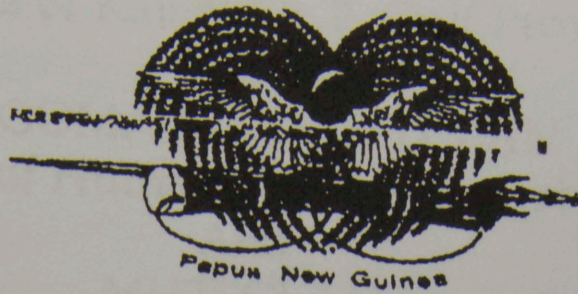


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IN THE SPECIAL LAND TITLES COMMISSION AT
KIKORI, ERAVE, WAIGANI

In The Matter of an order by the Head of State on advice of the
National Executive Council, under S.4(3) of the land Dispute
Settlement Act, in respect of a dispute over land known generally as
the Gobe Main and the South East Gobe Oil project in the land
regions of the Gulf and Southern Highlands Province between:

IMAWE KEWA CLAN

Claimants of Kaiam No 2 Village, Gulf Province
and

ISAWARI MAKOF, MAKENA AND WAFI CLANS

Claimants of Baina Village, Gulf Province
and

IMAWE BOGASI CLAN

Claimants of Samberigi, Southern Highlands Province
and

DOUAPASI CLANS (Luhali, Tipurupeke & Luu)

Claimants of Samberigi, Southern Highlands Province
and

YENIDOU BOGASI CLAN

Claimants of Samberigi, Southern Highlands Province
and

SONGOLO HAPROPAKE CLAN

Claimants of Samberigi, Southern Highlands Province.
and



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YESIKI CLAN
Claimants of Kaiam No.2, Gulf Province.
And
BOGOMA KUIDOBO CLAN
Claimants of Humane village, Kantobo, SHP
And
MUTI CLAN
Claimants of Kantobo, Southern Highlands Province
and
ANDEI CLAN
Claimants of Samberigi, Southern Highlands Province
and
YALLA CLANS
Claimants of Samberigi, Southern Highlands Province.

SALIKA, J
29 February, 1996

Introduction:

This matter arises out of conflicting claims by various clans in the Gulf and Southern Highlands Provinces over land generally referred to as Gobe and South East Gobe. The dispute in this case has been aggravated by the discovery of oil in the areas. With the discovery of oil there has been a lot of prospecting and drilling carried out by Baracuda and Chevron Niugini who are the developers of oil projects in the area. With the prospecting and drilling going on there is a need for the developers to establish helipads and base camps because of the rugged terrain of the area. With all these activities going on come the inevitable compensation claims and demands. The developers have on occasions paid a clan compensation for use of land for helipads for example and this has attracted other claims

from other clans to put in bids to the developers for their share of the money. This has often come about because two or three clans may lay competing claims of ownership over the same piece of land. As a result there have been problems faced by the developers in that the claimants often force the company to stop operating. As a result the projections of the developers and the State are often thrown into disarray. Mediation had been attempted but has failed.

It was from that type of background that the Head of State acting on the advice of the National Executive Council was of the opinion that special circumstances existed that required the dispute to be settled under the Land Titles Commission Act. The Head of State declared by notice in the National Gazette that the Land Dispute Settlement Act did not apply and pursuant to s.4(3) of the Act, ordered that the Land Titles Commission Act would apply and directed a Special Land Titles Commission be appointed to determine ownership of the Lands the subject of disputes.

I was thus appointed by the Head of State on advise of the National Executive Council by Gazettal notice. *J.L.*

VENUE OF HEARING

I commenced hearing in Erave on the 8th May 1995. Evidence was given orally on oath and parties represented there were given the opportunity to cross-examine witnesses. It took 5 months of sitting time in Erave. After completing evidence in Erave the hearing was moved to Kikori. Hearing time in Kikori was one month. The

hearing time in Kikori took less time because evidence was adduced by way of written statements and affidavits. The value of adducing evidence in that manner was appreciated by the parties because it was faster. It is thus recommended that in large scale hearings of this nature those entrusted to hear them might consider useful this method of obtaining evidence.

It is a requirement under the Land Titles Commission Act that the commission walk the boundaries before the hearing. In April of 1995 I did an aerial view of the declared area having being flown around in a helicopter organised by Chevron Niugini. After adducing all the evidence I walked some of the boundaries and also had another aerial tour of the boundaries. The land area to be determined is a large area and it is rugged. If I were to physically walk the whole land area it would have taken me several months to complete the inspection. An aerial inspection and walking some of it was sufficient.

PARTIES TO DISPUTE

The following disputing parties gave evidence.

Songolo Hapropakes

Imawe Bogasi

Tipurupeke

Luhaliipi

Luu

Yenido Bogasi

Isawari Makof

Museneri

Dipan

Wafi

Imawe Kewa

Yesiki

Muti

Bogoma Kuidobo

Isawari Bubuku Gohu

Yalla

Andei

The area that is in dispute is marked on the map:- It is described as:-

"All that land containing an area approximately 1082 square kilometres in the Gulf Province and Southern Highlands Province covering the Kaiam village in the Gulf Province then to the East towards Samberigi airstrip in the Southern Highlands Province and thence by a straight line to the junction of Mubi river and the Kikori river in the Gulf Province, thence following the South westerly bank of the Kikori river to the point of commencement at Kaiam village."

It is a large area covering a huge area of mountainous and swampy terrain with a lot of rivers and creeks. Much of the area is uninhabited. Much of the population is located on the Samberigi Valley. The people who live in Samberigi, Kaiam and Baina are involved in this dispute.

Much of the evidence that the parties presented was based on their traditional use of the land from their forefathers to the present day. Evidence of genealogy became important because in some cases there was heated debate about whether a sub clan was part of one clan. It became necessary to adduce evidence of genealogy to prove whether one clan was connected or not to a particular clan.

There are many examples of this in evidence.

For example the Songolo Hapropake witness Sei Doyo gave evidence that he is a Songolo only and not a Songolo Hapropake. He disassociated himself from the Songolo Hapropakes led by Kampani Sondopea and said that the Sisipike land, and Mt Kiki were his. Kampani Sondopea on the other hand says Songolo Hapropake is one clan. Yenido Bogasi another disputing party through Sakaire Nonome said his Yenido Bogasi clan was a clan on its own and not a sub clan of Imawe Bogasi clan. Leslie Ope on the other hand says Yenid o Bogasi is not a clan but that it is a victory shout of his Imawe Bogasi clan and further that Sakaire Nonome is a Toala Hongiri man a sub-clan of Imawe Bogasi. Imawe Kewa, another disputing clan through their main witness Jimmy Kinobo said Imawe Kewa is a clan on its own while Leslie Ope of the Imawe Bogasi clan claims Imawe Kewa is a sub clan of Imawe Bagasi and further that Jimmy Kinobo's grand father was adopted into the Kewa subclan of Imawe Bogasi. He claims that Jimmy Kinobo's grand fathers' original clan is

Gohu clan. Having heard all the evidence and making my own observations during the course of hearing I am of the view that the Turaha family is a member of the Isawari Bubuku Gohu. I further find that the Isawari clan of Baina and the Isawari Bubuku Gohu clan are related and that both Koloka Dumano and Wagiriyu Siripu are cousins. Again I am aware of the impact of this finding on the parties. I observed Wagiriyu Siripu as a witness and my impression of her as a witness was that she was very guarded as to what she was saying. I find that she lied about not knowing the Koloka Dumano's family and her relationship with them. It appeared to me at the outset while she gave evidence that she had been coached. I also observed on one occasion outside the Kikori Court that she was able to communicate in the Foe language with Koloka Dumano and Sei Doyo.

I summarise the preliminary finding in the following way. The Songolos and Hapropakes are one group of people, the Imawe Bogasis and the Yenido Bogasis are one group of people, the Imawe Kewas are part of the Tipurupeke clan and that the Isawari from Baina and the Isawari Bubukus Gohu are one group of people. Critics may argue that I have joined people from the Southern Highlands and the Gulf provinces, with different languages and land regions. It may be true that I have done that, however let me say that in reality there is only an imaginary line dividing the Southern Highlands from the Gulf. The languages many differ but not very much and in any case there are people living in Kaiam and Baina who speak the Foe and Samberigi languages and there are people

living in Samberigi who can speak Kaiam and Baina languages. Evidence also is that the Isawari Bubuku Gohu lived near Mt Kiki and the Sisipike areas which is a land region adjacent north of the Kaironstiyn land region claimed by the Isawari Makof of Baina. It therefore is within close proximity.

I now proceed on to the ownership issues. I would like to deal with ownership issues over portions of land that are in dispute.

CUSTOMARY LAND TENURE

Let me state here a general feeling of the people in the disputed areas regarding customary land tenure. There is a strong feeling of attachment to land by the various disputing parties. Evidence by the witnesses bear testimony to that fact. It is now evidence that because of the oil finds in the area the peoples attachment to the land has become necessary for economical reasons rather than for social or psychological reasons as was originally or traditionally.

Evidence from the disputing parties suggests that most land in the dispute area is held residually by clans or sub-clans but worked by individuals or families. While rights to the land is generally associated with clans or sub-clans, subsidiary rights to gardening areas are usually associated with individuals or family units. For example if a man planted bamboo trees on a clan land, those bamboo trees belong to him and not the clan. The fact that the bamboo trees belong to him does not necessarily mean he owns the land. Usually a

man inherits his rights to certain land from his father, who, in the same way inherited it from his father.

Amet J (as he then was) in the case of *RE HIDES GAS PROJECT LAND CASE (1993) PNGLR* restated some principles derived from Professor Coote in his Institute of National Affairs Discussion Paper No 39 which he found to be of relevance. For the purpose of further discussions I set them out again:-

"1. *Adverse possession.*

A group that resides upon or improve land for a sufficient time without the permission or active opposition from others thereby owns it. A group that uses land for a sufficiently long period of time without permission or active opposition from others but does not reside upon or improve it thereby acquires a useright in it.

2. *Ear marks of ownership*

Land can only be said to belong to a group when it is shown that either neighbouring groups acknowledge their claims by not challenging it or, by their ability to occupy and use the land and to stop others from doing likewise, they show that they exercise controlling interests over it.

3. *Last is first.*
If land is not used for successive generations, the claim of those further removed from those who vacated it becomes as the years pass of diminishing importance.
4. *Maintenance of interest in land (or possessing acts).*
An interest in land is maintained by building houses and settling on it and by gardening, grazing or burning it off, collecting from it, or for others to occupy and use it.
5. *No unqualified rights of return*
Once a group has abandoned its ancestral land by cutting off all ties and associations with it, they cannot return and claim it at a much later date without the agreement of those who prior to that date, have assumed controlling rights to it.
6. *Ownership presupposes control.*
Ownership implies the power, whether exercised or latent to occupy and use land and to stop others from doing so.
7. *Preponderance of the evidence.*
In customary land disputes, the party shall prevail whose case is supported by preponderance of the evidence.
8. *Right to resist attempt to return.*
The extent to which people attempting to return to the land of their ancestors are opposed is largely dependent upon the

extent to which their land has been taken over and used by others, and the extent to which they have been able to by others and the extent to which they have been able to forge a friendly relationship with those now in control do it."

I too find these principles useful in the determining the issue of ownership in the present case with variation and modifications where appropriate.

As I consider the competing claims I take into account the principles stated above and apply them where appropriate. I am not necessarily bound by them. In any case there are so many differing customs in Papua New Guinea and to attempt to follow one set of customs from a given area I would not be doing justice to the rest of the country's customs. Furthermore customs are changing. In some areas where missions and the government have long been established customs there have changed to suit their needs.

I agree with what Amet J (as he then was) said about the development of the underlying law. I am mindful of that duty and I have tried as best as I could to determine ownership on the evidence that was adduced before me.

I will start with the Samberigi land.

1. Samberigi Airstrip land and Masigi area

This land is hotly contested by the Ipipome Hongiri sub-clan of the Imawe Bogasi clan and the Luu clan. I have heard evidence from various witnesses from both sides. Apart from oral evidence documentary evidence was also tendered. This land was purchased by the government in 1964 and the government leased it to the Mission. The evidence as to who received payment for the land is known by the disputing parties. The transfer document lists Weriaru Iewia, Iumeli Sosisamena, Sali'a Iwewia of Masigi village transferring the land to the Government. There is much dispute as to the way the land was acquired. I acknowledge the difficulty in communication between officials of the Government and the villagers at the time of the transfer. I do not think the local people understood the full implication of what they were doing. However I am not convinced that the local people did not understand in general what they were doing. People generally in the 1960s in my view were aware of what was going on. There was evidence that at the time of payment many people were gathered there to witness the payment. It would have been a big occasion and I am sure that the people who were gathered there knew that the Government was buying the land from whoever the original owners were. I am also of the view that the people knew who owned the land at that time. I am convinced and satisfied from all the evidence before me that the Luu clan is the traditional owner of the Airstrip and the Masigi village land. My visit to the village revealed that the village is predominantly Luu. Preponderance of evidence factor supports their claim.

land but not ownership. They also live at Kaiam and use the land from there.

Having ruled them out the only other contestant is the Imawe Bogasi who through some of their clansmen who live at Kaiam also use the land regions. I award ownership of those land regions to the Imawe Bogasi through its clansmen that live at Kaiam. Any benefits to be derived from these land regions must be showed between the Imawe Bogasis, the Imawe Kewas and the Yesihis.

KITIKIPATI - SIPIRIYU LAND REGIONS

The Imawe Bogasi clan has a strong claim over this land regions and parts of it is being claimed by the Imawe Kewa and the Yesiki groups. After hearing evidence of land use on that land I award ownership of the land to the Imawe Bogasi clan. However again both the Imawe Kewa and the Yesiki groups have acquired user rights over portions of land they have used over the years in that land region. This ruling also is a flow on effect of my earlier rulings concerning the identity of those two groups.

KORO MAIYU - KAIRONSITEIYU LAND REGION

This land region was claimed by Isawari Makof and Isawari Bubuku Gohu. There is no dispute as to who owns this land region. The only dispute relation to this land was whether the Isawari Makof and Isawari Bubuku Gohu were part of one clan. I have already ruled that the two clans are related. The situation with this land region is that the male members of Isawari Makof are all dead.

Daniel Wau is the son of WAGIRIYU SIRIPU the only surviving member of the ISAWARI MAKOF clan. He traditionally cannot inherit his mother's land. However he appeared to have been the custodian of the land since he attained his manhood status. On the other hand I have declared that the TURAHA FAMILY is also part of the Isawari clan. The Turaha family has male members still living. Customarily the male members have controlling interest over land in this area. In that regard since Daniel Wau appears to have had controlling interest over the land he gradually hands over control of the land to the living members of the Isawari clan which is the Turaha family. After all Daniel Wau who is a member of the Kapakapa clan has his own clan land to look after. He of course would have user rights over that land region only through his mother. Daniel Wau will also be a beneficiary from any projects undertaken on his mother's land. This will also apply to the Posou family.

SESENAWAE, SETENAWAE, SUAGESI APUSI

This land region is where the SE Gobe oil wells are. It is disputed by the Imawe Bogaris, the Songolo Hapropakes. The Luhapis, the Yenido Bogaris, the Isawari Makofs, the Imawe Kewas and the Yesikis. Again I have heard evidence from the parties on this land region.

This region is rugged. The Imawe Kewas and the Yesikis are for the first time claiming this area. During mediation in earlier proceedings and land inspection they did not register any interest in

that land area. In any case they would have been cut off by the ridge that comes all the way from Mt Kiki to Sesenawae. I therefore discount their claims on that basis alone.

The Isawari Makofs claim is discounted because in my view they would have been cut off by the ridge. They would have to be mad to venture into very dangerous terrain onto the ridge. The only reason they would have gone there would have been to hunt. However my view is that there is plenty of ~~faller~~ land in the valley below to do hunting. No cassowaries would go up the cliffs to feed there.

I discount the Luhalipis because from their territory in Samberigi it would be difficult for them to travel the rugged terrain to Sesenawae. Again they would be mad to venture that far south to hunt for wild animals.

The Yenido Bogasi are part of the big Bogasi clan and I think they would have had access to the area through the valley from the Seipu land region.

I award the Sesenawae land region to the Imawe Bogasi group.

The Songolo Hapropakes are the other group which has laid a claim over that land region. They also, it seems to me, to have had access into the area from the Sokome cave side. I would put their land region as far as the ridge between Gobe 8X and 2X. Gobe 8X belongs to the Songolo Hapropakes while Gobe 2X I would award to

the Imawe Bogasi. From my observation of the area from the air this ridge is not suitable for gardening.

MAKENA, DIPAN, MUSONERI AND WAFI CLANS. There is no real challenge to the land regions claimed by these clans. I have heard evidence of ownership of the land by these clans. I am satisfied that each of those clans own separate land regions. I am however not impressed with very sharp angle boundaries because normally boundaries are marked by some natural features. I am satisfied that the Wafis share their land boundary with the Imawe Bogasi at the Waia river to the east and that they share their western boundary with the Musoneri clan. The Musoneri share their western boundary with Dipan who in turn has a boundary with Isaweri Nalof. The Miheva clan has a boundary with the Dipans and the Musoueri to the west. To their east they share boundary with the Imawe Bogasi. The Makena territory is on the west side of the Waia river while the Imawe Bogasi have the eastern side. The Makena territory however, does not go up the Sesenavae ridges. They have not claimed the SE Gobe oilfields. These clans are aware where their respective boundaries with each other are. Makena clan to the north has its boundary with the Isavari Mikof at the foot of the ridge that has the well heads. Makena likewise however in my view cannot claim ownership of the oilfields for the same reasons as the Isawari Makofs.

An application was made by the Isawari Makof group for the Land Title Commission to make the following declarations:-

- "1 Claim 1 is in Declarations sought in paragraphs 3,4,5,6 & 7. It is clear that, the "court of competent jurisdiction" referred to in section 16 (1) (b) of the Land Act, Ch. 185 is the Land Titles Commission. This Commission therefore has the power to determine the claims that, the Applicant is a person entitled to be served the Notice to treat and be paid compensation under the Land Act. Even this Commission has powers under section 31 of the Land Titles Commission Act, 1962 to make such inquiries and hold such hearings as it considers necessary for the purpose of the Commission. In this case, the Commission can inquire into the Land Act and ascertain whether the laws concerning the acquisition is being complied with any if there has been any infringement of the constitutional rights of the Application.
2. Claim 2 is in Declarations sought in paragraphs 8, 9 and 10. It is clear on facts that, the said land was never acquired under the land Act. The applicant claims unjust deprivation of property and infringement of his rights. The Applicant is entitled to enforce his constitutional rights under section 57 of the constitution. The Commission has powers under section 58 of the Constitution.
3. Claim 3 is in Declarations sought in paragraphs 11 and 12, where the Applicant claims to have equitable interest arising from the customary land ownership rights to be recognized by the Commission. The Commission has power to determine this claim on the basis that, in recognizing the ownership rights of the Applicant, there is also power to recognize the type of interest held by the Applicant in the said land

in respect of the activity on that land. The principles laid under the on equal participation be adopted to enforce the rights of the Applicant in this case.

4. *Claim is in Declarations sought in paragraphs 13, 14 and 15 based n the Applicant's interest to claim the said land to be in Gulf province and the project in Gulf province also with related claims of royalty rights to be recognized by the Commission."*

It is clear in my mind that the applicant is asking this tribunal to make declarations which are really matters of Constitutional interpretation. I refuse to make any such declaration but direct that the affected party or parties take the issues to the Supreme Court by way of a Special reference.