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

Civil Appeal
Case No. 21/1715 CoA/CIVA

BETWEEN: SILAS VATOKO
First Appellant

MORRIS KELLY VATOKO
Second Appellant

NAKMAU SAMBO
Third Appellant

AND: HUMPHREY TAMATA
First Respondent

SILU MALASIKOTO, TORIKO MALASIKOTO AND FREDDY MALASIKOTO
Second Respondents

Coram:	***Hon. Chief Justice V. Lunabek*** ***Hon. Justice J. Mansfield*** ***Hon. Justice R. Young*** ***Hon. Justice G. Andrée Wiltens*** ***Hon. Justice D. Aru*** ***Hon. Justice V.M. Trief***
Counsel:	***Mrs E. Blake for the Appellants*** ***Mr T. Loughman for the First Respondent*** ***Mr P. Fiuka for the Second Respondents***
Date of Hearing:	***8 July 2021***
Date of Judgment:	***16 July 2021***

JUDGMENT OF THE COURT

A. Introduction

1. This appeal concerns principally the application of section 6H of the Land Reform Act [Cap 123] to a meeting held on 19 December 2019 to appoint the representatives of the custom owners of certain custom land called the Pangona Land.

2. The Appellants were not allowed to vote at that meeting, although they claimed to be among the custom owners of the land. The Second Respondents were appointed as representatives of the custom owners at that meeting. The First Respondent, who is the National Coordinator of the Custom Land Management Office (called in this judgment

the National Coordinator) under the Custom Land Management Act No. 33 of 2013 (the CLM Act). The National Coordinator then issued or re-issued a Certificate of Recorded Interest following that meeting, recording the Second Respondents as the representatives of the custom owners.

3. The Appellants said that both the appointment and the issue of the Certificate were unlawful, and were contrary to an earlier Supreme Court decision upheld on appeal by the Court of Appeal.

4. As a result, on 22 September 2020, the Appellants as Applicants/Claimants applied to the Supreme Court for an order pursuant to Rule 18.14(3) of the Civil Procedure Rules for the proceeding in Civil Case No 19/1168 (the Supreme Court Action) to be re-opened and for the Respondents (the same Respondents as the Respondents to this appeal) to be punished for contempt under Section 32 of the Judicial Services and Courts Act [CAP. 270] and for related penalty orders. Separate penalty orders were sought against the First Respondent, and against the Second Respondents.

5. That application was not successful. On 29 April, the Supreme Court dismissed the application with costs.

6. This is an appeal from that decision. For the reasons which appear below, the appeal is allowed. The Court has found that, in the circumstances, the Appellants were wrongly deprived of the right to vote, so the decisions made at that meeting were of no effect and the Certificate itself is of no effect. Orders to that effect are made. In the course of the hearing, the Appellants indicated that they did not pursue the imposition of any penalty on the National Coordinator or on the Second Respondents. The Appellants are entitled to costs of their appeal against both the National Coordinator and against the Second Respondents jointly, as the National Coordinator positively asserted the validity of the meeting as well as the correctness of him issuing the Certificate, rather than simply saying that he acted in good faith on the basis of the meeting. The National Coordinator and the Second Respondents of course are to bear their own costs.

B. Background

7. The background to the Supreme Court application is important to understand the nature of this appeal.

8. The Appellants as Claimants had applied for the quashing of a Certificate of Recorded Interest, also called a 'green certificate', dated 20 March 2018 issued by the National Coordinator under the CLM Act. The certificate certified that the present Second Respondents were the representatives of the Pangona Custom Land owners. The certificate was based upon resolutions passed at a meeting on 30 November 2016.

9. A so-called green certificate is a certification issued by the Coordinator confirming the recording under the CLM Act of a decision made by an appropriate customary court of tribunal as to the custom owners of custom land. As the Court of Appeal explained in its judgment in *Malasikoto v Vatoko* [2019] VUCA 65 referred to below, a recorded decision will be used by the National Coordinator as a basis for two reasons. The first is to identify the custom owners for the purposes of a negotiator's certificate application under the Land Reform Act. The second is for the rectification of lessors in leases in existence prior to the commencement of the CLM Act in 2013. The term 'recorded interest in land' is defined in section 2 of the CLM Act, and its significance is explained in the decision of the Court of Appeal in *Kwirinavanua v Toumata Tetrau Family* [2018] VUCA 15 at [22] – [24].

10. The green certificate in issue in the Supreme Court proceedings followed the standard form used by the National Co-ordinator. It certified not only the declared custom owners for Pangona Custom Land, but also the representatives of the custom owners. The certification of the representatives is necessary for the purpose of a negotiator's certificate and for signing leases or other legal documents relating to dealings in the land.

11. In the initial Supreme Court proceedings, the Appellants also claimed (as they did in the contempt proceedings in the Supreme Court giving rise to this appeal) that the issuing of the green certificate in favour of the Second Respondents breached section 6H of the Land Reform Act. It relevantly provides that:

> *"Variation of names of representatives*
>
> *(1) All representatives of the custom owner group are appointed by the custom owners and must not act without the consent of the custom owners.*
>
> *(2) Custom owners may at any time meet and pass a resolution by consensus to vary their representatives. All members of the custom owner group or all members listed as descendants if original members have died must be present at a meeting to vary the representatives of the custom owners ..."*

12. After considering the evidence, the Supreme Court found that none of the Appellants were present at the meeting at which the resolution was passed appointing the Second Respondents as representatives of the custom owners.

13. The relevant decision about custom ownership had been made by the Efate Island Court in Land Case No 1 of 1996 and made on 22 July 2004. That decision was that Family Malasikoto was the custom owner of Pangona land, and that two other families had interests in that land, as well as Family Malasikoto, which had the main authority.

14. Then the Supreme Court found that the Family Tree of the Malasikoto Family included the family of the present Appellants, Family Vatoko. As the Appellants were not present at the relevant meeting, their interests were not adequately protected as prescribed by section 6H of the Land Reform Act.

15. Accordingly, on 12 July 2019, in the Supreme Court action the Court made orders in favour of the Appellants in the following terms:

> *"37. The certificate of Recorded Interest in Pangona Land issued on 20th March 2018 is hereby quashed.*
>
> *38. All the members and descendants of the Malasikoto family including those from the Taea Family, Vatoko Family, Sambo Family and Family Elmu Thomas Kalamate in conjunction with the Office of the National Coordinator, be required to arrange a meeting for all the members of these families in accordance with Section 6H of the Land Reform Act, not later than 29 July 2019."*

16. The Second Respondents appealed to the Court of Appeal from those orders. They wanted the green certificate re-instated. Their appeal was dismissed: *Malasikoto v Vatoko* [2019] VUCA 65.

17. On that appeal, the National Coordinator cross-appealed, as he said that the Supreme Court had wrongly quashed that part of the green certificate which declared the custom owner of Pangona Custom Land to be Family Malasikoto. The Court of Appeal also dismissed that contention because, as it pointed out, the wider purpose of the green certificate is to identify the representatives of the custom owners, and no decision had been made in accordance with the legislation validly appointing the Second Respondents to this appeal as those representatives.

18. It is noteworthy that the Court of Appeal at the conclusion of its reasons noted that the Second Respondents, against advice, called a meeting of their immediate family on 18 July 2019 at which they appointed themselves as representatives of Family Malasikoto, and then the National Coordinator saw fit to issue another green certificate on 12 August 2019 naming the Second Respondents as the proper representatives. The enforcement of that new green certificate was then stayed by the Supreme Court by order of 19 August 2019, pending the outcome of the appeal.

19. The effect of the Court of Appeal judgment was that, until new representatives are appointed at a meeting properly held under section 6H of the Land Reform Act, the identity of the representatives of the custom owners of the Pangona Land are not known and no green certificate should issue.

C. The Present Appeal

20. It is now appropriate to refer to the circumstances giving rise to the present appeal.

21. The Court of Appeal decision was given on 15 November 2019. The Second Respondents were not slow to take further steps.

22. Following that decision, the Second Respondents first planned a meeting of Family Malasikoto on 12 December 2019. That meeting did not proceed, and it is not necessary to refer to it in detail. There was then a further meeting on 19 December 2019. The details of that meeting are set out below. It resolved to appoint the Second Respondents as the representatives of Family Malasikoto. On the basis of the resolution at that meeting, the National Coordinator on 20 December 2019 reinstated or reissued the previous Certificate of Recorded Interest or green certificate naming the Second Respondents, namely Family Malasikoto, as the representatives of the custom owner of Pangona Land.

23. It is common ground that the notice of 18 December 2019 calling the meeting on 19 December 2019 was given to the Appellants. It is also common ground that that notice said that the Appellants, and generally Family Vatoko, would not be allowed to vote at the meeting. In the circumstances, they did not attend the meeting on 19 December 2019.

24. That led to the application to the Supreme Court by the Appellants of 22 September 2020. They said that the meeting of 19 December 2019 was contrary to the decision of the Supreme Court of 12 July 2019 and of the Court of Appeal of 15 November 2019, and also that the meeting of 19 December 2019 was not in compliance with section 6H of the Land Reform Act.

25. The application of 22 September 2020 applied to have the National Coordinator punished for contempt in relation to his reinstatement or reissuing of the green certificate – the Certificate of Recorded Interest – dated 20 March 2018 following and as a consequence of the meeting on 19 December 2019, in the face of the earlier decisions of the Supreme Court of 12 July 2019 and of the Court of Appeal of 15 November 2019. He re-instated or reissued that certificate on 20 December 2019.

26. The application in relation to the Second Respondents and their alleged contempt related to them calling the meetings on 12 and 19 December 2019 which they said was in compliance with section 6H of the Land Reform Act, but which (the Appellants said) was contrary to the same decisions, because they were not allowed to vote at the meeting of 19 December 2019..

27. Consequential orders were sought in the application of 22 September 2020 to have the Certificate of Recorded Interest dated 20 March 2018, and reinstated on 20 December 2019, formally cancelled. As well, the Appellants sought orders that the Shefa Custom

Land Officer attend a meeting to be jointly called by the Appellants and the Second Respondents on behalf of Family Malasikoto for the purposes of resolving representatives under section 6H of the Land Reform Act, and to prohibit dealings in the Pangona Land until a valid Certificate of Recorded Interest is issued.

28. There was a form of pleading in relation to the Application of 22 September 2020, by both the National Coordinator and the Second Respondents filing Responses to the Application. That material confirms that a meeting was proposed for 12 December 2020, but did not proceed because the National Coordinator was still awaiting advice about how to proceed in the light of the decision of the Court of Appeal. Then there was a meeting on 19 December 2020.

29. The National Coordinator through his Response said that that meeting took place at Mele Village, with the attendance of a Customary Land Officer to assist in facilitating the meeting. There were 59 family members present. Chief Silu Malasikoto made a welcome speech and explained the purpose of the meeting. There was a motion that the Second Respondents be appointed to be the family representatives and that was passed without dissent. He says then that he acted on that resolution to reinstate the effect of the earlier Certificate of Recorded Interest.

30. There is no dispute about what he did and why he did it.

31. The Second Respondents in their Response adopted the same position. They also started from an earlier position, to say that the Appellants had no standing to apply for the orders they were then seeking. They disputed that the Appellants are either custom owners of Pangona Land, or that they have the right to vote at any meeting under section 6H of the Land Reform Act, or that they are members of Family Malasikoto at all. They say further that that was recognised by the Court of Appeal in [17] of its decision. They further say that a notice of the meeting on 19 December 2020 was given on 18 December 2020, including to the Appellants, but that the Appellants refused to attend that meeting.

32. As noted above, the Supreme Court judgment of 30 April 2021 dismissed the Application of 22 September 2020 with costs. In short, and in effect on uncontested evidence, it found that the Appellants were notified of the meeting on 19 December 2020, but did not attend it. They could have done so, and could have contributed to the discussion on the appointment of the representatives. It was said by the judge at [5] that the Appellants chose not to attend. The primary judge said that was because the Court of Appeal said that they were not custom owners and did not have any voting rights, although they were entitled to be present at the meeting. Hence, the judge at [6] said:

> *"They cannot now turn around after having had [that] opportunity and after realizing decisions were taken as to representative nominations, did not go in their favour...."*

An additional comment is made that:

"They have come to the Court with unclean hands, therefore the Court cannot entertain their concerns anymore when they themselves were the authors of the situation or circumstances they now put themselves in."

33. It is apparent that the approach of the Supreme Court judge was based upon a certain understanding of what the Court of Appeal had decided.

D. Consideration

34. The critical issue is whether the meeting of 19 December 2019 was or was not held in compliance with section 6H of the Land Reform Act. Other issues were not pursued in the course of the submissions. In addition, the Appellants indicated that they did not pursue any claims that either the National Coordinator or the Second Respondents should be punished for contempt. Their focus was directed to showing that the meeting was invalid and so the reissue or reinstatement of the green certificate on 20 December 20019 was also invalid. And, of course, to have a valid meeting of Family Malasikoto for the purpose of selecting the representatives.

35. The starting point is to recognise that the Efate Island Court decided that the custom owner of Pangona Land is Family Malasikoto. It did not nominate any particular members of Family Malasikoto as the custom owner.

36. In 2013, the Efate Island Court in Land Case 3 of 2103 decided that Silu Malasikoto is the person who holds the title of Chief Silu Malasikoto. The Court of Appeal did not refer to that decision in its reasons. That is because that decision did not set out to, and did not, change the description of the custom owner of Pangona Land in the Island Court's earlier decision.

37. So it is necessary to look more closely at the decision of the Supreme Court of 12 July 2019, and then the Court of Appeal decision of 15 November 2019.

38. The Supreme Court decision relevantly started with reference to the definitions of 'Custom owners' and 'Custom land' in section 2 of the CLM Act. Section 57 of the CLM Act concerns the status of the decision of the Efate Island Court about custom ownership in 2004, as it was made before the commencement of the CLM Act: Section 57 was substituted by the Custom Land Management (Amendment) Act No 12 of 2014. It provides:

"Existing decisions of Island Court, Supreme Court, ...

(1) Decisions of the Island Court, Supreme Court, single or joint area Customary Land Tribunal and island Customary Land Tribunal which determine the ownership of custom land and

which were made before the commencement of this Act, are deemed to create a recorded interest in land in respect of persons or persons determined by such Court or Customary Land Tribunal to be the custom owners.

(2) Decisions made under subsection (1) will enable the custom owners so recorded to be identified for the purpose of consenting to an application for a negotiator's certificate or a lease, or is to provide the basis for rectification of an existing lease instrument ..."

39. It is plain that the decision of 22 July 2004 of the Efate Island Court is the relevant decision, and it is clear what it decided. There is no dispute about that.

40. As Saksak J observed, the Island Court found that the custom owner of Pangona Land is Family Malasikoto, Saksak J in the same judgment also noted that the Island Court findings included that Family Lakelotaua Nakmau and Family Elma K Thomas had interests in the land, and further that it found that dealings in the land would require the permission of the three family groups. Those findings meant that the three family groups fell within the definition of 'custom owners' in section 2 of the CLM Act in relation to Pangona Land. The judgment of Saksak J then records that the two families Family Lakelotaua Nakmau and Family Laltamate Thomas had 'cancelled' their claims as recorded in the decision of the Efate island Court, so that their separate interests did not need to be addressed.

41. It remained important to identify the status of Family Vatoko. The primary judge noted that Silas Vatoko had been the spokesman for Family Malasikoto before the Efate Island Court. He referred to the Family Tree of that family. He found expressly at [32] – [33] that Family Vatoko are part of Family Malasikoto, and that they have interests in Pangona Land. Consequently, the failure to have Family Vatoko participate in the meeting at which the representatives of Family Malasitoko were selected meant that the meeting was not in accordance with section 6H of the Land Reform Act. The green certificate issued as a consequence of that meeting was quashed.

42. It is worth quoting [38] of the judgment:

"All the members and descendants of the Malasikoto family including those from the...Vatoko Family ...in conjunction with the Office of the National Coordinator, be required to arrange a meeting for all the members of these families in accordance with section 6H of the Land Reform Act, not later than 29th July 2019."

43. As noted above, the appeal from those orders was dismissed. The Court of Appeal noted the extensive amendments to the Land Reform Act in 2013, in conjunction with the enactment of the CLR Act, so that they are intended to work together. Consequently,

whatever the precise relationship or position of Family Vatoko within Family Malasikoto, it confirmed that Family Vatoko (and relevantly the present Appellants, who were the Respondents to that appeal) were entitled to participate in the meeting of Family Malasikoto, including to vote at that meeting, to determine the representatives of Family Malasikoto for the purposes of the green certificate. In short, the Court of Appeal took the same view of the meaning of section 6H of the Land Reform Act and its application to the circumstances as the primary judge in his decision given on 12 July 2019.

44. It is then necessary to ask why the same reasoning does not apply to the meeting of 19 December 2019. Again, the Appellants were precluded from voting at that meeting when they were entitled to vote at it for the same reasons as already identified by the Supreme Court and the Court of Appeal. In our view the meeting was invalid. We respectfully do not agree with the view of the judge whose decision is presently under appeal that the Court of Appeal in its decision on 15 November 2019 decided that the Appellants were entitled to attend the meeting but were not entitled to vote at it. If that were the effect of the decision of the Court of Appeal on 15 November 2019, the result may well have been that the appeal of the present Respondents would have been allowed rather than dismissed. The Efate Island Court did not itself distinguish between patrilineal and matrilineal succession lines. If there is to be such a distinction, or if there are to be primary and secondary rights in the land, it is not for the Second Respondents themselves to make that decision.

45. We make no comment upon whether, as counsel for the Appellants suggested in the course of submissions, there is a procedure available under the CLR Act for the identification of the particular persons who are the 'custom owners' of a more subtle character than 'Family Malasikoto' (as expressed by the Efate Island Court) of Pangona Land in the light of the decision of the Efate Island Court by reference to their Nakamal, and then the other procedures under that Act. Nor is it either necessary or appropriate at this point to make any observation about any distinction between patrilineal and matrilineal descent lines within Family Malasikoto. As we have noted, that distinction is not in the wording of the Efate Island Court description of the custom owners of Pangona land.

E. Orders

46. In the result, the appeal is allowed.

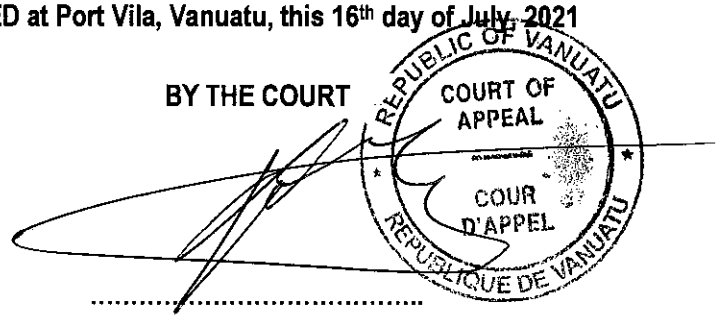
47. The Court declares that the meeting held on 19 December 2019 was not validly constituted for the purposes of any resolution under section 6H of the Land Reform Act appointing the Second Respondents as the representatives of Family Malasikoto to fulfil such a function on the Certificate of Recorded Interest.

48. The Court declares that the Certificate of Recorded Interest dated 20 December 2019 reissued or reinstated by the National Coordinator is null and void.

49. The National Coordinator and the Second Respondents are jointly to pay to the Appellants their costs of the appeal fixed at VT120,000. The National Coordinator took an active role in resisting the appeal on its merits, beyond saying that he had acted in good faith relying on the outcome of the meeting. As between the Coordinator and the Second Respondents, the Coordinator should contribute VT40,000 and the Second Respondents should contribute VT80,000.

DATED at Port Vila, Vanuatu, this 16th day of July, 2021

BY THE COURT



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Hon. Chief Justice
Vincent Lunabek