

IN THE COURT OF APPEAL
THE REPUBLIC OF VANUATU
(Civil Appellate Jurisdiction)

Civil Appeal Case No. 07 of 2010

BETWEEN: DIRECTOR OF LANDS, SURVEY & RECORDS
Appellant

AND: PIERRE NIKARA AND FAMILY
First Respondent

AND: MELE TRUSTEE LIMITED
Second Respondent

Coram: Hon. Justice J von Doussa
Hon. Justice R. Young
Hon. Justice O. Saksak
Hon. Justice D. V. Fatiaki

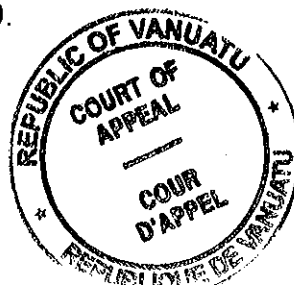
Counsel: Miss. Jennifer Harders for the Appellant
Mr. Edward Nalyal for First Respondent
Mr. Kiel Loughman for Second Respondent

Date of Hearing: 8th and 13th July, 2010
Date of Judgment: 16th July 2010

JUDGMENT

Introduction

1. This is an appeal by the State against the Orders of Justice Bulu issued on 27th April, 2004 in Civil Case No. 7 of 2004.
2. The original parties to the case were Pastor Pierre Nikara and Family as Claimants and Mele Trustees as defendants. The Attorney General applied on 24th April 2007 for orders that (a) the Director of Land Records be joined as a party to the proceeding and (b) that leave be granted to appeal against Order 3 in the Orders of Justice Bulu (the primary Judge). Justice Dawson granted leave to appeal Order 3 on 29th May 2009.



The Orders Appealed

3. On 27th April 2004 the primary judge issued the following orders:

"UPON READING the Supreme Court Claim and the Amended Supreme Court Claim filed herein AND FURTHER UPON READING the application for summary judgment and READING the sworn statements filed herein:

AND FURTHER UPON HEARING George Boar counsel for the Claimant and Freeman Langa Chairman of Mele Trustee Limited.

The Court notes that Mele Trustee Limited has no opposition to the Claim filed herein and on that basis the Court makes the following Orders:-

1. *That Mele Trustee Limited shall immediately release to Ps. Pierre Nikara as representative of Ps. Pierre Nikara and Family all files including land leases documents relating to Saweroa land which land area is shown and annexed "PN 2" to Ps. Pierre Nikara's sworn statement filed and dated 20th January 2004 as declared in Land Case No. 1 of 1993 and affirmed in the Supreme Court in Land Appeal Case No. 1 of 1994 on 19th December 2003.*
2. *That Mele Trustee Limited shall immediately release to Ps. Pierre Nikara all outstanding land rents and premiums and all records of payment paid by various leases who have executed leases with Mele Trustee Ltd on Saweroa.*
3. *That following the Island Court's decision in Land Case No. 1 of 1993, Ps. Pierre Nikara and Family are the declared custom land owners of the following identifiable leasehold titles located on Saweroa Land, which include inter alia,*
 - (a) *Toa Farm Enterprise Ltd – 12/0631/002*
 - (b) *Ballande Vanuatu Ltd – 12/0631/004*
 - (c) *Vanuatu Abattoir Ltd – 12/0631/010*
 - (d) *Vanuatu Beverage Ltd – 12/033/032*
 - (e) *Patche Ltd – 12/0631/009*
 - (f) *Ceseritte Frouin – 12/0631/007*
 - (g) *Taono Ltd – 12/0631/001*
 - (h) *Pacific International Trust Company – 12/0822/003*



- (i) Land Lease Titles No. - 12/0824/004
- 12/0824/005
- 12/0824/006
- 12/0824/007
- 12/0824/008
- 12/0824/009
- 12/0824/010
- 12/0824/011 and
- 12/0824/002

4. That Mele Trustee Limited shall immediately transfer and surrender its lessors status on the land lease titles identified in Order 3 above and on other land lease titles yet to be identified but otherwise located on Saweroa land.
5. That as of 19th December 2003 the following individuals and companies identified in Order 3 of this Order shall negotiate and pay annual rents and premiums to Ps. Pierre Nikara and Family and not to Mele Trustee Ltd.
6. Each party pays its own costs.

Dated the 27th day of April 2004

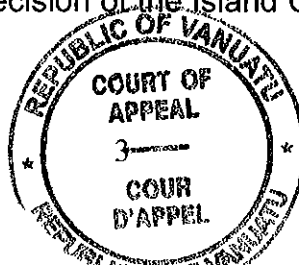
Signed: Ham Bulu

Judge of Supreme Court.”

Grounds of Appeal

4. The appellant's grounds of appeal are that the primary judge -

- (a) Misdirected himself as to the effect of the Efate Island Court decision in Land Case No. 1 of 1993 by ordering the surrender and transfers of titles over land which the First Respondent was not declared custom owner.
- (b) Exceeded his jurisdiction by granting the said order.
- (c) All the leasehold titles referred to in Order 3, save for the first three (12/0631/002; 12/0631/004; and 12/0631/010) were the subject of a different Land Case, Efate Island Court Land Case No. 10 of 1993 concerning the “Malaora Land”. The decision of the Island Court in that matter was ultimately



quashed in Supreme Court Case No. 57 of 2004 and remitted for redetermination by a differently constituted court.

(d) Land Case No. 10 of 1993 has not yet been determined by the Efate Island Court.

Response

5. In their response the First Respondents admitted the assertions in (c) and (d) above. They denied the assertions in (a) and (b) above and said that -

(a) all lands the subject of proceeding No. 7 of 2004 which were dealt with by the primary judge had had their customary ownership determined by the Efate Island Court.

(b) The disputed titles were all the subject of Land Case No. 1 of 1993 and not Land Case No. 10 of 1993.

(c) As such the issue is res judicata.

(d) If the titles are included in Land Case No. 10 of 1993 then they are included by fraud and/or mistake

Cross-Appeal

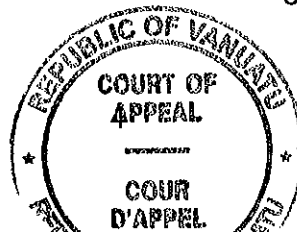
6. The First Respondent cross – appealed against the whole judgment of Justice Dawson dated 29th May 2009 that granted leave to the appellant to appeal Order 3 on grounds that -

(a) The Notice of Appeal was filed on 26th June 2009 some 5 years and 2 months late and the appeal proper was filed on 26th June 2010 some 6 years and 2 months late.

(b) The judgment appealed is a final judgment not an interlocutory one which would require leave to appeal.

(c) The appellant had accepted the judgment and had implemented it by rectifying leases, accordingly he was estopped from appealing at a later stage.

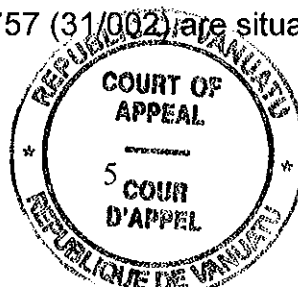
(d) There was no arguable case to warrant the granting of leave to appeal.



- The First Respondent then sought orders that –
- (a) the appeal be dismissed, and
 - (b) the appellant pays the costs of the Cross – Appeal.

Discussion

7. In the course of the hearing on 13th July the Court noted and recorded the position of the Second Respondent which indicated it would simply abide any Orders of the Court.
- 7.1 When the appeal first came on for hearing on 8th July 2010 the Court allowed an adjournment to enable counsel and the Court to locate the original map used in the proceeding in the Efate Island Court as the judgment identified both the land the subject of Land Case No. 1 of 1993, and the portions which were found to belong to the First Respondents as custom owners by colour marked on the map.
- 7.2 The central issue is whether the primary judge misunderstood the Island Court Judgment.
- 7.3 In Land Case No. 1 of 1993 there were 6 Claimants claiming Customary Ownership of Marobe Land. The Nikara Family was the Fifth Claimant. Their Claim was in relation to Sawareo Land which is situated within the boundary of Marobe Land. At page 3 of the Island Court Judgment the Efate Island Court clarified the boundary of the disputed land the subject of the judgment by making reference to the map annexed to the judgment as Exhibit 1. The boundary of the land in dispute is marked in red colour. At the first paragraph on page 4 of the Judgment the Island Court made it clear that the boundary covers the area of Malaroa which includes Title 534, 111 and 129 and also covers one part of Erangorango Title 3922 but does not touch upon the other part of Erangorango. The boundary covers an area of Sawareo Title 118, 131 and includes the area on which Titles 3242, 94, 2757 (31/002) are situated.



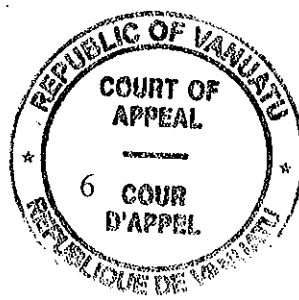
7.4 In its decision and orders the Efate Island Court said at page 43 and 44 of its Judgment as follows:-

“After hearing of each case of the Marobe Land Dispute, located on a map which is annexed in the judgment, the decision of the Court is as follows:

1. *The Court is satisfied that there are two different custom owners to Marobe land. The map annexed in the judgment shows two different parts of Marobe Land with two different custom owners.*
 - (a) *The first part, marked green, covers Title 118, 131, 2757 (31/002), 3242 and 94.*
 - (b) *The second part marked blue covers Title areas which were sold by Chief Nareo (1872-1884).....*
.....
2. *The Court is satisfied and declares that Pastor Pierre Nikara of Mele Village is the true custom Owner of the Sawareo Land which is in the boundary of Marobe Land- it covers the Titles 118, 131, 2757 (31/002), 3242 and 94. These are coloured green on the map.*
3. *The Court is satisfied and declares that the Nikara Family and all its descendants, according to custom have perpetual rights to occupy and enjoy the land coloured green on the map covering Titles 118, 131, 2757 (31/002), 3242 and 94.....”*

7.5 During the course of the adjournment the Original file of the proceeding in the Island Court was located in Government Archives and the map referred to in the judgment as Exhibit 1 was found. The map is the original and has the following features -

- (a) the outline of the boundary marked in red, identifying the boundary of the land under consideration by the Efate Island Court.
- (b) Areas marked in blue colour identifying the titles sold by Chief Nareo, and



(c) Three areas marked in green colour covering titles 118, 131, 2757 (31/002), 3242 and 94 which are those parts of Sawareo Land included within the boundary of the Marobe Land Claim.

7.6 During a further adjournment on 13th July the file including the original judgment and the map were made available to counsel. When the Court resumed counsels were given further opportunity to address the Court in relation to the original map. No further submissions were received.

7.7 We are satisfied that the primary judge misunderstood the judgment of the Island Court and misdirected himself as to the scope and effect of the Island Court's decision by ordering the surrender and transfers of titles over lands which were not the subject matter of Land Case No. 1 of 1993 before the Island Court and were not declared in favour of the First Respondent. In doing so we accept that the primary judge exceeded his jurisdiction. The appeal must therefore be allowed.

Discussion On Cross-Appeal

8. In regards to the cross – appeal of the First Respondent against the grant of leave by Justice Dawson to the appellant to appeal on two main grounds namely:-

(a) the appeal was more than 6 years out of time, and

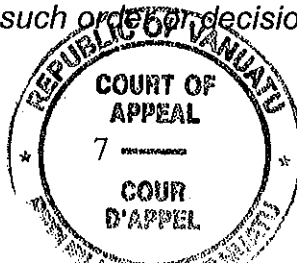
(b) the Director of Land Records having acted in compliance with the Court order and effecting rectification, was estopped from appealing the judgment.

8.1 In deciding these grounds the Court considered the provision of Section 22 of the Island Court's Act [Cap 167] and in particular Subsection (4) which states:

"An appeal made to the Supreme Court under Subsection (1) shall be final and no appeal shall lie therefrom to the Court of appeal."

Subsection 1 states:

"Any person aggrieved by an order or decision of an Island Court may within 30 days from the date of such order or decision appeal from it to:-



(a) the Supreme Court in all matters concerning disputes as to the ownership of land;

(b) the Magistrates Court on all other matters..”

Clearly these provisions have no application to this appeal which is not an appeal from the Island Court decision, but from the decision of Dawson J in Supreme Court Civil Case No. 7 of 2004.

8.2 The judgment of Justice Dawson of 29th May 2009 made Orders that -

“(a) The Director of Land Records’ urgent application under Rule 3.2(4) of Civil Procedure Rules to be joined as a party to these proceedings is granted.

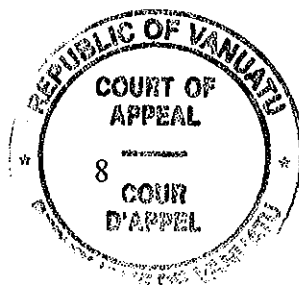
(b) As the Claimants oppose the submissions of the Director of Land Records, the Director is granted leave to appeal Order 3 of the Court Order dated 27th April, 2004.

(c) Costs in the cause.”

8.3 The Orders issued by Justice Bulu on 27th April 2004 constitute a final judgment. It is common ground and knowledge that the appellant was not a party to the proceeding when those orders were made. It is acknowledged the appellant did not file a Notice of Appeal until 26th June 2009, more than 5 years after judgment. However, until the appellant became a party he had no standing to appeal. Once he became a party he required an enlargement of time within which to appeal.

8.4 A single judge of the Supreme Court is empowered to enlarge time for appeal under Rule 9 of the Court of Appeal Rules. The order of Justice Dawson granting leave to appeal is in substance an order enlarging time.

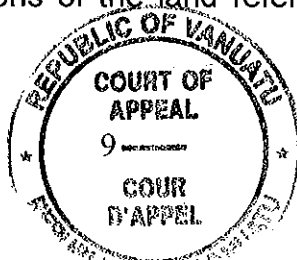
8.5 The order joining the appellant as a party to the proceeding was made to allow an appeal to be instituted against the final order of Bulu J, and the two grounds of cross – appeal are inter-related.



- 8.6 In issue is the ownership of very valuable land. The determination of custom ownership, and its correct entry on the Land Leases Register is a matter of great public importance. The passage of time between the decision of the Island Court in Land Case No. 1 of 1994 and the application made in Civil Case No. 7 of 2004, and the delay between the order of Bulu J and the appellant's application to be joined as a party in Civil Case No. 7 of 2004 is unfortunate, but the overriding concern must be the accuracy of the Land Leases Register, and for the Register to correctly and accurately reflect final and binding decisions of the Island Court.
- 8.7 It must be remembered that the decision in Land Case No. 1 of 1994 remains binding on everyone and finally determines the custom ownership of the land in question, and if the Register does not correctly and accurately reflect that decision, the Register would be misleading.
- 8.8 In our opinion it is not open as a matter of law to argue that a public officer whose statutory duty is to maintain the accuracy of a public record can be estopped by his conduct from correcting an entry wrongly made in that record. There can be no estoppel of a statutory duty.
- 8.9 We are not persuaded that there was any error in the enlargement of time for the appeal or in the orders of Justice Dawson.
- 8.10 For these reasons, the cross – appeal must be dismissed.

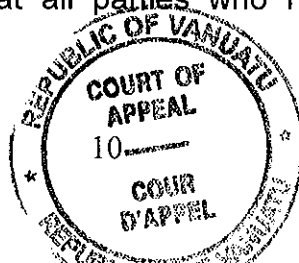
Conclusion And Orders

9. As we are satisfied that Bulu J misunderstood the scope and effect of the decision in Land Case No. 1 of 1993, the appeal must be allowed.
- 10.1 A number of consequential matters arise. First, although the appeal is brought against Order 3, only portions of the land referred to in Order 3 were wrongly



included in the order for rectification. Titles 12/0631/002, 12/0631/004 and 12/0631/010 were however correctly the subject of the declaration of custom ownership by the First Respondent. This appeal is therefore allowed only in respect of the balance of titles. The orders of the court set out below are intended to achieve that result.

- 10.2 Secondly, the effect of allowing the appeal in respect of those portions of the land referred to in Order 3 which were not the subject matter of Land Case No. 1 of 1993 is that the lessors immediately before the rectifications which implemented the order become again the lessors. In other words the judgment of this court puts the parties in Civil Case No. 7 of 2004 back into the position they were in before Bulu J's orders.
- 10.3 Thirdly, we understand that since the Land Leases Register was altered to reflect the order of Bulu J there have been sub-divisions of some allotments, and other leases have issued in substitution of those which existed in 2004. The order of this Court will have to be applied to all derivative titles that have been created from titles the subject of those parts of Order 3 of Bulu J's Order which this Court has now set aside.
- 10.4 Fourthly, the order of Dawson J granting leave to appeal was expressed to grant leave only in respect of Order 3. However, the balance of the Orders (save for the costs order) are inter-related and assume the validity of Order 3. As the appeal against Order 3 succeeds in part, we consider there must be consequential adjustments to Orders 1, 2, 4 and 5 so as to return the parties, as far as possible, to the positions they were in before the orders of Bulu J were made.
- 10.5 It is possible this will give rise to difficulties in some instances. If this happens the parties should use their best endeavours to sort out the difficulties sensibly on commercial grounds. Should parties decide to resort to further litigation it will be important to ensure that all parties who have a possible interest in the



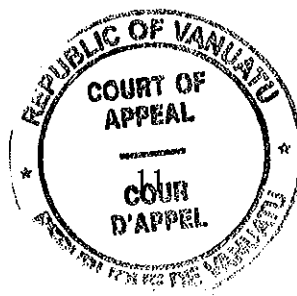
outcome are joined in the proceedings, and if several actions eventuate consideration should be given to consolidating actions, or having them tried together where there are common issues.

- 10.6 Fifthly, there is the issue of costs on this appeal. The appellant has argued that costs should be awarded in his favour. However, we consider each party should bear their own costs in the unfortunate circumstances which have made the appeal necessary. The appellant's public role is such that he has a responsibility to ensure the accuracy of the Land Leases Register, and this is a function which at times will require him to incur expense. We think this is one of those occasions.

Orders

11. 1. Appeal allowed.
2. Orders 1, 2, 3, 4 and 5 of the Order made on 27 April 2004 are set aside in so far as those orders concern leasehold titles other than titles 12/0631/002; 12/0631/004; and 12/0631/010.
3. Order that the Land Leases Register be rectified by reversing the entries made on the following leasehold titles (and any new titles derived therefrom) in consequence of the Order made on 27 April 2004 so as to restore the interest of the former lessors.

<u>Title</u>	<u>Former Lessor</u>
12/0631/007	Mele Trustees
12/0631/009	Mele Trustees
12/0631/001	Mele Land Committee
12/0633/032	Mele Trustee Ltd
12/0824/002	Minister of Land pursuant to S. 8 of the Land Reform Act
12/0824/003	Mele Trustees
12/0824/004	Mele Trustees
12/0824/005	Mele Trustees
12/0824/006	Mele Trustees




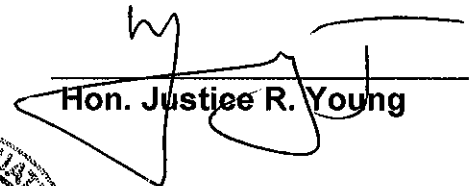
12/0824/007	Mele Trustees
12/0824/008	Mele Trustees
12/0824/009	Mele Trustees
12/0824/010	Mele Trustees
12/0824/011	Mele Trustees

4. The cross – appeal is dismissed.
5. Each party to pay their own costs of the appeal.
6. Liberty to apply to a single judge of this court in the event it is necessary to correct any title reference or description of a lessor to reflect the intent of the orders of the Court of Appeal.

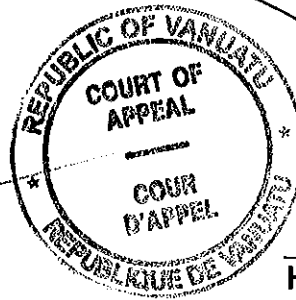
Dated at Port Vila, this 16th day of July, 2010

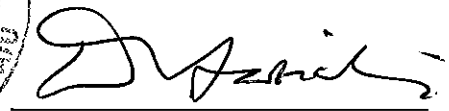
BY THE COURT


Hon. Justice John von Doussa


Hon. Justice R. Young


Hon. Justice O. Saksak




Hon. Justice D. V. Fatiaki