

IN THE SUPREME COURT
OF THE REPUBLIC OF VANUATU
(Civil Jurisdiction)

Civil Case No.69 of 2005

BETWEEN: BEN CHICHIRUA
Representing the Estate of
KALTOI CHICHIRUA
Claimant

AND: ALOANI GEORGE KALO
Defendant

Coram: Justice C. N. Tuohy

Counsel: Mr. Hakwa for Applicant
Mr. Daniel for Respondent

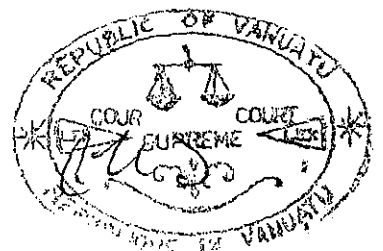
Dates of Hearing: 19 February 2007

Date of Judgment: 17 April 2007

RESERVED JUDGMENT

Introduction

1. This trial has been limited to an issue affecting the claimant and defendant only, that is whether the rental monies from Marope Land payable to the



defendant, Aloani George Kano, as declared custom owner must be divided equally between the families of the 6 grandchildren of Kano Nareo surviving or leaving issue or whether they may be disbursed by him amongst the descendants of Kano Nareo as he sees fit.

2. The decision on that issue does not directly affect or bind the other parties to the proceeding who were not represented at the hearing. Their separate claims on the rental income remain to be heard.

Facts

3. The starting point, logically though not chronologically, is the judgment of the Island Court in Land Case No. 1 of 1993 in relation to "Marope Land". This judgment was delivered on 25 February 1994. The relevant orders made are set out below. They relate to the part of the "Marope Land" marked blue on a map but that land is now called, in this case, simply "Marope Land". (This English version is taken from the judgment of the Supreme Court on the subsequent appeal in which certain mistakes in the English version of the original Bislama judgment were corrected):

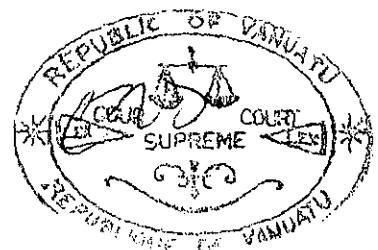
4. *The Court is satisfied and thus declares Pastor George Kano the true custom owner of the land marked in blue on the map.....*

5. *The Court is satisfied and declares that:*

- (a) *Naflak Teufi Ifira (LC.2) and their descendants;*
- (b) *Chief Nunu Naperik Mala and his family (LC.1) together with their descendants;*

- (c) *Family Sope of Mele village and their descendants;*
According to custom laws, have perpetual rights to occupy, use and enjoy the area on the map marked in blue.....

This customary right includes the right to grow crops, make gardens, build houses, and live on the land subject to any



government restrictions. This right also includes right to receive rents or any other form, of profit.

6. *The Court is satisfied and declares that the Kalsakau Family (LC.3) and their descendants have the same perpetual rights to occupy, use or enjoy (a part of Marope Land) with the Naflak Teufi Ifira and their descendants, Chief Nunu Naperik Mala and his descendants and the Sope family of Mele village and their descendants.*

This customary right which the Kalsakau family has obtained includes the right to grow crops, make gardens, build houses, and live on the land subject to any government restrictions. This right also includes the right to receive rents or any other form of profit.

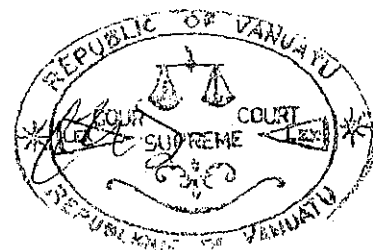
7. *Perpetual right to occupy, use or enjoy the land and the other entitlement of the land is to be exercised and enforce under the control and direction of the custom landowner.*

8. *The Court would generally accept application by any party to clarify the rights issue from the judgment of this Court.*

4. The Island Court decision went on appeal to the Supreme Court but every ground of appeal was dismissed and the Island Court decision stands in full.

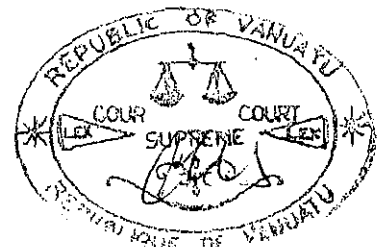
5. The rights which the parties to this judgment assert arise from their kinship with Pastor George Kano, named as the true custom owner of the land in Order 4.

6. In essence, the Island Court identified a custom chief Nareo, who sold the land in the 19th century, as the custom owner of the land at that time. The



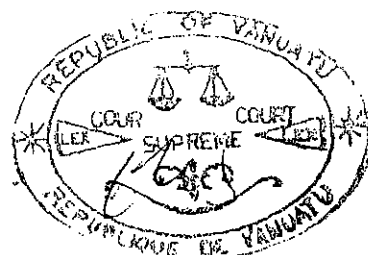
Court found that custom ownership then passed through his sister, Toumata Tetrau, to her son Kano Nareo.

7. Kano Nareo had 3 children, a daughter also named Toumata Tetrau, a first son named Kaltongorua and a second son named Kaljipohua Jack. It is assumed that all 3 had passed away by the time of the Island Court hearing because the line of Kano Nareo was represented there by the leader from the next generation, Pastor George Kano, first son of the first son of Kano Nareo. It was by virtue of that line of descent that Pastor George Kano was declared, according to customary laws, to be the custom owner.
8. In fact, there were seven grandchildren of Kano Nareo – Kalonsema Philip, Antoine Itu Kanegai, Masato Kanegai (children of Toumata Tetrau II), Pastor George Kano, Sea Chichirua, Kaltoi Chichirua and Abel Chichirua (children of Kaltongorua). The last named Abel died childless as did the third child of Kano Nareo, Kaljipolua Jack. Apart from Abel, all the other grandchildren had families so there are now 6 families, each descended from one of those 6 grandchildren of Kano Nareo.
9. Of these 6 grandchildren of Kano Nareo, only 2 survive. They are Antoine Itu Kanegai and Sea Chichirua who each heads his own family. The other four families are headed by their oldest male member: Gilbert Kanegai (family Kalonsema Philip), Joe Kanegai (family Masato Kanegai), Aloani George Kano (family Pastor George Kano) and Ben Chichirua (family Kaltoi Chichirua).
10. The eldest son of Pastor George Kano (now deceased), Aloani George Kano, has now been declared the custom owner of the land by the Island Court. In that capacity he has been paid rental income from the land, the distribution of which is the subject of this dispute.



Submissions

11. Mr. Hakwa submitted that when Pastor George Kano was declared “the custom owner”, it did not mean that he was being declared the individual owner of the land but meant that he was the representative of the custom owning families.
12. He submitted that the Court should look first to the Constitution in deciding the issue before it, specifically Articles 95 and 73.
13. He submitted that the Court cannot apply customary law pursuant to Article 95 (3) because there was no evidence of any custom law about the issue of division of rents.
14. He submitted that the Court must look to Article 95 (2) for the source of the applicable law. In particular he relied upon the equitable principle of English law that “equity is equality”, and called in aid the Supreme Court decision of Kent J. in **John Noel –v- Obed Toto** (Case No. 18 of 1994, 19 April 1995), in which that principle was applied in relation to division of cash income from custom land between the custom owning families. (Interestingly, Mr. Hakwa appeared for the named custom owner in that case to argue the opposite position for which he now contends).
15. He also pointed out that Article 73 of the Constitution speaks of “*the indigenous custom owners*” in the plural to support his submission that the custom owners in respect of a piece of land are always a group, not an individual.
16. He also relied upon s. 28 (2) of the Judicial Services and Courts Act No. 54 of 2000 to provide if necessary the jurisdiction for the Court to make the orders he seeks.

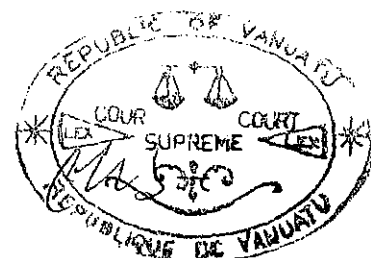


17. It was implicit in Mr. Hakwa's submission that Ben Chichirua represented all the custom owning families apart from Aloani George Kano's family.
18. Mr. Daniel submitted that the Island Court judgment did not specify that Pastor George Kano was the custom owner as representative of the claimant families but as representative of the whole tribe of Naflak Teufi.
19. He submitted that in **John Noel –v- Obed Toto**, the Court had already decided that the land in question was owned by the family consisting of the descendants of the late Crero Toto, and no-one else. On that basis, he distinguished the present case.
20. He further submitted that receipt of rental is part of the enjoyment and use of the land, control and direction of which is given by Order 7 of the Island Court decision to the custom landowner, at present his client Aloani George Kano. He drew attention to the wording of Order 5 which makes clear that the customary right to occupy use and enjoy the land includes the right to receive rents.

Discussion

21. It is axiomatic that custom ownership is not individual ownership. That is made clear in the Island Court decision and in Kent J's judgment in **Noel – v- Toto**.
22. At p. 35 of the Island Court decision, (which was a decision of the present Chief Justice), the Court outlined some general considerations, including:

The custom land owner is normally a chief, sometimes there are exceptions when the custom owner is not a chief. The custom chief owns land on behalf of his people, who live and work on the land. The custom chief acquires land on behalf of his people who occupy the land.



Custom ownership is based on representation. The custom chief represents the custom boundary of the land he and his people live and work on. The custom land belongs to the custom chief and his people.

23. In **Noel -v- Toto**, Kent J said:

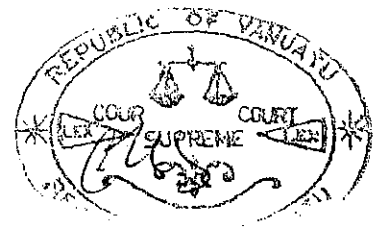
"In general terms, custom land does not belong to any individual. Mr. Hakwa, who appeared on behalf of Obed Toto said in the course of his submissions –

"All actions before the Island Court and this court can only be a representative action. In Vanuatu, land is owned by families, a group, a tribe, or even a whole Island.

A chief would be a person holding for other people. Mr. Toto can only act in a representative capacity".

I accept that this submission is correct and that when Obed Toto was held to be the custom owner, he was the representative of his family.

24. It is therefore necessary first to identify the group which the named custom owner represents before moving to the subsequent question of how any rental income is to be distributed. The Island Court decision is the source for that information.
25. The first point that arises from the decision is that Pastor George Kano was a claimant in the Island Court as leader of Naflak Teufi, not as representative of only the direct descendants of Chief Nareo, as the present claimant's proceeding implies. It is specifically recorded that he claimed the customary ownership on behalf of Naflak Teufi of Ifira. It was his case that Naflak Teufi was the only owner of Marope land.
26. Although his claim was founded upon descent from Chief Nareo, it was not limited to Chief Nareo's direct descendants. It was based on the claim that Chief Nareo, the custom owner who sold the land in the late 19th



century, was himself representative of the tribe Naflak Teufi as it existed at that time.


27. It is clear also from Order 5, that while accepting Pastor George Kano's case on behalf of Naflak Teufi, the Island Court also accepted claims in respect of rights of occupation, use and enjoyment from Chief Nunu Naperik Mala and his family together with their descendants, family Sope of Mele and their descendants and family Kalsakau and their descendants. Those rights specifically extended to the right to receive rents.

Conclusion

28. It is plain therefore that the claimant's whole claim to the division of rent between 6 families only is misconceived, putting aside the question of how that division is to be carried out.
29. The manner of sharing the rental income from Marope Land can only be decided in a hearing involving all those parties mentioned in Order 5 of the Island Court decision together with the present custom owner, Aloani George Kano. For the avoidance of doubt, the Court has made no decision about that.

Dated AT PORT VILA on 17 April 2007

BY THE COURT



C.N. TUOHY

Judge

