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

Civil Appeal
Case No. 20/3101 CoA/CIVA

BETWEEN: **Songoriki Family represented by Roro Poilapa Lorry Banga Lulu and Tilu Bema Charley**
Appellants

AND: **Director of Lands**
First Respondent

AND: **Family Kaltapang Malastapu**
Second Respondent

AND: **Family Kaltongo Marapongi**
Third Respondent

AND: **Family Lakeleo Taua**
Fourth Respondent

AND: **Family Masau Vakalo**
Fifth Respondent

AND: **Family Taravaki**
Sixth Respondent

AND: **Family Malasikoto**
Seventh Respondent

AND: **Family Kaltoa Malas**
Eighth Respondent

AND: **Family Thersa Anatu**
Interested Party

Coram: ***Hon. Chief Justice V. Lunabek***
Hon. Justice J. Mansfield
Hon. Justice J. Hansen
Hon. Justice O. Saksak
Hon. Justice D. Aru
Hon. Justice V. M. Trief

Counsel: *Mr. E. Nalyal for the Appellants*
Mr. L. Huri for the First Respondent
Mr. S. Hakwa for the Second Respondent
Family Kaltongo Malastapu Third Respondent not present and not represented
Family Lakeleo Taua Fourth Respondents not present and not represented
Family Masau Vakalo Fifth Respondents not present and not represented
Mr. B. Bani for the Sixth Respondent
Mr. P. Fiuka for the Seventh Respondent
Ms. V. Muluane for the Eight hRespondent
Mr. B. Livo for the Interested Party

Date of Hearing: *15th February 2021*

Date of Judgment: *25th February 2021*

REASONS FOR JUDGMENT

A. Introduction

1. This notice of appeal filed on 5th November 2020, is against the judgment of the Supreme Court dated 7th October 2020 which clarified a prior judgment of the Supreme Court in Land Appeal Case 1 of 1985 as to what exactly the Customary Land known as Lakenpagatau comprised of : whether it covered an area of land of 33/34 hectares or 500 hectares based on the judgment and determination of the Efate Island Court on the customary ownership made on the said disputed customary land in 1985 in favour of Family Songoriki, the appellants in this appeal.

2. The learned Judge found and was satisfied that the said disputed custom land covered 33/34 hectares but not 500 hectares. A clarification order was made by the learned judge to that effect. This is now the subject of this appeal.

3. The Efate Island Court in its judgment of 1985 described the disputed land and its extent at the beginning of its judgment as:-

> *"Mele Land dispute, South Sea Cement Factory, Roman Catholic Mission Land, Lakenpagatau, I go kasem hill on top, we map isoem out."*

4. On appeal before the Chief justice Cooke in his 1986 decision, the learned Chief Justice recorded in his judgment the following:

> *"The appellant appealed against the decision of the Efate Island Court who in their Judgment hold that Songoriki Family were the custom owners of the land in dispute, that is i.e., the land at Mele on which the Cement Factory stands."*

5. Since the judgment of Chief Justice Cooke in 1986 up to 2007, the appellants, Family Songoriki, did not take any active steps in their customary ownership rights as declared by the Efate Island Court and confirmed by the Supreme Court in 1986. It was only in 2008 that the appellants began to assert that their declared customary rights extended and covered a bigger area of land of 500 hectares from their reading and understanding of Chief Justice Cooke's 1986 decision on appeal of the said disputed land. This led to uncertainty or ambiguity about the terms and meaning of Chief Justice Cooke's 1986 decision.

6. Further, two other customary land claims were registered and dealt with by the Efate Island Court in Island Court decisions E/C 6/93 in "Pangona Land" and E/C 1/97 " Ponatoka Land". Ponatoka

Land includes Lakenpagatau, the disputed land, under consideration in this appeal. It is a smaller part of Ponatoka custom land.

B. Background

7. The Director of Lands, pursuant to Land Leases Act (Section 8 (g)) filed an application on September 2019 seeking clarification from the Supreme Court as to the legal status of the interim restraining orders against the Director of Lands issued in Land Appeal case No. 58 of 2004 (Ponatoka land) which was the decision referring the case back to the Efate Island Court for re-hearing. The Efate Island Court had reheard the Ponatoka land case and had delivered its judgment. The Land Appeal Case No 2A of 2010 is the appeal against that Efate Island Court decision (Ponatoka Land) currently pending before the Supreme Court.

8. The Director was concerned about two sets of the interim restraining orders which prevented the registration of subsequent land transactions, and sought clarification as to whether that interpretation was correct.

9. Mr. Hakwa who obtained the restraining orders on behalf of his client (the Second Respondent in this appeal), proposed to withdraw both set of restraining orders and made application to Court for such. The Director of Lands supported that approach as it made his position clear. All other parties also supported that approach, except Family Kaltoa Malas (the Eighth Respondent in this appeal).

10. Family Kaltoa Malas, in September 2019, made a counter - application in relation to the same land and the same parties. The counter-application sought clarifications of Chief Justice Cooke's decision dated 8 October 1986 in Land Appeal case No 1/85. It is said that the issue of concern was to identify whether Lakenpagatau Land comprised some 33 hectares or 500 hectares.

C. Judgment of the Supreme Court appealed against

11. In the Supreme Court, the learned Judge below identified the following issues:-

    (a) Mr. Nalyal filed an application that Mrs. Ferrieux Patterson- was conflicted and ought to recuse herself or be prevented from acting in this case as the legal representative for Family Kaltoa Malas (Eighth Respondent).

    (b) There was a difference of opinion as to whether the Supreme Court had jurisdiction to hear the counter - application.

    (c) In the event the decision was made that the Court had jurisdiction, a determination was required as to what exactly Lakenpagatau land comprised.

12. The learned judge dealt with the three issues as presented to him in this way:-

13. On issue one: The learned Judge heard and considered the respective submissions of Counsel on this first issue, and was of the view that, Mrs. Ferrieux Patterson cannot properly be said to be conflicted. There are issues of remoteness of her firm from that of the former principal Mr. Hudson and as well as remoteness in time. The learned Judge was of the view that the proceeding before him was discrete and sufficiently unrelated to previous ligation. He dismissed Mr. Nalyal's application and Mrs. Ferrieux Patterson was permitted to act for the now Eighth Respondent (then seventh respondent).

14. On issue two: The Judge noted that Mrs. Ferrieux Patterson filed her counter- application due to issues she submitted had beset the community since 1985 due to the Director of Lands reading Justice Cooke's decision as affecting 500 hectares and the lessorships of numerous Ponatoka custom land area have been changed into Family Songoriki as new lessors. Even if what Mr. Hakwa proposed to the Director's dilemma were accepted and put into practice, there would remain numerous disputes in relation to Ponatoka custom land. A first step to address some of the residual disputes would be to determine what land was referred to as Lakenpagatau in Chief Justice Cooke's 1986 decision. It is said this clarification would impact at least on two other extant cases, namely Island Court decisions E/C 6/93 and E/C 1/97.

15. In terms of whether the Court had jurisdiction to entertain Mrs. Ferrieux Patterson's counter-application, Mr. Hakwa and Mr. Nalyal submitted there was no jurisdiction for the Court to entertain the counter-application.

16. In the court below, Mrs. Ferrieux Patterson relied on the substantial justice requirement that the Court dealt with all underlying disputes, not simply the issue raised by the Director of Lands. The Judge noted Mrs. Ferrieux Patterson's submissions to the effect that the Director of Lands by accepting the counter-application as necessary, submitted that the Director has extended the original application to also include this second aspect. She submitted both clarifications came within the ambit of section 8 (g) of the Land Leases Act. She also referred to the Court's unlimited jurisdiction, pursuant to section 28 of the Judicial Services and Courts Act.

17. Mr. Hakwa's main point of opposition focused on the fact that Family Kaltoa Malas was not a party to the original Efate Island Court Land case which decision was confirmed by Chief Justice Cooke's 1986 decision. He further submitted that this was actually an application to review Chief Justice Cooke's decision, which was impermissible as the decision is final. He submitted the Supreme Court has no jurisdiction to determine Custom Ownership land.

18. Mr. Nalyal supported Mr. Hakwa's submissions and responded the counter-application amounted to an appeal of Chief Justice Cooke's decision. He considered the point has already been considered and determined.

19. In his judgment, the learned Judge stated that the Supreme Court has unlimited jurisdiction to decide civil disputes, but not customary land ownership issues. What is sought is for the Court to clarify what the then Chief Justice Cooke was referring to in his decision. The learned judge was satisfied that this did not equate to either a review of the decision or an appeal from the decision. There was nothing in his view to prevent the Court below hearing the counter-application. He pointed out also that the fact that the Director of Lands supported the application and described it

as "*necessary*" is significant. The learned judge accepted he has jurisdiction to hear the counter-application.

20. On issue three: Mrs Ferrieux Patterson sought to rely on the filed statements by a number of witnesses: F. Bulegih, P. Malas (x4), C.S. Malapa, A. Mansale, and K. T. Anatu. She also relied on her submissions of October 2019 and September 2020.

21. Ms Bulegih's statement is to the effect that the land identified as *"Mission Catholique"* prior to independence covered a total just over 34 hectares. Mr Malapa and Mr Mansale both stated having walked the boundaries of Lakenpagatau which only covered some 33 hectares of land; that family Songoriki only commenced to pro-actively claim to be lessors of the 500 hectares that comprises Ponatoka from 2008 onwards.

22. Mr Anatu's statement describes Lakenpagatau as the ex-Catholique Mission land later known as the South Sea Cement Factory. The land is only comprised 33 hectares. He provided a copy of the Chief Justice's Cooke's 1986 decision with a map of the land covered by title 12/0822/010.

23. He also provided a clarifying statement issued by Chief Justice Cooke dated 7 November 1990. He finally provided a copy of the Efate Island Court's decision which was appealed and resulted in the Chief Justice Cooke's 1986 decision. That Island Court Decision appended a copy of the map of the land as that appended to Chief Justice's decision.

24. The Judge noted that Mrs Ferrieux Patterson commented on the heading of the Island Court decision as material as it recorded:

> *"Mele land dispute, South Sea Cement Factory, Roman Catholique Mission land, Lakenpagatau. I kasem Hill on Top. We map I soem aot."*

25. The Island Court recorded similar descriptions of the land in dispute at paragraphs (3), (5A) and (5C). The learned Judge noted Mrs Ferrieux Patterson's submissions that the Lakenpagatau land was restricted to the Cement Factory area or the ex-Catholique Mission title, both of which ran from the bottom to the hill top.

26. The learned Judge noted Mrs Ferrieux Patterson referred to the Chief Justice's Cooke's decision where it is recorded:

> *"The appellant appealed against the decision of the Efate Island Court who in their Judgment hold that Songoriki Family were the custom owners of the land in dispute, that is i.e., the land at Mele on which the Cement Factory stands."*

27. The learned Judge noted that Mrs Ferrieux Patterson did not resile from the fact that Chief Justice Cooke does refer in his decision to an area of 500 hectares of land – described as having been sold by Deed in 1884. She submitted that was the area called Ponatoka, of which Lakenpagatau is but a small part. She maintained that all references to the 500 hectares do not relate to Lakenpagatau land.

28. She said further that any references to the 500 hectares do not relate to Lakenpagatau land.

29. The Judge then referred to Mr. Ferrieux Patterson's next point related to the situation where post the 1986 decision, Family Songoriki did not take any steps to claim any lease in respect of Ponatoka land as lessor. In 1990, Family Songoriki claimed the seashore area as being part of their customary land, but Chief Justice Cooke explicitly rejected this in his clarifications of his decision dated 7 November 1990. It is noted that the first claim relating to an area of 500 hectares was made on 28 February 2006 by Martin Sokomanu.

30. The learned Judge noted that Mrs Ferrieux Patterson sought to rely on the evidence of those who had actually walked the Lakenpagatau boundaries with Island Court officials, and the time that it took, as supporting her contention that the land comprises 33 hectares.

31. It was noted that prior to 2008 Mele Trustees Ltd was the lessor for land surrounding Lakenpagatau, on behalf of disputing custom owners. That position changed in 2008 when Family Songoriki sought to increase its land holdings. Five examples were referred to in the Judgment below.

32. It was of note that on 5 December 2012 Family Songoriki admitted by consent that they were not custom owners of leasehold title 12/0821/138 in Civil Case No. 11/32. That land is adjacent to the ex-Catholique Mission land and within the greater area of Ponatoka land.

33. The Judge noted that Mrs Ferrieux Patterson's point was that those leases were registered after 1986 decision, the leases would not have been permitted to be registered with the Mele Trustees Ltd as lessor on behalf of the custom owners.

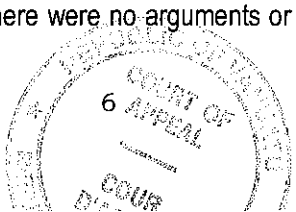
34. Mrs Ferrieux Patterson dealt with a letter of 2 December 2013 by the then Attorney-General stating Family Songoriki was custom owners of 500 hectares. That letter was retracted by a later Attorney-General letter on 14 June 2017 that Lakenpagatau land was made up of 33 ha 44a, 40a, not 500 hectares. That later position was confirmed by the State Law Officer's Letters of 18 February 2019 to Mr Nalyal, and 1 June 2020 to Family Songoriki.

35. Mr. Livo, Mr Leo, Mr Bani all adopted Mrs Ferrieux Patterson's submissions.

36. Mr. Fiuka and Mr Hakwa adopted Mr. Nalyal's submissions. Mr. Hakwa did not agree or concede any points. It is noted that Mr. Hakwa's view was that this issue could and should be addressed when the various Ponatoka land appeal cases were heard.

37. Mr. Nalyal relied on Chief Justice Cooke's decision – but he was unable to point to any part of the judgment which declared Lakenpagatau to be 500 hectares in area, or that declared that Family Songoriki to be custom owners of an area of land that size.

38. In his judgment, the learned Judge was of the view that Mrs. Ferrieux Patterson's arguments were compelling and comprehensive. There were no arguments or submissions made to the contrary apart from technical issues.



39. The learned Judge was satisfied that the judgment of Chief Justice Cooke was dealing with certain land in dispute – it was described as ex-catholic Missions Land, the land where the South Sea Cement Factory had stood, and as Lakenpagatau. There is a clear distinction between Ponatoka land, which is significantly larger area than Lakenpagatau land. Family Songoriki are the declared custom owners of the smaller area which comprises 33/34 hectares. It was the learned Judge's view that that was what Chief Justice Cooke confirmed the Efate Island Court to have determined.

40. These interpretations and meaning of Chief Justice Cooke's 1986 decision based on the Efate Island Court's 1985 decision were subject to the present appeal.

D. Grounds of Appeal

41. This appeal was advanced on the following three grounds:

1. The court erred in fact and law in holding (at paragraph 22 of the judgment) that the Court has jurisdiction to hear the counter-application when it concerned a final judgment of the Island Court as to custom ownership of land (boundary) made in 1986 by the Supreme Court, and under s.22 (1) and (4) of the Island Court as the 1986 judgments as to custom ownership of Lakenpagatau land was final.

2. The court below erred in fact and in law to accept fresh evidence from the eighth respondent, Family Kaltoa Malas, in making the judgment in question.

3. The Court below erred in fact and in law because it was not properly constituted, in breach of s.3 of the Island Courts Act, as the Primary judge sat alone on 28 September 2020, to hear and determine the boundary of Lakenpagatau land, an issue that goes to the heart of claims as to custom ownership of land in this jurisdiction.

42. On Monday 08 February 2021, we had expressed our concern that all Respondents had not been served with the notice and grounds of appeal by Mr Nalyal and his clients and that the directions orders for the preparation and submissions on the appeal have not been complied with by Mr Nalyal and his clients. Mr Nalyal offered to pay costs personally so that the appeal could be heard. Consequently, we ordered costs of 20,000 vatu for that day against Mr Nalyal as he was ready to incur such costs personally. We directed Mr Nalyal and all Counsel present that the Court would hear this appeal on Monday 15 February 2021 on the issue of jurisdiction.

E. Submissions of Counsel

43. Mr. Nalyal submitted for the Appellants that the court below in entertaining the counter-application of the Eighth Respondent was reviewing the judgment of Chief Justice Cooke of 1986 as it reduced the size of its boundary. He said from the 1986 judgment of Chief Justice Cooke his clients was declared custom owner of a bigger area of land than 33 Ha.

44. He submitted the learned Judge in the court below erred in fact and in law to accept fresh evidence from the Eighth Respondent (Family Kaltoa Malas) in making the judgment under appeal.

45. He further submitted that the learned Judge erred when he heard the counter-application and gave judgment without assessors sitting with him in this case.

46. Mr. Huri on behalf of the First Respondent (Director of Lands) said they would rely on the effect of the Judgment of the court below under appeal as to the proper interpretation of the Land Appeal Judgment of Chief Justice Cooke in 1986.

47. Mr. Hakwa supported Mr. Nalyal's submissions. He said he challenged the process by which the counter-application filed by the Eighth Respondent came before the court.

48. Mr. Hakwa made his point that the application by the Director of Lands related to two things:- the restraining orders issued by the Court in the leases on the adjacent custom land and his application to withdraw them. The Director applied pursuant to s.8(g) of the Land Leases Act. There is no issue with this. He said the complaint is about the second part which is the counter–application made under s.8(g) of the Act. It is not correct he submitted as this amounted to a new claim or it should be dealt with by way of appeal. It is now 35 years that the judgment on the disputed land was issued. The Eighth Respondent did nothing since then. He said if the Court agreed with him that would be the end of the matter.

49. As to clarification of a judgment he accepted the Court can clarify its judgment but this is not what happened in the Court below which is now under appeal.

50. He said the Eighth Respondent lacked standing as they were not a party in the said land dispute in the Island Court and the Supreme Court. He supported Mr. Nalyal in his submissions in respect to ground 2. He was asked by the Court that until 1986, none of the Songoriki Family asserted interest in the adjacent area of the disputed land as the effect of the evidence recorded at paragraph 25 – 26 of the judgment. He responded it was not the right evidence. He was again asked by the court as to what was wrong for the Judge in the court below to act on the objective facts. He said he and his clients did not have access to the Island Court files. Mr. Hakwa relied on his written submissions.

51. Mr. Fiuka submitted his client supported the submissions of the Appellants.

52. Mr. Bani informed the Court that in the court below he supported the submissions of the Eighth Respondent. However, on appeal he changed his position and supported the submissions of the appellants.

53. Mr. Bani referred to Article 49(1) of the Constitution and Section 22(2) and (4) of the Island Courts Act. He submitted that where the Constitution or law bestows exclusionary jurisdiction and powers on the Supreme Court, then the unlimited jurisdiction of the Supreme Court is ousted and cannot be invoked anymore except under specific circumstances as provided by the relevant law.

54. He submitted the Court erred in law in its judgment of 8th October 2020 by purporting to invoke its unlimited jurisdiction in this matter when it was not open to the Court to invoke such jurisdiction unless specified by s.22(2) of the Island Courts Act.

55. He further submitted that it was not open to the learned judge to invoke the Court's inherent jurisdiction in entertaining the counter–application as he was in want of jurisdiction conferred on the Supreme Court as specifically spelled out in Section 22(2) of the Island Courts Act. Therefore, being improperly constituted, he submitted, it was also not open to the Court to call for fresh evidence. He submitted finally that if the Court was properly constituted, it could review its own decision to a certain extent. Given the peculiar circumstances of this case, by clarifying whether or not the judgment of 8th October, 1986 concerned 33 hectares or 500 hectares. However, it could not call fresh evidence.

56. Ms. Muluane, on behalf of Eighth Respondent, submitted to the following effect:-

57. The counter–application filed on 3 September 2019 was an application seeking clarification on the judgment of the Supreme Court dated 8th October 1986 by Chief Justice Cooke because it had received different and conflicting views.

58. The original application made by the Director of Lands on September 2019 was made under Section 8(g) of the Land Leases Act. It was not a land appeal case from any court below, nor a specific appeal nor a question of the Eighth Respondent.

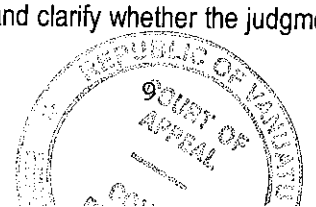
59. The counter–application was a request for clarification endorsed by the Director of Lands in his response to the counter–application dated 17 October 2019, paragraph 3(c) and (d):

> *"... it concedes that there is a need to also clarify the judgment dated 08.10.1985 in the Land Appeal Case No. 01 of 1985 by Justice Cooke relating to Lakenpagatau land ("Cooke Judgment") as the land in also within Ponatoka land which is disputed under LAC 02A of 2010;*
>
> *"... it has received difference and conflicting views as to the effect of the Cooke Judgment such that clarification by the Court is necessary".*

60. The Director of Lands through the State Law Office accepted the counter–application and was also of the same view that the clarification is "necessary" to advance the matter and to avoid more conflicts. The Application was therefore integrated in the application under Section 8(g) of the Land Leases Act.

61. On 8 October 2020, the Court below did not make any alterations or set aside the decision of Chief Justice Cooke of 1986 made some 35 years ago, and said that the 1986 decision of Chief Justice Cooke was final and still stands.

62. The application was for clarification only within the overriding objectives of the Civil Procedure Rules (r.1.2) to ensuring that all parties are on equal footing, and to saving expense to look at the judgment of 1986 in LAC1/85 and clarify whether the judgment covers an area of 33 hectares or 500 hectares.



63. The Judge in the Supreme Court had the jurisdiction to clarify the decision of Justice Cooke of 1986 as that decision of 1986 was made by the same court.

64. As to receiving evidence, there is nothing that prevented the Court from considering the new evidence as it was not an appeal.

65. The evidence provided by the Eighth Respondent included public documents in support of the application for clarification which assisted the Court to clarify the ambiguity and uncertainty of the judgment of Justice Cooke of 1986 as to what area of land was considered by Justice Cooke's judgment.

66. Besides, the Appellant did not oppose the filing and the consideration of the evidence in the Supreme Court in any way in the Court below.

67. The Court below considered the evidence as necessary to enable him to clarify the issue of uncertainty.

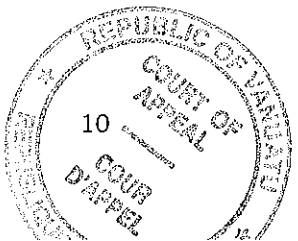
68. The evidence provided to assist the Court in support of the counter-application refers to the Appellant's own evidence where he confirmed that the land disputed (Lakenpagatau) is the ex-Catholic Mission (see page 32 of appeal book and page 158 where it outlines the Appellant's own evidence).

69. On the other hand, even if the Court had not relied on the guiding evidence, the Court would still come out with the same result as the contents of the judgments of 1986 and of 1985 are very clear on what land exactly the Supreme Court was dealing with back then by describing the Lakenpagatau land as the Ex Catholic Mission title later known as the Cement Factory land as admitted by the Appellant as well in the judgment of 1986 and help to clear the confusions that has been reigning since the beginning of 2008.

70. As to ground 3, the Eighth Respondent submitted that the Court below did not err in law and that the Court is not in breach of Section 3 of the Island Court Act for not appointing 2 or more assessors to sit with the Court in the Supreme Court.

71. There were no questions or matters of custom that required the Judge in the court below to appoint 2 assessors to sit with him on 28 September 2020 as it was not an appeal from the Island Court or the Magistrates Court.

72. At no point in time, did the Judge in the court below make a determination on the boundary of Lakenpagatau. The boundary of the disputed land was already determined in the judgment of Efate Island Court of 1985 and in the Supreme Court Judgment of 1986. It was only a clarification on what area of land exactly does the Island Court decision cover (question of figure, not limit/boundary) which the Court had jurisdiction to give to the Director of Lands and to the other parties.



73. Therefore, based on these reasons and the arguments raised, the Eighth Respondent submitted that the Appellant's grounds are misconceived and the appeal should be dismissed with costs.

74. Mr. Livo made submissions in support of the Eighth Respondent's submissions and relied on his written submissions on this appeal.

75. We thank counsel for their helpful submissions and assistance in this appeal.

F. Discussion

76. In order to dispose of this appeal, we shall deal with the counter-application and the circumstances under which it came about, the jurisdiction of the Supreme Court in its clarification's role and purpose of a prior Supreme Court judgment, whether a judge can sit alone to clarify a land appeal judgment on a disputed custom land and whether or not it was proper in such circumstances to get assistance with and from the use of evidence on post judgment events.

1. Counter–application for clarification of Chief Justice Cooke 1986 Appeal Judgment on Lakenpagatau Custom land at Mele

77. We accept the submissions of the Eighth Respondent that although the counter-application was not initially filed by the Director of Lands pursuant to section 8(g) of the Land Leases Act, the fact that the Director agreed with it and accepted it as "necessary" in the circumstances of this case and made submissions in support, the Director of Lands adopted it as if it was made pursuant to section 8(g) of the Land Leases Act.

78. We consider that it was procedurally proper for the Eighth Respondent to have done so in the circumstances of this case which was then adopted by the Director as his application. The primary judge was correct in his judgment when he accepted to entertain the counter-application for the following reasons:-

a) The Chief Justice Cooke's 1986 decision, as a final Land Appeal Judgment on the declared disputed land, is enforceable against the parties and the world at large including the Eighth Respondent, Family Kaltoa Malas.

b) As a final judgment, it has to be properly effectuated or enforced as a matter of law by Family Songoriki.

c) Family Songoriki who was the declared custom owner of the said disputed land by 1985 decision of the Efate Island Court and confirmed on appeal by the 1986 decision of Justice Cooke, had given a different interpretation and meaning to the terms of the judgment of Chief Justice Cooke and in particular of the areas of land it covered since 2008 by successfully applying and changing the status of leases in the Land Leases Records as lessors in the surrounding wider custom lands of 500 hectares.

d) There appeared to be an ambiguous term in the 1986 Land Appeal judgment faced or caused by Family Songoriki in their interpretation and understanding of the said judgment in terms of the area of custom land their declared custom ownership covered.

e) In such a situation, Family Songoriki should have sought a clarification upon application rather than resort to self-help, as they have resorted to in this case. We emphasize that the appropriate remedy to resolve doubt about the meaning of a judgment is to seek a judicial resolution of an ambiguity; it is not to resort to self-help by creating more confusion and misunderstanding over the declared custom land ownership.

f) It is a serious and on-going concern in the community of Mele for the leases granted on surrounding custom land since 2008 covering a wider area of more than 500 hectares. The Eighth Respondent like other parties claimed interest in the leases granted on the surrounding custom lands to the declared disputed custom land.

g) It is also important to ensure that the court decisions in surrounding custom lands in decisions E/C 6/93 and E/C 1/97 have been determined without encroaching on the declared disputed land already determined (here, Lakenpagatau custom land) or whether or not it covered a much bigger area of land as advanced by the Appellant, Family Songoriki. Thus, the counter-application was a proper and "necessary" application in the circumstances of this case.

h) It is therefore in the public interest for the Director of Lands to accept the counter-application and filed submissions in support of it in the Supreme Court. This is akin to what is traditionally known as "relator" nature type of action.

2. Inherent jurisdiction of a judge sitting alone to clarify a prior land appeal judgment (Judgment of CJ Cooke of 1986) with the use of evidence filed in support

79. The purpose of a clarification is to take a prior judgment and make it easier to understand or let it free from confusion.

80. We note the submissions of Counsel referring this Court to Articles 47(1), 49(1) of the Constitution and section 28 of the Judicial Services and Courts Act.

81. We are of the view that an application for clarification of a prior judgment, although not specifically described in the rules of practice, is commonly considered by the trial court and is procedurally proper. There is no time restriction for filing an application for clarification. The trial court has jurisdiction to clarify an ambiguous judgment or one which is said to be ambiguous at any time.

82. We are also of the view that courts have continuing jurisdiction to fashion a remedy appropriate to the vindication of a prior judgment pursuant to their inherent powers [here, section 28 of the Judicial Services and Courts Acts is the relevant section]. Thus, when an ambiguity in the language of a prior judgment has arisen as a result of post judgment events, the trial court may, at

any time, exercise its continuing jurisdiction to effectuate its prior judgment by interpreting the ambiguous judgment and entering orders to effectuate the judgment as interpreted. This is the case for the Court of Appeal, the Supreme Court, the Magistrate Court, and the Island Courts (See **Roger Japhet v. Elmo Joseph Civil Appeal Case No. 3446 of 2016; Kalwatsin v. Willie [2009] VUCA 49 and Republic of Vanuatu v. Bohn [2008] VUCA6).**

83. In cases in which execution of the original judgment occurs over a period of years, which is currently the situation for the judgment of Chief Justice Cooke of 1986 over Lakenpagatau at Mele, an application for clarification is an appropriate procedural vehicle to ensure that the original judgment is properly effectuated. We need to say at this point that applications for clarification may not, however, be used to modify or to alter the substantive terms of a prior judgment and in order to ensure that this is not going to happen, we must look to the substance of the relief sought by the application rather than the form to determine whether the application is properly characterized as one seeking a clarification.

84. We note that in this case Counsel for the Eighth Respondent used and relied on sworn statement evidence to assist the Court in its interpretation of the asserted ambiguity of the prior judgment of 1986. There was no objection for the Eighth Respondent to have done so. Consequently, the learned Judge acted on these facts to assist him in his clarification of Justice Cooke's 1986 decision. Whether objections were raised or not, we do not see anything wrong for the Judge below to act on these objective facts which included the public documents of Lands Records provided to this effect to assist the judge in clarifying the terms and meaning of the prior judgment on the events occurring after the judgment. We reject submissions made to the contrary effect.

85. We note and consider further that there was nothing wrong for the learned Judge to sit alone in the present case as it was not a matter of determining a custom matter nor a review or an appeal. In 1986, Justice Cooke sat with two (2) Custom Advisers to hear the appeal against the judgment of the Efate Island Court of 1985 over Lakenpagatau, determined the custom ownership and the boundary of the disputed custom land (s.22(2) Island Courts Act [Cap. 167]. The role and function of the custom advisers in land appeal cases is a limited one - to advise the judge of the Supreme Court (here, Chief Justice Cooke) on the matters of custom, not more not less. The Judge may accept or reject their advices. They do not take part in the deliberation and decision on the custom ownership and boundary of the disputed custom land. They do not sign the judgment as it is the judgment of the judge alone. This has to be contrasted with an Island court hearing a custom land case, in which the presiding Magistrate has to sit with three (3) justices of Island Courts who take part in the deliberations and judgments of the Island Courts in land cases (ss.2A and 3(4)(a)(b) of the Island Court (Amendment) Act of 1983.

86. We are therefore of the view that a judge of the Supreme Court has inherent powers to interpret a land appeal judgment of the Supreme Court if its terms are said to be ambiguous. This is what happened in the case under appeal. The Supreme Court has the jurisdiction and had exercised it to clarify the 1986 judgment of Chief Justice Cooke as there are different interpretations as to whether or not the disputed land is of 33 hectares or 500 hectares which created confusion in the community of Mele and beyond. The learned Judge was correct in exercising his inherent powers to clarify the 1986 judgment in Land Appeal case 1/1985.

3. Clarification of the 1986 Decision in Land Appeal Case No. 1/1985

87. The learned Judge was satisfied that the judgment of Chief Justice Cooke was dealing with certain land in dispute – it was described as ex-Catholic Missions Land, the land where the South Sea Cement Factory had stood, and as Lakenpagatau. There is a clear distinction between Ponatoka land, which is a significantly larger area than Lakenpagatau land. Family Songoriki are the declared custom owners of the smaller area which comprises 33/34 hectares. It was the learned Judge's view that that was what Chief Justice Cooke confirmed the Efate Island Court to have determined.

88. In order to determine whether the learned Judge properly clarified the ambiguity in the judgment or impermissibly modified or altered the substantive terms of the judgment, we must first construe the trial court's judgment (original judgment). It is well established that the construction of a judgment presents a question of law over which the appellate court exercises plenary review. In construing a trial court's judgment, the determinative factor is the intention of the court as gathered from all parts of the judgment. The interpretation of a judgment may involve the circumstances surrounding the making of the judgment which can be gathered from evidence. Effect must be given to that which is clearly implied as well as to that which is expressed. The judgment should admit of a consistent construction as a whole.

89. Applying the above principle in the context of this case, the learned Judge noted that Chief Justice Cooke's decision recorded: ***"The appellant appealed against the decision of the Efate Island Court who in their Judgment hold that Songoriki Family were the custom owners of the land in dispute, that is i.e., the land at Mele on which the Cement Factory stands."***

90. This is materially consistent with the Island Court decision appealed from as it recorded: ***"Mele land dispute, South Sea Cement Factory, Roman Catholique Mission land, Lakenpagatau. I kasem Hill on Top. We map I soem aot."***

91. The learned Judge, who was in the best position to resolve the discrepancy between the factual findings and the orders, clarified that Chief Justice Cooke dealt with certain custom land dispute described as ***"Ex–Catholic Mission Land, the land where the South Sea Cement Factory had stood and as Lakenpagatau". The disputed land covered an area of 33/34 hectares and that was what Chief Justice Cooke confirmed the Efate Island Court to have been determined.*** The confusion or ambiguity in the 1986 land appeal judgment arises out of the references made in the said judgment to land sold in 1884 of some 500 hectares. These references to 500 hectares are part of the alleged evidence of land dealings within and surrounding the custom land dispute in question. But they are not facts as they do not form part of the factual findings concerning the judgment to the said disputed land under challenge which arose as a result of the South Sea Cement Factory development. The disputed land is the custom land on which ***"the cement factory stands".*** It was ***"the land where the Ex-Catholic Mission"*** was; it is called ***"Lakenpagatau" "I kasem Hill on Top. We Map isoem aot".*** The following are some objective facts in support of this interpretation:

1) In 1990 Family Songoriki claimed the seashore as being part of their customary land, but that was explicitly rejected by Chief Justice Cooke's clarification of his decision dated 7 November 1990.

2) The first claim relating to an area of 500 hectares was made on 28 February 2006 by Martin Sokomanu.

3) Land case No. 6 of 1993 also relates to Ponatoka land. That case was determined in July 2004, but appealed. The Supreme Court returned the case to the Island Court for re-hearing, which resulted in a judgment of 2 March 2010. This decision acknowledged that Lakenpagatau custom land was declared to be Family Songoriki's customary land in Land Appeal case N.1/85, but the decision went on to award surrounding land to other parties. Family Songoriki did not appeal that decision, which clearly delineated Family Songoriki custom land as being only a small part of Ponatoka land which covered 33/34 hectares of custom land.

4) Evidence was provided and relied on of those who had actually walked the Lakenpagatau boundaries with Island Court officials, and the time it took, as supporting the interpretation that the land only comprises 33 hectares.

5) Prior to 2008 Mele Trustees Ltd was the lessor for land surrounding Lakenpagatau, on behalf of disputing custom owners. That position only changed in 2008 when Family Songoriki sought to increase its land holdings. The point was that if the decision had declared Family Songoriki as custom owners of those lands, the leases would not have been permitted to be registered with Mele Trustees Ltd as lessor on behalf of disputing custom owners. As examples of this, references can be made of the following:

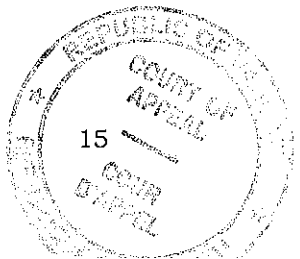
   i. On 5 December 2012 Family Songoriki admitted by consent they were not custom owners of leasehold title 12/0821/138 in Civil Case No. 11/32. This land is adjacent to the ex-Catholic Mission land and within the greater area of Ponatoka land.

   ii. Leases 12/0544/060 was first registered in the name of Mele Trustees Ltd as lessor in 1983. There was no change in lessorship until 2019, despite Chief Justice Cooke's decision of 1986.

   iii. Lease 12/0544/017 was registered in November 2006 with Mele Trustees Ltd as lessor. It was changed to Family Songoriki in 2009.

   iv. Lease 12/0543/022 was registered in October 2006 with Mele Trustees Ltd as lessor. It was changed in 2008.

   v. Lease 12/o822/074 was registered in 1994 with Mele Trustees Ltd as lessor. It was only changed in 2011.



92. Based on the forgoing reasons, we are of the view that not only was this interpretation reasonable, but any other interpretation would have rendered the trial court's (original judgment) factual findings superfluous and inconsistent with its orders. Moreover, the clarification merely reiterated the factual finding as originally stated and, thus, did not change or modify the judgment. Because the trial court's clarification (or the primary judge's clarification) was not manifestly unreasonable, we conclude that the learned judge was correct in his clarification of Chief Justice Cooke's 1986 judgment of the disputed custom land covering an area of 33/34 hectares.

G. Result

93. We dismiss the appeal.

94. The Respondents who actively opposed the appeal, namely, the Eighth and First respondents and Interested Party, are entitled to their costs against the Appellants.

95. We set them at 150,000 Vatu for the Eighth Respondent, 50,000Vatu for both the First Respondent and Interested Party.

96. Such costs shall be paid by the Appellants within 21 days.

DATED at Port Vila this 25th day of February, 2021

BY THE COURT

Hon. Chief Justice
Vincent Lunabek