

BETWEEN: CHIEF WAYA TENENE
First Appellant

AND: SUAL KALMARIE
Second Appellant

AND: KALMETABIL KALMET NMAK
Respondent

First Appellant: Mr. Boar
Second Appellant: Mr. Kalsakau
Respondent: Mr. Morrison

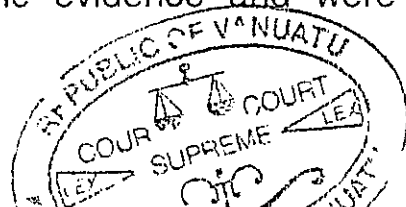
RULING

On 26th February 2002 Chief Waya Tenene and assistant Chief Arthur Mathai of Erakor Village filed proceedings in the Supreme Court to resolve the disputes over the chiefly claims to Erakor. On 8th February orders were made for serving the proceedings upon persons the plaintiffs knew to be making a claim to the chiefly title. It became clear there were three contenders, Chief Waya Tenene, Sual Kalmarie and Kalmetabil Kalmet Nmak.

After discussion six general questions were formulated by the parties for decision. The Island Court is the proper court of first instance in the formal system for matters of custom. By consent the six questions were put before the Island Court. This, in effect, became the claim and the three named above the parties.

On 7th August 2002 the Island Court gave its answers to the six questions. There was an unsuccessful appeal to the Magistrates Court (see the judgment of 7th January 2003). The matter came again before the Supreme Court (CC203/02), this time on appeal from the Magistrates Court.

On 26th May a Ruling was given. No assessors sat. The Court did not make findings of custom. It looked to see that in the Island Court proper procedures were followed and the conclusions reached were properly based on the evidence and were not



unreasonable. This Court found no grounds to disturb the Island Court's findings upon the six questions.

However, the Island Court went a stage further than answering the questions and found that Kalmetabil Nmak was the correct chief of Erakor.

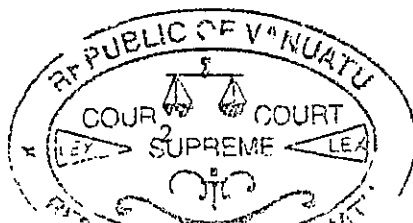
- Counsel for Waya Tenene and Sual Kalmarie argued they should not have done so. They were only requested to answer the six questions, which were directed generally to the qualifications to the chiefly title and associated matters. They did not put forward argument on who the actual person should be. It was not the subject of any question.

The lawyer for Nmak agreed they hadn't been asked to go that far, but they were entitled to do so. There was only one person who could be the Chief on the evidence and the answers to the questions, and that was Nmak. In any event, disharmony and disunity had prevailed long enough. It was time for a conclusive decision.

- Before deciding this issue the appeal was stopped and the matter put to a meeting in the nakamal to attempt to resolve the disputes in "the light of the Island Court answers to the (six) questions". It was suggested neutral third persons be present to ensure calm and orderliness.

A large meeting did take place on 7th June 2003. It was chaired and guided by the President of the Malvatumauri, an executive member was present and a record of the meeting was kept. No single person was accepted by all as chief. The case therefore returned to Court for further adjudication. The record together with recommendations was sent to the Supreme Court, the Report of the Meeting. The parties had the opportunity to advance further argument, on the question whether the Island Court had exceeded its jurisdiction. None did so.

- I found the Island Court was wrong to do more than answer the six questions. That was all that was before the Court. Tenene's and Kalmarie's parties can say, with justification, had we known they were going beyond the six questions we would have brought more and different evidence.



Whilst the desire of the Island Court to resolve this dispute is laudable, it went too far when it pronounced Kalmetabil Nmak to be the true chief of Erakor. I must quash those parts of their decisions which went beyond answering the six questions.

But the reality is this, even with the answers to the six questions before a large meeting there has been no resolution.

The formal Court system is not always the best way of resolving these disputes. It is not fast and procedures and courses which are legally correct may seem tortuous and bewildering, like a slow river winding its way through the bush. The cost in money to the village or area will be high. Interim arrangements often please no-one.

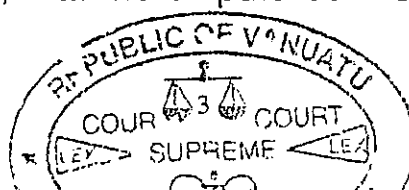
The Court acknowledges the position of Chief Tenene after 30 years and how he sees the present state of affairs. However, if no other means of peaceful resolution can be found and the matter is referred to a Court then the Court must and will act. When it does so, it will be according to law. Peace and the rule of law are paramount.

The Court must therefore decide what is the next step. This Court cannot today, even if it wished, begin to decide which of these contenders should be chief. The evidence on that matter is not complete.

The original judgment read to the Court stopped at this point. It was ensured all parties had a copy of the Report of the Meeting. Argument was heard as to what is the next step. In particular, discussion focused upon whether it was simply a matter of returning the case to the Island Court to hear any remaining evidence on genealogy, an unattractive course given the length of this dispute so far, or whether the Court should recognise what the people of Erakor wanted as reported by the President of the Malvatumauri and according to his recommendations.

The Report of the Meeting sets out a record of what speakers said and the recommendations of the President of the Malvatumauri and the Executive Member.

It is clear everyone wishes this dispute to be ended and ended quickly. Further, there was a strong opinion from the meeting, though not everyone, that the dispute be resolved by an election



between the competing parties. The President and Executive Member agreed with this course, saying it was the only way. References are made to elections of some kind in the past when selecting Erakor Chiefs. The President of the Malvatumauri and the Executive Member also suggested that the new Chief should include representatives of all three parties in the Village Council of Chiefs or make them Assistant Chiefs. There must also be a fitting ceremony to recognise and say thank you for Chief Waya Tenene's thirty-two years of service.

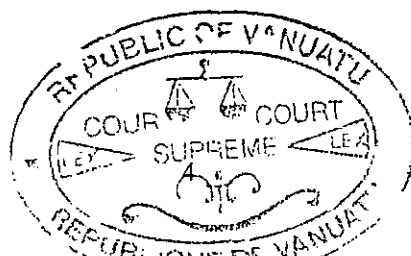
The appellants are content with an election. The respondent objects to that. He argues strongly that the custom of Erakor is clear. The Island Court has answered the questions. Procedurally and evidentially there was no flaw. Elections as such are no part of their custom.

First, I find I can and should receive and take cognizance of the report. Under s. 22 of the Island Courts Act the appeal Court can consider the records relevant to the decision and review such evidence and make such enquiries as it thinks fit. Whilst the President's report did not come about as a result of a direct enquiry, it necessarily follows from the Court's referral of the matter to the nakamal and the failure there to reach a decision. Indeed, given the contents of that report the Court would be acting without vital information if it proceeded without considering it.

The Island Court (Question 4) stated "*... according to Efate custom, a male bloodline meeting should be held to choose one of them to be chief, but there must not be an election similar to the one adopted to appoint Chief Waya Tenene.*"

Chief Tenene has indicated through his counsel he no longer wishes to be chief of Erakor.

All parties agree only those of the chief's rightful bloodline are entitled to become chiefs. The Island Court agreed this is custom. It further stated the chief's first born son of the bloodline is entitled to take over the chief's duty. It is on that basis that Kalmetabil Nmak makes his claim. He says the geneology is clear. There is only one person who meets the requirement. Kalmetabil Nmak is that person.



It is accepted Sual Kalmarie is also of the bloodline. He says let the people of Erakor decide from those of the bloodline who is to be the next chief. That is what they asked for in the Meeting.

There is the dilemma.

Custom and common law have many features in common. One of those features is their flexibility to meet change and development, yet still retain their inherent qualities and value. Neither works on the basis of saying, this is how it was always done in the past and must always be done in the future.

The Constitution states the Republic of Vanuatu is founded on traditional Melanesian values, faith in God and Christian principles.

Article 1 states "*The Republic of Vanuatu is a sovereign democratic state.*"

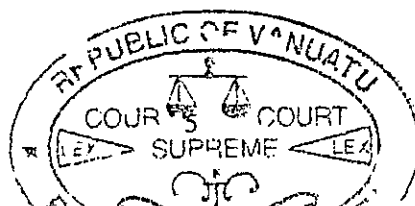
Article 4 (1) states "*National sovereignty belongs to the people of Vanuatu which they exercise through their elected representatives.*"

Article 4 (2) states "*The franchise is universal, equal and secret...*"

Article 4 refers to Parliament. The principles are clear.

The people of Erakor have suffered turmoil for over two years now. That turmoil stems from strong, competing challenges to the chiefly title. The claimants are those of the chiefly bloodline. The turmoil stems from resolving which of the claimants should be the chief. The Island Court says the chief should be the first born of the male bloodline. There is no place for an election. The sitting chief for over thirty years. Chief Waya Tenene is a man from the bloodline. He was "*elected*".

Chapter 5 of the Constitution makes provision for a National Council of Chiefs. Article 29 (1) says it shall be composed of custom chiefs elected by their peers sitting in District Councils of Chiefs. The constitution explicitly requires an election for membership of the National Council. The President himself is elected. The National Council has a general competence to discuss all matters relating to custom and tradition and make recommendations for the preservation and promotion of ni-Vanuatu culture and languages, (Article 30 (1)).



The broad consensus of the Meeting as seen and reported upon by the President of the Malvatumauri was a desire for an election. The President recommended to this Court that that was the course which he perceives will end this unhappy saga. This Court accepts such a recommendation would not be made if it had no place in custom.

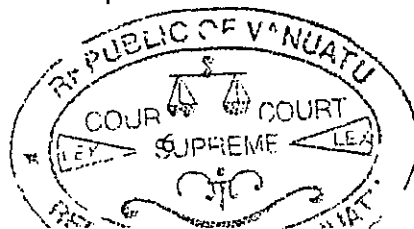
It is difficult for any leader or chief if he does not command the respect and support of his people. Indeed, without that respect and support for its leader a community soon falls to internal division and conflict or oppression.

There is another and very practical aspect to this dispute. There is concern about the future running of the financial affairs of Erakor and the accountability of those who will be in control. This is another area where custom must look to its flexibility and development to retain its quality, its value and its relevance.

In my judgment therefore the custom of Erakor has recognised that when there are competing and irreconcilable claims to the chiefly title from those of the bloodline then an election can be held. This is consistent with what has happened in the past in Erakor. It is in keeping with the principles and aspirations of the Constitution of Vanuatu. It does not devalue custom. It enhances custom.

Accordingly, under section 23 (1) (a) of the Island Courts Act I order as follows: -

1. An election should be held to resolve this dispute.
2. That election must be held on Saturday 9 August 2003. This date is agreed by Chief Tenene.
3. Men and women of Erakor over the age of 18 years are entitled to vote.
4. The ballot should be by secret vote and public counting.
5. Chief Waya Tenene is to continue to be the Chief of Erakor until the vote is held and a winner announced and installed as chief. This part of the Order starts immediately. Everyone must ensure Chief Tenene is in possession and control of all matters



and things the chief is responsible for, e.g. the keys to the hall, by 4pm on 26th June 2003.

6. Chief Tenene has agreed to arrange the election, in particular he is required to:-

- (a) fix the times for the election;
- (b) fix the place for the election;
- (c) make the arrangements for the election;
- (d) oversee its running and ensure no cheating;
- (e) make the official announcement of the winner;

If there are any disputes about who is qualified to vote Chief Waya Tenene will decide. Everyone must accept his decision.

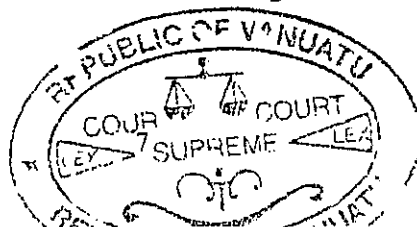
If there are any disputes about how the election is run then he will decide. Everyone must accept his decision.

If he wishes to seek the assistance and advice of an officer of the Electoral Commission he may do so. It is for the Electoral Commission to decide whether to assist and advise.

7. The Island Court and the President of the Malvatumauri have recognised the importance of the winner of the election including in his Council representatives of all three parties and/or the appointing of assistant chiefs. It is part of this Order that this happens.

8. The new Chief and his Council must recognise and accept that though custom is present, considerations of today are also important. This case illustrates how custom stands into danger if it does not recognise and accommodate such considerations. The new Chief and his Council must ensure that:-

- (a) the affairs of Erakor are run in an open and honest way and the interests of all persons are safeguarded;



(b) full accounts and reports and supporting documents are kept of all activities; named people must be responsible for keeping and producing the records;

(c) at least every six months accounts and a full report of activities are published and all supporting documents are available for inspection;

(d) council members can inspect and make copies of all accounts and documents at reasonable intervals.

9. After ordination the first official act of the new Chief and his Council must be to arrange a fitting ceremony to recognise the long years of service of Chief Waya Tenene.

I anticipate that one party and his supporters will hold some disappointment at this decision. They must accept it and work with it for the benefit of everyone. It is for the people of Erakor to make the decision as to who is to be their chief.

All parties must now look not to their self-interest, but to the welfare and happiness of Erakor and its Children.

The appeal is allowed. Orders are substituted as above. There will be no Order for costs. The first appellants costs deposit of VT50,000 is to be returned to him.

Dated at Port Vila, this 25th day of June 2003.


R. J. COVENTRY
Judge.

