

**IN THE ISLAND COURT
OF THE REPUBLIC OF VANUATU**
(Other Jurisdiction)

Declaration
Case No. 19/2794 IC/DCLR

BETWEEN: TOM NUMAKE TUAN

Original Claimant

AND: FAMILY NAIH NISSINAMIN

First Counter-Claimant

AND: FAMILY NATUKA MATUA

Second Defendant

AND: FAMILY NAEIU FAILET

Third Counter-Claimant

AND: FAMILY RAKATNE

Fourth Counter-Claimant

AND: FAMILY NAWAKAI KAPATANGATANG

Fifth Counter-Claimant

**AND: FAMILY KATANEK MEI NEMAKE
TUAN**

Sixth Counter-Claimant

AND: FAMILY AHLIEN ASUL

Seventh Counter-Claimant



Before: *Senior Magistrate Moses Peter*
Justice Samson Nieru
Justice Lina Tamanu Sam
Justice William Lomai

Clerk: *Blandine Tepi*

In Attendance: *All Parties*

Copy: *All Parties*

JUDGMENT

1. The appellant successfully appealed the Island Court decision dated 25th September 2014 after satisfying the Supreme Court that the court below failed to properly deal with the boundaries of Lengkowgen land.
2. The matter was remitted to the Tanna Island court with the issues confined as follows and I quote at paragraph 11 in the Land Appeal case **Nissinamin v Family Nipiknam [2013] VUSC 134**:

“At counsels request and to assist the Island Court to avoid the pitfalls identified in this appeal, I give the following directions:

- (a) *Before hearing the oral evidence in the case, the Island Court must comply with the requirements of Rule 6 (10) of the Island Court (Civil Procedure) Rules 2005, and ideally, have the area surveyed at the cost of the parties or at least, adopt a single hand-drawn map accepted by all the parties showing an agreed boundary, boundary marks and custom features [see in this regard: the Native Court judgment (op cit.) paragraph (1)].*
- (b) *The rehearing is to be confined to the existing parties including Chief Tom Numake if he wishes to participate;*
- (c) *Fresh filing fees are hereby waived save for any additional sworn statements that are filed by the parties at the rehearing;*
- (d) *.....*



(e) *In order to prevent and avoid further litigation and disputes and to maintain the status quo pending the rehearing and determination of this claim and with the consent of the parties I order:*

Until further order of the court all parties, their servants and agents are hereby restrained from conducting any new developments including the erection of fences within the perimeter of "Lengkowgen" land at Whitegrass, Tanna".

3. I reiterate what has been observed in the courts that the disputes remained after a Native Court Judgment of the New Hebrides in 1973 whereby Chief Tom Numake Tuan was declared the lawful owner of Niougan or Lengkowgen land.

4. At paragraph 9 of the Native Court judgment of 1973 at paragraph 9 the court held that:

"The court noted that during the course of the hearing some disagreement has emerged with regard to the status of certain small parcels of land situated within the over-all area of "Niougan". The court make no judgments in respect of these small parcels of land because it has not been requested to do so, but the Court strongly urges that such disagreements should be resolved amicably between the parties concerned, without further recourse to Court action".

5. Claimant Tom Numake said he has served written invitations on each of the respective counter-claimants at one stage to resolve the pending issues but some of them refused and filed proceedings against him instead.

6. It appears subsequent proceedings initiated by several of the counter-claimants seeks to claim ownership rights over Niougan land through claims for custom ownership of name and bloodline of Nemake Tuan and current Tom Numake Tuan despite the Native Court Judgment of 1973.

7. In the case of **Nissinamin v Family Nipiknam [2013] VUSC 134** the court held at paragraph 7:

"Such a Native Court judgment constitutes "res judicata" [see: Kalotiti v. Kaltapang (2007) VUCA 25] and, unless it can be avoided or limited in its application, is binding on the Island Court and constitutes a complete bar to the present proceedings which seeks to answer the question: "who of the competing claimants is the true custom owner of the customary land known as "Lengkowgen" situated at Whitegrass, Tanna?"

8. In the Court of Appeal case **Numake v Iopil [2019] VUCA 60**, the court held that:



[33] As noted above, the 1973 Native Court decision at [9] also recognized that there may be small portions of land within 'Niogvan' (sic) land that may require more consideration.

[34] Finally but most importantly, the Court of Appeal in *Laus v Noam* [2017] VUCA 40 at [34] specifically approved of what the Chief Justice had said in *Family Kaltapang Malastapu v. Family Kaltongo Marapongi, Family Songoriki, Family Lakeleo Taua, Family Masau Vakalo and Family Taravaki* (Supreme Court Land Appeal Case No.58 of 2004, 14 September 2009) about the importance of secondary rights in custom land, and the mean of enforcing them. See also *Kalwatsin v. Willie* [2009] VUCA 47 AT [32].

[35] In the course of his submissions, counsel for Sam Naiu Iopil appeared at one point to suggest that the concern of his client (and those of his family) may fall within the concept of asserting secondary rights of that character. As that was not developed, we do not take that matter further in this judgment".

9. The court noted that during the course of hearing it is obviously impractical for all parties to have the identified boundary surveyed as directed by the Supreme Court.
10. When the court went and visited the land before hearing oral evidence in court, no contention was raised on the identified parcels of land within Niougen land claimed to be of importance to the custom protocol and practices of each of the tribe represented by claimants.
11. Each of the claimants have identified their boundaries within the Niougan land as deposed in the attached sketch map.

GOVERNING LAWS RELATING TO LAND OWNERSHIP & USAGE RIGHTS

12. Article 73 of the Constitution :Land belongs to custom owners

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

13. Article 74: Basis of ownership and use

"The rules of custom shall form the basis of ownership and use of land in the Republic of Vanuatu."

14. Article 75: Perpetual ownership

"Only indigenous citizens of the Republic of Vanuatu who have acquired their land in accordance with a recognised system of land tenure shall have perpetual ownership of their land."



15. We will now discuss the rule of Tanna custom that forms the basis of use of these parcels of land by each of the claimants.

TOM NUMAKE TUAN (Primary Rights over Niougan Land)

16. His history as deposed in the Native Court Judgment revealed Numake Tuan was the last survivor with his sister Nalin Mwei at Niougan land after the tribal war. He then sought for a man from other tribes to come, raise his tribe, and own the land but none of them would accept his request.
17. He then sought help from a man called Ielome Tukiapen at NAIH FA MIN Tribe at Illisilis.
18. Ielome then spoke to his son Tom Nalawas if he could send his son Jimmy Ielome and to which he and everyone agreed.
19. Jimmy Ielome was brought down to seacoast to Numake Tuan at his village called Loukaluas.
20. Numake Tuan then bought Jimmy Ielome with two pigs and one turtle. As everyone was watching, he untied a special bead of honour from his own neck and tied it on to Jimmy Ielome's neck. This is a sign of giving him power, handing over to him all his land at Whitegrass down to the sea and at Louiouanou village, ruling over that entire land he had, and raising up his tribe. Tom Numake Tuan is the son of Jimmy Ielome.
21. At [8] of the Native Court Judgment of 1973 it is held that:

"The Court of two Assessors and the President are of one mind in this matter, and the Court is of the firm opinion that the Plaintiff, Tom Numake, is the lawful owner of the area of land known as "Niougan", situated at White Grass, Tanna, and that the boundaries declared by the Plaintiff are the correct boundaries in custom law."

NAIH NISSINAMIN (Spokesperson Sam Naiu)

22. This tribe originated from the same tribe as Tom Numake Tuan (NAIH FA MIN) of Illisilis let alone of the same parentage of Tom Nalawas.
23. It is claimed that when Tom Numake was a young boy his father Ioleme Iabar passed away so his grandfather at Illisilis Supreme nakamal namely Tom Nalawas had to take care of him and his father Jimmy Ialamei Tukiapen.



24. This claimant said because he is of the same tribe and bloodline as Ialamei Iabar (the father of Tom Numake Tuan), he should enjoy the same relief ordered in the Native Court Judgment of 1973 to Tom Numake Tuan.

NATUKA MATUA (Spokesperson- Charlie Nango)

25. This tribe does not dispute the ownership of Niougen land given to Tom Numake Tuan in the Native Court judgment of 1973; however, they assert that before the tribal war, they use to occupy certain parcel of land within the parameters of Niougan land and had three nakamal all being responsible for distribution of turtles to other nakamal. The name of these nakamal are Lamkawawia, Lamalu and Launikiapen.
26. This assertion does not appear to be challenged by the parties. Mr. Tom Numake admitted accepting his family and to which the spokesperson sought for recognition to be given to both his male and female relative. Tom Numake does not oppose that proposition.

NAIEU FAILET (Spokesperson Naieu Failet)

27. At the start of the case when we visited the land boundary declared to Tom Numake Tuan, this claimant appears to have some contention on the eastern boundary mark that was acknowledged by the Native Court, as was the case between Tom Numake and Nisak.
28. However, he concluded that the mark in the map presented before the Native Court judgment by Tom Numake is correct and he withdraws his previous dispute as regards the Eastern boundary mark.
29. He firmly submitted that in custom, his tribe Naihne has the custom governance through his supreme nakamal at Lowlipang where Nisinamin tribe (Tom Numake) is subject to and it is important that his nakamal must be made aware of any developments that occurs at Niougan land.
30. It is clear in the map deposed in court that Naihne tribe is the tribe sitting right above Nissinamin tribe.

RAKATNE TRIBE (Spokesperson Erick Ialulu)

31. This tribe claimed parcel of land called Imid, which covers the areas submitted by Natuka Matua to have his three nakamal. They claimed these nakamals also including the airport runway and several mango trees, which he say was planted by his grandfather many years before the 1973 Native Court Judgment.
32. He denied every submissions put to him that Imid is a place where his tribe would come and access marine resources. He said his tribe have initially



occupied the land up until the tribal war, which saw most of them died and some fled and are now residing at Rakatne.

33. All the claimants accepted that his grandfather may have planted these mango trees but it is only for their use when they come and access the ocean.
34. Rakatne is located far behind Naihne tribe on the eastern side of the Island far behind a mountain (Mount Tangen) separating it and Naihne tribe.

NAWAKAI KAPATANGATANG (Philip Kapatangatang)

35. It is not disputed that Katanek Mei Numake who is the surviving bloodline of Numake Tuan is married to Nowakai Kapatangatang. It is deposed in his submission that Numake Tuan had given several parcels of land to several individuals due some custom reasons, which was not made clear by the spokesperson but the court heard in evidence that several parcels of land were given to those who took part in the tribal war. He claim two parcels of land were allocated to his grandfather namely, Sule and these land are Lowakawa and Leisiririp. Tom Numake confirmed this deposition.

KATANEK MEI NEMAKE TUAN (Spokesperson Philip Kapatangatang)

36. This counter-claimant claim rights over the Niougan land based on his family bloodline with Nemake Tuan. It is clearly stated in the Native Court Judgment at [4] that at the time when Numake Tuan was seeking for a male from other tribes to come and raise his tribe, she Nalin Mei was still alive.
37. It appears she was married to a man from Isla namely; Philip Iasu and they raised two children namely Katanek Mei and David Hiwa. He says because there is no surviving male blood of Nemake Tuan, she has the custom right to claim ownership of Niougan land.
38. That being the case would render the Native Court Judgment negatory. It is of course within the ambit of Nikoletan Constitution that give recognition to a female surviving bloodline to inherit land and it appears the adoption of Tom Numake may fall outside the provisions of the Nikoletan Constitution that adoption must follow bloodline. However, it cannot be rectified based on finality of the Native Court Judgment of 1973.



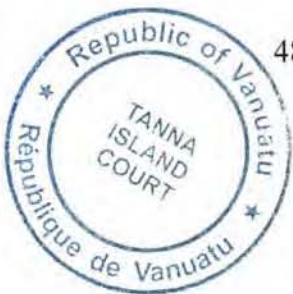
FAMILY IAHLIEN ASUL

39. Iahlien Asul is Rakaurne tribe.
40. Ielome Tukiapen came to Ilisilis from Rakaurne and lived in Ilisilis and raise up the tribe.

41. When number of people grew in Ilisilis, then Ialome Iabar was sent to Nemake Tuan at Nissinamin Tribe and a piece of land at Niougan called Iuiak was given by Numake Tuan to Ilisilis.
42. Ilisilis then gave the land to Rakaurne because it was through Ielome Tukiapen that the tribe at Ilisilis have grown.
43. Another land called Kolminek Iken was also given to Rakaurne through Jimmy Kalapen. It is deposed in evidence that the land was given to him by Nemake Tuan at his request and is only for planting cotton.

FINDINGS

44. Iuiak land within Niougan land is for use by Rakaurne under the rites of custom through what is considered in Tanna Custom as payment of Ielemai Tukiapen to Ilisilis.
45. Kolmenik Iken is a karkil for Rakaurne Tribe under some form of arrangement with Nemake Tuan. The boundary mark lies uphill from Iuiak beside Lenil Creek in Niougan land.
46. The nakamal are alive when people live and perform the custom rituals in the nakamal. When people escape by reasons of tribal war and settle on another land and establishes their nakamal there, then the previous nakamal losses its cultural significance as all custom authority of that nakamal is transferred to the new location of settlement.
47. A Supreme Nakamal that has governing authority over a kitchen nakamal does not have ownership right in custom over land in that particular kitchen nakamal. Any development that happens in the kitchen nakamal may be made known to the Supreme Nakamal but the Supreme Nakamal does not have the power to make any decision.
48. A supreme Nakamal behind a Supreme Nakamal cannot claim authority over a kitchen nakamal in front of the Supreme Nakamal. In custom, a Supreme Nakamal behind a kitchen nakamal has custom authority of that kitchen nakamal. A Supreme Nakamal can only access tupunis by a parcel of land to access marine resources (drink solwota). In the event of accessing marine resources, you can plant fruit trees for use but it does not make you own the land.
49. A person cannot be ruled by two tribes if it happens in custom that another tribe adopts him, then he has to relinquish his previous connection with his original tribe and perform the custom duties of that new tribe he is adopted into.



50. Where there is no surviving bloodline in the tribe, a surviving blood must be traced to a woman married to another tribe. Adoption to a tribe must follow bloodline.

DECLARATION

1. Iuiak and Kolmenik Iken are parcels of land at Niougan land accessible for use as '*Ples blong drink solwota*' and *Karkil* for Rakaurhne tribe under the name of Iahlien Asul and the boundaries for Iuiak lies at coastline adjacent to Ikatikhiu on the northern side and Leisiarip on the southern side of the declared map of 1973. Iuiak sits right in the water channel with coconut tree demarcating its north boundary with Ikatkhu and a Natapoa tree on the south side demarcating its boundary with Leisiriarip. Evidence shows the name depicts a fish called 'bigbel' and that land is only accessible for catching that type of fish. I therefore agree that the land goes inland up to main road only and not far stretched to the cliff as submitted by Family Naih Nissinamin. Kolmenik Iken lies above the declared map where it is shown to have been allocated to Jimmy Kalapen. It does not cover more than 200 square meters.
2. Lowakawa and Leisiarip are two parcels of land accessible for Sul Nawai Kapatantang. Lowakawa is located on the plateau above Ikatikhiu and Lowakus. It does not cover more than 200 square meters of the land mass. Leisiarip is adjacent to Iuiak on the south side and begins from the Natapoa tree and ends on a fence demarcating the areas where Rock Ridge begins.
3. Three nakamals namely Lamkawawia, Lamalu and Launikiapen are no longer in existence and it would be impractical in custom to access the sites and perform any cultural duties as such duties are currently exercised in the present nakamal accommodating Natuka Matua. They can only be acknowledged for their historical connection with Niougan land.
4. It appears this same situation would apply to Rakatne tribe. If they could accept that they only access Imid to collect fish and shells, then they will continue to have use of the land for that particular purpose only. Rakatne falling behind another supreme nakamal namely Laulipang, cannot claim authority over Nisinamin tribe. Imid is a stone submersed in the sea few meters away from the coastline. Imid is only a small place and is clear in evidence that it is a rock that has a hole in it and is submersed in the sea not far from the coastline. It has some custom practices connected to it.
5. While it can be accepted in custom that Naihne Tribe has governing duty over Niougan land, no comment is made concerning any rights with Niougan land.
6. It is accepted that Katanik Mei is the surviving bloodline of Nemake Tuan and while she is married away to another tribe, this court is of the firm view




that she be given usage right over all Niougan land after having consultation with Tom Numake Tuan.

7. With regard to Family Naih Nissinamin, we are also of the view that even though they are of the same blood as Ialame Iabar and Tom Numake Tuan, the adoption of Jimmy Ialame Iabar into the Niougan land carries with it the governing authority of Louiouanou as declared by Numake Tuan when he tied the special bead of honour on Jimmy Ialome's neck. The governing authority of Ialome Iabar does not represent Illisilis nakamal where the Naih Nissinamin tribe originates.
8. All claimants must perform custom reconciliation with Chief Tom Numake by end of December 2019 to restore good working relationship so as to ensure that any future usages of Niougan land does not trigger any more fights and disputes.
9. Parties are reminded about their rights to appeal.


DATED at Isangel Tanna this 30th day of October 2019

BY THE COURT




MOSES PETER
 Senior Magistrate






Justice S. NIERU



Justice L T SAM



Justice W. LOMAI

