings upon. The Local Court and CLAC lacks jurisdiction to determine issues on registered land. It is our humble view that the court should base its findings on customary facts when deciding the issue of ownership of customary land.

Appeal ground number 3 & 4 is allowed.

Appeal ground No: 5

The appellant's submission in this ground is that, the local court was wrong to accept the Respondents boundary was the correct boundary of Takwa land. He submits that local court did not visit the boundary claimed by respondent. No oral evidence from persons whose land bordered Takwa land to support them. They did not mention their boundary in their oral evidence in court.

The respondent in reply submits that the local court in its land proof survey findings and evidences produced in court clearly justified proof of respondent's ownership over Takwa land. The appellant has shown lot of inconsistencies and contradictory to his statements. Further the respondent referred this court to the local courts Judgment page 3 – 4 para. 3 (1), also page 4, para. 4, 5, 6 and respectively.

The Court:

The court upon considering both parties submissions and examined the local courts record of proceeding found that the appellant at page 3, para. 3 clearly states his boundary which starting from the beach of Ferasubua and move up straight to a Abalolo tree and then go across to the starting of Takwa river and then to Ngalibabari. From there go across to a village called Keleasi and then to Anoufi then came down to Fatamaebungu and through Rofelato river and down along the river to the sea shore. Reaching the shore it covers the sea area (reef). From the mouth of Rofelato river then along the sea shore Busu and Fio. From there coming up to a artificial island called Kokoefu and Talua and come to reach on fishing ground called Kafa, then moving up to a artificial island named Ambu, and move across the fishing area called Gounamatakwa. From Gounamatakwa move up cover other fishing area called Lamai Ferasubua and back to my starting point (Ferasubua sea shore).

The Respondents did not adduce evidence on land boundary in their oral evidence in court. The local court in their Judgment did not mention having visited the respondent's boundary in order to confirm that it is the true

boundary. Here once again it is important to note that, court carryout site visit purposely to actually show what parties mentioned in their evidence in court. The local court also failed to carefully weigh evidence before them.

Appeal ground No. 5 is upheld.

Appeal ground No: 6

In this ground the appellant submit that the local erred in custom to apply the principle "If someone is the discoverer, then he should continue to live in his land". This is not necessarily correct in custom. People are growing. People can go and settle to another place but they must always return to their mother land. This is the case in my tribe. Though some of us live just in front of Takwa land, Majority of our tribe's men and women still live in Takwa Customary Land.

He submits that his tribe's generation at Takwa is fifteen (15). Only 4 generation were absentees however the rest of his generation still living in Takwa land.

Respondent confirm the fact that the discoverer of any land cannot leave of move out from his land. This is according to Malaita custom.

The Court:

The courts knowledge about our custom is that the DISCOVERER is the person who first discovers the land. This present generations claimed their right of ownership of the land from their discoverer. People are growing and are moving everywhere that doesn't mean they cannot claim right of ownership passed down to them from generation to generation. There is no evidence to say that none of the appellants' generation lives in Takwa land. The local court therefore failed to carefully consider evidence before them when making their decision.

Appeal ground No: 6 is Upheld.

Appeal ground No: 7:

In this ground the appellant argued that the respondents twentieth (20) generations lived in Duruana. Their Principle tambu site is called Rongaebungu situated at Duruana. Billy Feralao only came to Takwa in 1930. From Billy to his son Patrick Lone, it is only two generation who lived in Takwa. Appellant submit that from Tama, (His Discoverer) to this present generation, there are fifteen (15) generation of his line occupy and cultivate Takwa Customary Land.

Respondent submit that the Local court fact findings revealed that Takwa Land genealogy exists without any error. Therefore the appellant's statement of claim is baseless according to customary settlement.

The Court:

In this ground of appeal both parties argued about their number of generations who said to have been living in Takwa Land until now. Number of generations alone will not determine ownership of customary land.

Appeal ground number 7 is allowed.

Court Finding:

The Law governing Customary is our Custom, therefore person claiming ownership of any customary land must prove his claim based on custom in that particular Area. Person claiming ownership of customary land must be able to know the land he claimed, his genealogy and the custom applied.

In this case, the court having considered customary evidences before us and upon examining the local courts record of proceedings found that the Appellant has proven his claim of ownership over Takwa Customary Land on the balance of probabilities.

The Malaita Local Court decision is hereby set aside. The MCLAC make its decision as stated below;

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DECISION
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1. The ownership of Takwa Customary land is awarded to the Appellant Plasid Sade and his line.
2. The boundary of Takwa customary land is as stated by the appellant in his evidence in the local court.
3. Any new development prior permission from the Appellant and his line.
4. No order as to cost.
5. Right of appeal on point of law only to the High Court within three months from the date of this judgment.

Dated this 18th day of October 2011.

Signed:Mr. Adam Kwaeria	-	President
Mr. Stanley Toata	-	Member
Mr. Philip Otoahu	-	“
Mr. Joseph Sihiu	-	“
Mr. Smith Ragi	-	“
Mr. Jacob Rahe	-	“
Mr. Davis D. Vurusu	-	Secretary

