

REPUBLIC OF VANUATU

IN THE SANTO/MALO ISLAND COURT OF JUSTICE

(LAND COURT JURISDICTION)

Land Case # 3 of 1988

IN THE MATTER OF CUSTOMARY OWNERSHIP RIGHTS DISPUTES
INVOLVING SHARK BAY PLANTATION LAND. TITLES NOS. 727, 728.
BETWEEN:

THE CLAIMANTS: . 1. JAMES NGISA
2. NWARMOKOS CAPTAIN
3. THOMAS FABRICK
4. RIETH VOR SEKSEK
5. THOMAS REUBEN SERU
6. NGAHAM RERE
7. SHEM THO
8. TICE ISHMAEL
9. NATHRIC LATH
10. KAVCOR WASS.

Luganville, Santo: Chairman: J. SINGOMAT, Senior Magistrate
Members: Chief Warawara, Justice
Chief Atevare, Justice
Chief Rubi, Justice

Issue in Dispute: Customary Land Ownership
Rights Claims. 4

Claimant Representations:

1. J. Ngisa in person
2. N. Captain in person
3. T. Fabrick in person
4. R. V. Seksek represented by S. Hinge (spokesman)
5. T.R. Seru represented by S. Seru
6. W.T. Sipre / N. Rere
7. W.T. Sipre / S. Tho and J. Konan and J. Tor
8. T. Ishmael inn person
9. N. Lath in person
10. K. Wass in person.

Brief History of the case

The Island Court pronounced oral judgment in court on 27th April 2004. This is a written judgment for the court and for the parties.

The case originally started in 1989 with only some claimants. Court proceedings got disturbed due to ill-health of the Island Court Clerk and original depositions got lost (court heard from the present Clerk, N. Kolan) and so the court had to treat this case as a fresh complaint or dispute and proceeded on with it as such.

Then the court allowed for new and aspiring claimants to be part of the dispute. So the court commenced its hearings in November, 2003.

Facts

Originally, the land in dispute was purchased in 1885 by a French New Hebrides Company from the natives in the Shark Bay area of East Santo (refer to Annexure (1) in the affidavit statement of J. Ngisa). The same document will be mentioned as annexure (1) during the course of further discussions in this judgment.

Article 73 of the Vanuatu National Constitution at Independence in 1980 recognized and gave the indigenous peoples of Vanuatu to claim for any legal interests that they may have over any land in the country. Thus it is, with the Shark Bay Plantation in so far as it relates to claiming of rental lease payments for the land. The court in its humble opinion views such a reason is the underlying matter in the disputes that the claimants have taken to court.

There are ten claimants. Each claimants' case will be discussed separately for reason of clarity as to why the court made its findings and final decision in the way it did. The court inspected the land itself too.

Accepted Customary Notion of Property Ownership.

1. Patrilineal in heritage
2. Adoption by custom of child and in heritage
3. Matrilineal in heritage rights.

It is the accepted custom in the areas in the East of Santo Island and generally throughout most of the Islands in the country that the man has an undisputed right to share out his land but not for the whole clan. Land is communally owned and so a particular father may need

to share land to his sons and daughters (if he so desires to share to the daughters) only in regard to what land pieces he had acquired and used from his father's rights.

Where a father had no children, he could adopt, by custom a child or two. Then he would choose to distribute his properties (including land). On the other hand if he had brothers then the properties would pass to the brother's and their children (especially customary land). If the man had only a sister and made no adoptions by custom then his nephews, (i.e. the sisters sons etc. would claim the customary interests on the properties).

The court, at this stage is mindful of the fact that this is not the exhaustive scenario of how customary properties may be acquired and inherited.

Issue: who were the original custom owners of the Shark Bay Plantation Land?

Discussion.

All the claimants have attempted to convince the court why each of them claim ownership by custom over the land in dispute. At this stage it is the courts view that each claimant is or has been concerned over the improvements in the plantation area. Many of the claimants fell short of clearly identifying to the court of what customary interests one had beyond the demarcated boundaries of the plantation land. It is understood that many of the claimants are in one way or another related to each other. Their observations about the particular ancestor vary as stories have been passed over generations down to this day.

In the annexure No. 1 of the claimant James Ngisa the names of ancestors and the relative customary land sold are specified quite clearly. The claimants have accepted (generally) the annexure. Then each of the claimants (at least) tried to identify their ancestors names and the customary lands that belonged to them.

The claimants and their witnesses submitted and explained to the court evidence of their lineages (family trees). It was found that the Plantation land is properly demarcated but none of the claimants was able to show that the land in dispute was solely for him or her alone (in its entirety). As proved on inspection, each of the claimant made mention and tried to physically identify ancestral habitat (nakamals) and ceremonial venues and burial grounds (at least a couple did show the court what is believed to be the burial place).

The customary boundaries that each of the claimants was fighting for, fell in the now plantation area only.

Only a couple of the claimants were able to identify to court at inspection how their customary land extended beyond the boundaries of the demarcated area.

The claimants, J. Ngisa, N. Captain, R.V. Seksek and T. Fabrick do live in villages quite close to the land in dispute. Other claimants reside quite far from the land itself.

Evidence show that each claimant realised of their customary interests in the property through other claimants and or their witnesses. This is true in many cases relating to customary norms of any society that has no written records of its customary rules and practices. All and every aspect of custom is taught by hearing and practical activities. (eg. Building nakamal and or planting certain species of yams etc).

In the instant dispute parties have been very wary of each other in revealing evidence about many aspects of their cases and in the belief that others may use the information to press their own cases or attack their cases. In an ordinary dispute in other courts of law, a party generally would not be allowed to 'ambush' the other opposing party. Everything (evidence of fact) ought to be provided to the opposing party in the dispute. In the Land court, it was generally accepted by the court that rules of evidence (in strict sense) was not to be followed. That means interviews were done by the court from other sources during the hearing.

The Western Pacific Cattle Company that has current legal interests to the disputed land had complained of verbal abuses and rumours of disruptions in writing to the court also. The claimants gave evidence against each other of how other claimants' ancestors came to live on the land in issue. Some customary taboo places were described and identified to the court party. Each claimants had the opportunity of showing to court at inspection what area of land it was claiming. It was uncertain then and even to the day court made its decision how many of the claimants (about half of them) did not have food gardens or any other improvements on any land mass immediately near the demarcated land.

The claims were expressed by the claimants on the basis of customary ties each had with the original ancestors. The courts decision to award customary interests on each of the ten claimants was based on the accepted and adopted customary rules and practices of the peoples of the east Santo area. When ownership and other interests in custom is recognized by the majority of the peoples of the area then that becomes the custom.

Generally, a man invests on his natural (male) sons the first right of possession and ownership of any of his properties. He shares the properties. At times he may share some land to his daughter(s). Where he had no children of his own (ie sons) he may adopt a male to succeed him. His other brothers (if surviving) will take over the land (not necessarily other moveable assets) at his death. The surviving daughter may have right by custom over her father's land where there are no other surviving family members.

In the recognition of customary interests ownership rights the order of accepted practices to this day are as follow:

- (a) Sons get the first preferences, and
- (b) The adopted son immediately by the father himself (not a second party adoption).
- (c) The daughter (only survivor) has equal right if she was the only surviving person and as if she was the son of the deceased.

It had been the court's humble view that the claimants not only had to prove their lineages by custom but also how they had acquainted themselves to the property in dispute over a period of time since the property was first made a subject of any binding object by an arrangement or an agreement. So in the instant case one had to prove over time what his or her interests had been in relation to the land in dispute. It has been noted that many of the claimants had nothing to do with the plantation land in the sense of hunting, fishing or making food gardens etc. Infact, the claimants (many) live at places many kilometres away from the land itself.

The Law.

- 1. Constitutional law
- 2. Customary law
- 3. Common law.

Article 73 of the Constitution states:

“All land in the Republic of Vanuatu belongs to the indigenous custom owners and their descendants.”

This provision does not say any recognized custom owner may forcefully take over any alienated land. It merely provides for the recognition of original owners of the land in Vanuatu. It does not say that at anytime an alienator may be thrown off the land by any person.

In the instant case though, the dispute arose as claim for the interests to do with payment of the rents paid each year for the lease of the land in dispute. The question had been one of who should be the recipients of such a payment and as such, the custom owners had to be identified. So this decision is the product of such an issue.

Then the provisions of Articles 74, 75, 76, 77, 8\78 had been the realisation of this court and it is hoped that the claims would be settled once and for all.

Custom law is recognized as part of the laws of Vanuatu under Article 95 of the National Constitution. It states then that;

Article 95 (3)

“Customary law shall continue to have effect as part of the law of the Republic of Vanuatu.”

In the instant dispute the court had the opportunity of hearing (from each claimant) what the customary practices have been and are being recognized and enforced in the villages where the claimants come from. It had been commonly and generally accepted that when the ancestors sold the land originally, in 1885 the people were living in very strict tribal and ethnic grouping areas. No persons would take over a strangers land or any other properties be used by any person. Permission to use certain properties (eg. Rivers, sea etc) had to be sought and granted by those in the area.

When the land was sold in 1885 the chiefs in the Shark Bay area needed no permission from the Chiefs in Hog Harbour or Big Bay areas. People in those areas were in fear of moving around due to tribal differences and warfare reasons. On the other hand it is true to say that after peace came about with the coming of colonial administration and the missions these entities began taking peoples from other areas of the island or from other islands to settle in areas that the mission or the government officials chose at the time for people to settle in.

Where anyone claimant contests (in court) that a particular opposing claimants ancestor migrated from another area due to mission and or government influences then he (contesting party) must prove indefeasibility of his or her title to the property. That is to say that the party contending must show by evidence that he had the ownership claims and that the other party had been warned about the fact that his (migrating party) rights to the common law notion. Then in this country, common law rules and practise had been adopted and had been in use even at Independence (see Article 95 (2) of the Constitution).

Court Finding:

It is the humble view of the court (majority view) that all ten claimants are to a greater or lesser degree entitled to some recognition in the rights their ancestors had as the original custom owners of the land on which the Shark Bay Plantation is now located in (ie. Land Lease Title No. 727, 728 as the Rural Land Records show at this time).

Those claimants who had substantial interests to the land and over a period of time had been in any event the claimants, James Ngisa, Nwarmokos Captain, T. Vor Seksek and Thomas Fabrick.

Then also, the court found that there are yet another group of claimants who have had over time proved that they had some customary interests in the same land and that they have had history of ancestral evidence to prove their claim. These claimants are; Thomas R. Seru, Ngahan Rere, Shem Tho and Tice Ishmael.

Two other claimants in Nathrick Lath and Kavcor Wass have been found by the court to have rights also. They have claimed that they are related to the original ancestors. For instance, Kavcor Wass claimed he had his mother adopted by that woman. Nathrick Lath claimed as a nephew of the original ancestor (on his mother's side). Both of these men (claimants) have lived away from the land as had been with some others in this dispute.

Decision

1. Claimants, James Ngisa, Nwarmokos Captain, Tieth Vor Seksek and Thomas Fabrick shall have 50% share of the Lease Rental Payments, and
2. Claimants, Thomas Reuben Seru, Ngahan Rere, Shem Tho and Tice Ishmael shall have 30% share of the Lease Rental Payments, and
3. Claimants, Nathrick Lath and Kavcor Wass shall have the remaining 20% share of the Lease Rental IPayments for the plantation lease
4. Parties to meet their own costs.

Reason for Decision.

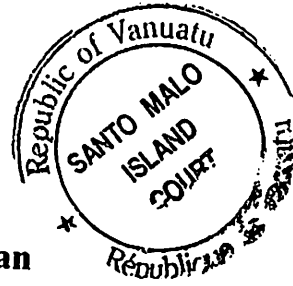
The discussions advanced in the judgment have been the inevitable and conclusive findings of the court.

Order accordingly

Dated at Luganville, this 5th day of May, 2004.

By the Court ~~House~~

Jeremiah Singomat



Jeremiah Singomat, Chairman
Chief Warawara, Justice
Chief Atevere, Justice
Chief Rubi, Justice