

IN THE MAGISTRATE'S COURT
OF THE REPUBLIC OF VANUATU

Civil Appeal case No. 09 of 2013

(Appellant Jurisdiction)

BETWEEN: FAMILY RORY

1st Appellant

AND: JEANNOT MALCEKAN

2nd Appellant

AND: GRATIEN VIRVIR

1st Respondent

AND: TEILEMB MELTOUSI ALBERT MARIE

2nd Respondent

AND: ISMAEL MALVARU

3rd Respondent

AND: TETEOUR KISITO TEILEMB

4th Respondent

AND: TORONBABARU

5th Respondent

AND: MALTAUS RICHARD

6th Respondent

AND: WILFRED TUENVANU

7th Respondent

AND: LILIORD GUILLAUME

8th Respondent

Coram:

Senior Magistrate A. M. L. Bolen

Justice R. Niptick

Justice K. Hapsai

Counsel:

Ms. Thyna for first-appellant

Mr. Molbaleh for Second Appellant

No appearance of Counsel for first Respondent (1st Respondent present)

Second Respondent in person

Third Respondent in person

Fourth Respondent in person

Fifth Respondent in person

Sixth Respondent in person

Seventh Respondent in person

Mr. Toka for Eighth Respondent

JUDGMENT

This is an appeal against a decision of the Malekula Island Court dated 05th September 2013.

Counsel for First and Second Appellant and Eighth Respondent were present at today's hearing including all unrepresented parties except, Mr. Kabini, Counsel for First Respondent. The Court had served notice within reasonable time to all parties and their legal representatives.

During the hearing, the Island Court clerk, Ms. Tete, filed a sworn statement to inform the Court that Mr. Kabini shall not make appearance today because he had a matter before the Supreme Court. In addition, he needed to file extra pleadings in this matter.

Counsel for First and Second Appellant argued that all pleadings had been filed and that the Court should hear the appeal since all unrepresented parties and Counsels had wasted time and funds to make appearance this morning. Having heard all the parties and Counsels, the Court shall proceed in the absence of Mr. Kabini. The Court shall consider Mr. Laumae's submission in his absence.

The First and Second Appellants seeks to bring their appeal as of right alleging that the Island Court Justices' decision was erroneous in law.

The First and Second Appellants alleged two general grounds of appeal as follows:

1. The Learned Justices of the Malekula Island Court had erred in law to send the matter back to the North East Malekula Council of Chiefs. The issue was before the Malekula Island Court was of chiefly right over Toughvanu Nasara located at the Vao area, North East Malekula. It would be proper for the learned justices to

seek assistance from the North East Malekula Council of Chiefs to clarify a certain custom or tradition of that area. That is not the case. The learned justices allocated their function to North East Malekula Council of Chiefs to perform. This is contrary the National Council of Chiefs Act No. 23 of 2006. The National Council of Chiefs Act No. 23 of 2006 stated that the jurisdiction of a council of chief's is limited to administrative and executive functions. Thus, the North East Malekula council of chiefs has no jurisdiction to perform a judicial function. The learned justices had erred in law.

2. The North East Malekula Council of Chiefs is not the proper forum to determine an issue brought by the parties in form system. The Appellants had made its decision to seek a relief within the formal system and not informal system. In *Tenene v Nmak* Civil Case No. 203 of 2002, the Supreme Court stated that chiefly disputes lodged within the formal system must be lodged within the Island Court as the first instance court in the formal system. This is applied in *Chief Mariwota Matua Tapu v Samuel Rolland & Ors*, Civil Case No. 44 of 2003 (page 3, para: 3) where the Senior Magistrate Kewei stated that the proper forum to decide a chiefly dispute is the Island Court. In *Chief Mariwota Matua Tapu v Samuel Roland & Chief Mason Kelu* MC44 of 2003, Magistrates' Court mentioned at page 3 the status of a Council of Chiefs that:

"Certainly, Vaturisu Council of Chiefs is not a Court of law and does not possess any legal or judicial powers. It is an administrative and an executive body. Its establishment does not give it any judicial functions. The Constitution has defined institutions to exercise court or judicial powers. Apart from the Supreme, Magistrate's and Island Courts no other person exercise court powers in the absence of any clear authority. Thus any orders, decisions, judgments or pronouncement purport to be made by Vaturisu Council of Chiefs cannot have the force of law. Its orders may not be capable of enforcement. It may have been out respect that persons have succumbed to various orders by Vaturisu Council of Chiefs. However, no Court of law may lawfully sanction such an arrangement."

3. Section 22 and 23 of the Island Court's Act [CAP. 167] that made it clear that the Island Court has the inherent jurisdiction to deal with customary dispute. It is also the proper forum since its decisions shall have a legal effect. The principle laid in *Chief Mariwota Matua Tapu v Samuel Rolland & Ors* and *Tenene v Nmak* must be applied in this appeal. Therefore, the Malekula Island Court shall determine the chiefly dispute and not the North East Malekula Council of Chiefs. The matter must be dealt by the Malekula Island Court before different justices.
4. Counsel for Eighth Respondent and First Respondent submitted that the decision made by learned justices had not erred in law. The National Council of Chiefs Act No. 23 of 2006 reflected Article 29 (1) of the Constitution and North East Malekula Council of Chiefs had the status and ability to resolve disputes of custom including a chiefly dispute. The judicial jurisdiction of the Malekula Island Court is not exclusive since such function is also vested in a council of

chiefs as stated in s. 13 (1) (a) of the National Council of Chiefs Act NO. 23 of 2006:

“13. Functions of an Island Council of Chiefs and an Urban Council of Chiefs

(1) The functions of an Island Council of Chiefs and an Urban Council of Chiefs are:

(a) to resolve dispute according to local custom;

(b) to prescribe the value of exchange of gift for a custom marriage;

(c) to promote and encourage the use of custom and culture;

(d) to promote peace, stability and harmony;

(e) to promote and encourage sustainable social and economic development;

(f) to undertake such other functions as are conferred on them under this Act or any other Act.

(2) To avoid doubt, each Island Council of Chiefs and Urban Council of Chiefs must only perform the functions referred to in subsection (1) in their respective islands or urban areas.”

5. Moreover, in *Chief Simeon Poilapa IV & Tasil Masaai* Civil Appeal Case No. 128/2009, the Supreme Court referred a chiefly dispute back to the Council of Chiefs of Mele village, Efate to determine the dispute. The decision of the Supreme Court had set out a principle which the learned justices had applied in this case.
6. The North East Malekula Council of Chiefs is the proper forum to deal with a chiefly dispute.
7. During the hearing, the Second Appellant stated in Court that his claim was for Lamatnamaki nakamal and not the Toughvanu nasara. The former Island Court clerk, Mr. Joel, recorded his claim as a claim of right over Toughvanu nasara which is wrong. The administration of the Malekula Island Court had made the mistake.

FINDING

This Court finds that:

- The learned justices had erred in law to send a chiefly dispute back to North East Malekula Council of Chiefs since it has no judicial jurisdiction. It is clear from the National Council of Chiefs Act NO. 23 of 2006 that the North East Malekula Council of Chiefs only has an administrative and executive jurisdiction and not a judicial jurisdiction.
- The proper forum to determine the chiefly dispute is the Island Court in accordance with Island Court Act [CAP. 167]. The Court shall apply the principle *Tenene v Nmak* and *Chief Mariwota Matua Tapu v Samuel Rolland & Ors.* Thus, the learned justices had erred in law to send the matter back to the North East Malekula Council of Chiefs.
- The Malekula Island Court had made a mistake to record the First Appellant's claim as over Toughvanu nasara.

ORDER

Upon these findings, this Court orders as follows:

1. The decision of the Island Court dated 05th September 2013 is hereby quashed.
2. The Malekula Island Court shall dismiss the First Appellant's claim for Toughvanu nasara.
3. The First Appellant shall file a new claim for the Lamatnamaki nakamal and not Toughvanu nasara.
4. Each party may pursue their claim of chiefly title in respect of their own Nasara or nakamal in any court they choose.
5. Costs to be taxed or agreed upon.

DATED at Lakatoro, Malekula, this 16th day of March 2015

BY THE COURT


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SENIOR MAGISTRATE

