



SG 123 22/8/12

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

Civil Case No. 147 of 2008

**BETWEEN:** PHILIP ENBUE as representative of the Families of  
Luei Malmemel, Nappua Paipua and Sael Sikoma  
*Claimant*

**AND:** WILLIE BRAS  
KENCY ARTHUR  
SHEM REUBEN  
ROBERT ABEL  
as representative of their respective Families  
*First Defendants*

**AND:** THE REPUBLIC OF VANUATU  
*Second Defendant*

*Hearing: 9 and 11 March 2012*  
*Before: Justice Robert Spear*  
*Appearing: Colin Leo for the Claimant*  
*Kiel Loughman for the First Defendants*  
*Frederick Gili for the Second Defendant*

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**JUDGMENT**

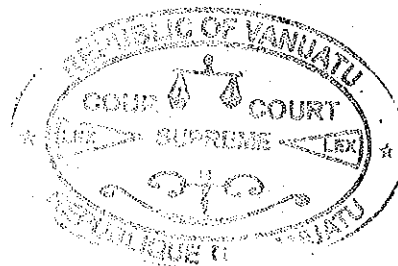
**Spear J**

**Delivered 16 May 2012**

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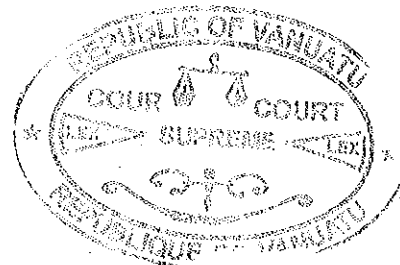


1. In a decision delivered on 28 October 2008, the Malmetenvanu Island Land Tribunal determined on appeal that land on Malekula known as *Metenesel* and/or *Ameliacos Land* essentially was the customary land of the first defendants. This decision overturned a decision of an Area Land Tribunal which had, in turn, confirmed a decision of a Village Land Tribunal that the land was indeed the customary land of the claimants.
2. I refer to “claimants” although, strictly speaking, there is only the one claimant, Chief Philip Enbue. However; he is the representative of both his own family as well as the the families of Luei Malmemel, Nappua Paipua and Sael Sikoma. I will use the reference “claimants” as that appears appropriate.
3. The claimants seek an order pursuant to s. 39 (2) of the Customary Land Tribunal Act [CAP 271] that the decision of Malmetenvanu Island Land Tribunal be set aside and the dispute under appeal re-determined by a differently constituted Island Land Tribunal. The application is opposed.
4. This proceeding was commenced in 2008 and it has already occupied time with the Court of Appeal – see **Enbue v. Bras and others**, *Civil Appeal No. 147 of 2009*; 8 April 2011.
5. It is necessary to deal with some of the history to this case and, in particular, the events leading up to the appeal hearing by the Malmetenvanu Island Land Tribunal in October 2008.
6. The land in question is a large block of land of approximately 3,500 hectares on Malekula. It has been the subject of a dispute as to customary ownership for some years. As previously mentioned, a Village Land Tribunal determined that the land was essentially the customary land of the claimants. That determination was upheld on



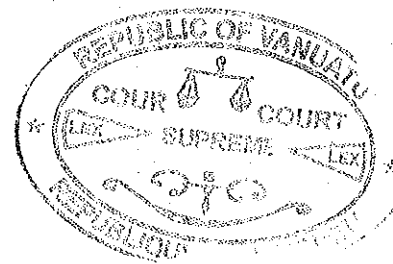
appeal by the Area Land Tribunal. The disgruntled first defendants then appealed further to the Island Land Tribunal (Malmetenvanu Island Land Tribunal) and that is where matters fell into some difficulty.

7. Once the composition of the Malmetenvanu Island Land Tribunal for the hearing of this appeal was notified to the parties, the claimants gave notice that they objected to both Chief Temo Saity and Chief Owen Rion being members of the Malmetenvanu Island Land Tribunal for this appeal. A conference was convened on 2 July 2008 to address this objection. All parties attended. Chief Temo and Chief Owen indicated at the outset of that conference that they would stand down from the case. The claimants then left the conference and went outside to discuss that development. When they returned, Chief Philip Enbue informed those members of the Malmetenvanu Island Land Tribunal that the claimants (as appellant) did not require those two chiefs to stand down. This is not disputed. What is disputed is whether the concession from Chief Philip was qualified by him to relate only to preliminary issues pertaining to the appeal and that the concession did not extend to the two chiefs remaining as members of the tribunal for the substantive hearing of the appeal. This is the principal issue for this Court. I will return to it soon.
8. At the time of that conference on 2 July 2008, the claimants had been led to believe that the first defendants' appeal to Malmetenvanu Island Land Tribunal had not be brought within time. As it happened, the appeal had been brought within time and this uncertainty came about as a result of incorrect advice received by the claimants from the Lands Tribunals' Office. Be that as it may, at the time of the conference on 2 July 2008, leading through to the hearing of the appeal on 6 October 2008, the claimants were under the misunderstanding (not through any fault on their part) that the appeal had not been brought within time.
9. At the conference on 2 July 2008, the claimants (through Chief Philip) indicated to both the first defendants and the members of Malmetenvanu Island Land Tribunal that they intended to apply to the Supreme Court for orders determining the validity of the appeal



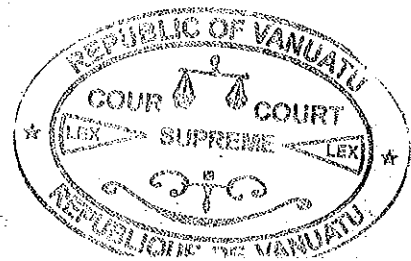
to Malmctenvanu Island Land Tribunal but on the basis as to whether the appeal had been brought within time. However, by September 2008, no steps had been taken by them in the Supreme Court and, indeed, Chief Philip acknowledged that the claimants had not yet gone to Port Vila to consult the Public Solicitor about this matter as had been their stated intention.

10. As time passed, the first defendants became increasingly frustrated at the delay at having their appeal brought on for hearing and they made their frustrations known. In mid-September 2008, as there had been no indication that proceedings in this Court had been commenced by the claimants and, in particular, that no order had issued from this Court restraining the Malmctenvanu Island Land Tribunal from hearing the appeal, the Malmctenvanu Island Land Tribunal decided to bring the appeal on for hearing. To this end, notice was given to all the parties on 19 September 2008 that the appeal would be heard on 22 September 2008. However, when the Malmctenvanu Island Land Tribunal convened for the hearing of this appeal, there was no appearance by any of the claimants (as the respondents to the appeal). The case was then adjourned through to 6 October 2008 and the elected secretary of the tribunal (Chief Owen) was dispatched to meet with the claimants and advise them of the new hearing date; which he duly did.
11. When the case came back before Malmctenvanu Island Land Tribunal for hearing on 6 October 2008, there was still no appearance by any of the claimants notwithstanding that they were fully aware that the appeal had been set down for hearing that day having received adequate notice of this hearing date. The claimants were also aware that both Chief Temo and Chief Owen remained members of the Malmctenvanu Island Land Tribunal for the hearing of this. Chief Philip indeed acknowledged that this was one of the principal reasons why the families that he represented had elected to stay away from the appeal hearing.
12. It was clearly a deliberate decision on the part of the claimants not to attend the appeal hearing. The appeal hearing proceeded in their absence. The outcome of the appeal is recorded in the decision of Malmctenvanu Island Land Tribunal given on 28 October 2008. It declared that that the land was the customary land of the Paramount Chief



being Chief Willie Bras (one of the first defendants) subject to certain nasara being identified as the customary land of other first defendant families. In short, the appeal was allowed in favour of the first defendants.

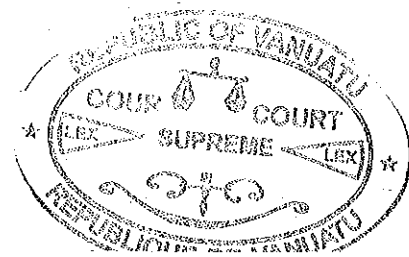
13. This proceeding was then commenced by Chief Philip seeking to have the decision of Malmetenvanu Island Land Tribunal set aside and the case reheard. In support of his case he contended:-
  - a) That the claimants had been denied an opportunity to be heard on the appeal;
  - b) That the Malmetenvanu Island Land Tribunal that heard the appeal was compromised in respect of its dealings with this appeal because Chief Temo and Chief Owen were members of the Tribunal in the face of both the claimants' objection to their involvement and because of the chiefs' close relationship and vested interest in the proceeding;
  - c) That the appeal had been brought out of time. This point has already been addressed (para. 8 above) and it requires no further attention.
14. There is a clear dispute as to whether, at the conference on 2 July 2008, Chief Philip withdrew his objection to Chief Temo and Chief Owen remaining on the Tribunal in an absolute and complete way or whether it was qualified so that, as Chief Philip contends, they were permitted to remain only for preliminary issues and not for the substantive hearing. Certainly, the evidence from Chief Temo and from the first defendants Shem Rueben and Robert Able was very clear that there was no such qualification and that everyone left the conference on 2 July 2008 with the clear understanding that the objection to Chief Temo and Chief Owen had been unreservedly withdrawn.
15. As it happened, a Minute was prepared of that conference on 2 July 2008 and it took note of Chief Philip's statement following his return to the conference. That Minute was prepared by Chief Temo (who had been elected the Chairman of the Tribunal for



the appeal) and, as it happened, Chief Owen had been elected the Secretary. The Minute is in these terms in this respect:

*“...Folem plenty confussion we family Rag I mekem long Ajenda ia mo tream blong controlem Chair, chairman blong tripinal jif Temo Saity I Deside blong acceptem objection we ikam be, wan long ol family ia nem blong em Philip I stanap mo talem se no mbai yutufala I still stap from case ia ikam long yutufala mbai yutufala I still stap kasem taem we kot I sidown. Folem toktok we Philip I talem ia, everi parties I Aggree long em”*

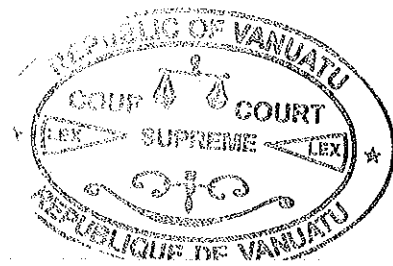
16. Therein lays the difficulty. This portion of the Minute, that records Chief Philip's statement in respect of the two chiefs, is somewhat equivocal as to whether Chief Philip had withdrawn his objection in a limited or qualified way such that they two chiefs could remain, without objection, on the tribunal only for the preliminary matters nad up to the substantive hearing (until “*kot I sidown*”) or whether the objection was withdrawn unreservedly so to enable the two chiefs to remain on the tribunal right through to and including the substantive hearing. The wording of this Minute is not helpful on this issue. It supports the possibility, and probably no more than a possibility, that there was a difference in understanding between the claimants for the one part and the first defendants and the members of the tribunal on the other part in this important respect. What is clear, however, is that the claimants have acted consistently since that time in accordance with their stated belief that the tribunal, as then constituted, could not and should not hear the appeal because of their objection to the two chiefs as well as the timing issue in respect of the appeal. That is evidenced to some significant degree by the poor decision to boycott the notified appeal hearing. Furthermore, this claim was commenced in this court shortly after the decision of the island land tribunal and it not only raised the issue as to whether the appeal had been brought within time (now resolved) but also the complaint that the two chiefs had sat on the appeal despite objection.
17. Before dealing further with this particular issue, it is necessary to consider whether either Chief Temo or Chief Owen was compromised in his ability to sit on this appeal.



18. It should be noted, however, that there were 5 members of the Tribunal who heard this appeal with Chief Temo having been elected the Chairman and Chief Owen having been elected the Secretary.
19. An attempt was made by the claimants to explain the basis upon which they considered the two chiefs were disqualified or otherwise compromised in this respect. In particular, the claimants assert that the two chiefs were closely related to the first defendants. Furthermore, that Chief Temo had a direct and specific interest in the outcome of the appeal through a connection with the land. None of these complaints has any substance at all.
20. The evidence is abundantly clear that Chief Temo and Chief Owen are, indeed, more closely related to the claimants than to the first defendants and this was eventually accepted by Chief Philip. As might be expected, even on a large island such as Malekula, it will be difficult to find someone from Malekula who cannot find some family relationship, even a distant connection, with another person from Malekula. This must surely have been recognised when the land tribunal scheme was introduced in 2001 by the Customary Land Tribunal Act [CAP 271]. It is difficult to see how the members of a village land tribunal could have no family ties to the parties to a customary land dispute and, indeed, it is highly likely that they would be related to the parties. Members of an area land tribunal are less likely to be closely related to the parties to an appeal but there would still surely be the probability of a family relationship or some such connection. Even with an island land tribunal, there must at least be a likelihood of some family connection to the parties to the dispute; particularly in the smaller and less populated islands.
21. There is a procedure for objecting to a member or members of a customary land tribunal (at whatever level) that is provided by s.26 of the Act.

**26. Start of hearing and objections**

- (1) *The land tribunal must, so far as practicable, meet to hear a dispute at the time and on the date and at the place specified in the notice given under section 25.*



- (2) *Whenever a land tribunal first meets to hear a dispute, the chairperson must:*
- (a) *open the meeting with a prayer; and*
  - (b) *introduce himself or herself, the other members and the secretary of the land tribunal; and*
  - (c) *ask if there are any objections to the qualification of the chairperson, any of the other members or the secretary.*
- (1) *Subject to subsection (4), the chairperson must consider any objection, and if he or she considers that the objection is justified, he or she must disqualify the person concerned and adjourn the meeting to enable another person to be appointed.*
- (2) *If the objection is to the chairperson of the land tribunal, the other members of the tribunal must consider the objection, and if they consider that the objection is justified, they must disqualify the chairperson and adjourn the meeting to enable another chairperson to be appointed.*
- (3) *If a party to a dispute fails to follow any of the procedures under this Act, another party to the dispute may apply to the land tribunal for an order directing the party to comply with the procedure.*
- (4) ....
- (5) ....

22. There was a question raised by Mr Leo as to whether such an objection could only be raised at the hearing of the appeal or whether it could be addressed at an earlier conference; such as the one convened on 2 July 2008. There is nothing in this point. Customary land tribunals, like any judicial or quasi-judicial tribunals, have the power to regulate their own procedures within certain constraints necessary to ensure that the tribunal is not acting contrary to law or natural justice. It made eminent sense for the preliminary conference on 2 July 2008 to be convened to hear the notified objections to Chief Temo and Chief Owen being members of tribunal. However, and irrespective of what happened at that preliminary conference, the procedure set out by s 26 still had to be followed at the actual appeal hearing and there is no suggestion that it was not followed. If the claimants had taken the time to attend the appeal hearing, as they clearly should have, they would have had the opportunity to voice any objection that they had to Chief Temo and Chief Owen and that would then have been addressed and determined by the full Tribunal pursuant to s. 26.





23. The qualification of members and secretaries of land tribunals is dealt with under part 7 of the Act. Section 37 (2) (d) provides that a Chief must not be appointed or continue as member of a land tribunal if he or she has a particular interest in the outcome of the case.

**37. Qualifications of members of land tribunals**

- (1) A chief or elder is not qualified to be a member of a land tribunal unless he or she is included in a list approved under section 35 or 36.
- (2) **A chief or elder must not be appointed or continue as a member of a land tribunal if he or she:**
- (a) is incapable by reason of physical or mental disability from adjudicating the dispute before the tribunal; or
  - (b) is holding any elected office in a national Parliament, local government council or municipal council; or
  - (c) is holding any office in a political party; or
  - (d) **has such business or financial interests, or social, religious, political or other beliefs or associations that will prevent him or her from applying custom honestly and adjudicating impartially; or**
  - (e) has been found by a land tribunal:
    - (i) to have influenced or attempted to influence the decision of a land tribunal; or
    - (ii) to have adjudicated in a dispute before a land tribunal when disqualified from doing so; or
    - (iii) to have appointed, or attempted to appoint, a person whom he or she knew, or ought reasonably to have known, was not qualified to be appointed as a member; or
  - (f) has been convicted of an offence against section 42. . . .

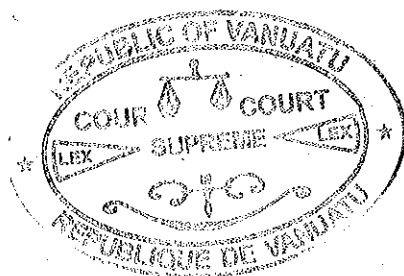
**(emphasis added)**

24. The evidence is clear and convincing that neither Chief Temo nor Chief Owen was so closely related to the first defendants that he was disqualified from sitting on the appeal. Indeed, as mentioned, the evidence points to Chief Owen and Chief Temo being more closely related to the claimants than the first defendants. While it was acknowledged that there was a distant relationship on the part of Chief Temo and Chief Owen with the first defendants, that is hardly surprising within the relatively modest population of Malekula and given the need for chiefs and elders selected to sit on land tribunals to

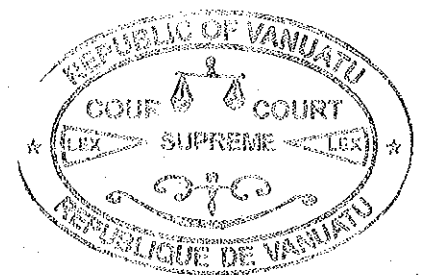


have “sufficient knowledge of the custom area to adjudicate disputes relating to the boundaries or ownership of customary land in the custom area” – s. 35 (2) (a) (ii).

25. There is mention in the Tribunal’s decision of a woman by the name of Elita who was said to be the “head of the family tree” of Botwale Nasara within the land under appeal. It was accepted that *Elita* is Chief Temo’s mother. Mr Leo complained that this indicated that there was a close relationship and interest held by Chief Temo in the outcome of the appeal. However, that did not bear scrutiny. The Botwale Nasara is a very small part of the land under appeal. It is the nasara from where Elita (Chief Temo’s mother) came. However, the custom on Malekula is for the customary ownership of land to be held by men and not by women. Chief Temo explained in very clear terms that his Mother never owned the land (Botwale Nasara) nor did she have a customary interest in it. Consequently, Chief Temo did not inherit the land (Botwale Nasara) and he disavowed any interest in it whatsoever. Chief Temo’s mother died in 1954 so it can be safely assumed that any question of inheritance or customary succession would have been well resolved by now or at least would have been part of the appeal consideration. Chief Temo indeed explained that he came from another area on Malekula, “some distance away from the land in question”. The decision of the Malmetenvanu Island Land Tribunal was that the Botwale Nasara was the customary land of the Paramount Chief – Chief Willie Bras.
26. There is no substance at all to the challenge to the qualifications of Chief Temo and Chief Owen being members of this tribunal. Indeed, if the claimants had appeared at the appeal hearing, as they should have, and voiced their objection to either Chief Temo or Chief Owen sitting on the tribunal, the tribunal would have addressed the objections pursuant to the approach mandated by s. 26. Having heard from both Chief Philip (for the objectors) and from Chief Temo and Chief Owen on this point, it is difficult to see how the other members of the tribunal would have ruled against either Chief Temo or Chief Owen remaining on the tribunal for the appeal.

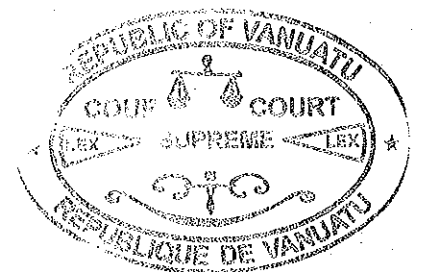


27. The real question here must be whether there was a possibility that the claimants genuinely but mistakenly believed that the appeal hearing could not proceed with either Chief Temo or Chief Owen as members of the tribunal and that their boycott of the appeal hearing was made in that light. If so, does this mean that the decision of the Malmetenvanu Island Land Tribunal must be suspect as the tribunal did not have the benefit of hearing from the claimants who had, of course, already succeeded at both village and area land tribunal levels? .
28. This is, in the end, a dispute about customary land. It is, and will remain, of substantial importance to both the claimants and the first defendants. There is a need to ensure that any determination by a customary land tribunal is capable of withstanding criticism as to the integrity of the determination process. In this case, the criticism from the claimants is essentially that, for whatever reason, the decision of the Malmetenvanu Island Land Tribunal was reached without any input from them; that is, that the claimants were not heard on the appeal notwithstanding their right to appear and be heard as a matter of natural justice.
29. I am in little doubt that any confusion or uncertainty that may have arisen here can be attributed entirely to the actions of the claimants by staying away from the appeal hearing. However, that still does not remove the need for the decision, on such an important matter as this, to be able to withstand criticism for the sake of all concerned.
30. To allow the decision of the Malmetenvanu Island Land Tribunal to remain would not see the dispute resolved and it would continue. It would become a point of dispute between the parties that may never be resolved. All parties to this case, in the end, should be able to leave the hearing of an appeal reasonably appreciating that they have received a fair hearing and that the outcome is an objective decision reached by an impartial tribunal. In this case, an unfortunate set of circumstances may have created this uncertainty or misunderstanding which led to the claimants to make the very poor decision to remain away from the appeal hearing. If the decision of the tribunal is



allowed to stand, the claimants will continue to believe that they did not have the opportunity to present their case to the tribunal.

31. For that reason, I most reluctantly consider that the application should be allowed, that the decision of the Malmetenvanu Island Land Tribunal of 28 October 2008 should be set aside, and the case returned to the Malmetenvanu Island Land Tribunal for re-hearing.
32. This decision should not be taken, in any way, as a criticism of either Chief Temo or Chief Owen. It is just an unfortunate misunderstanding, created by the claimants, that requires this extraordinary step to be taken to ensure that there is no lingering discontent about the fairness of the appeal process. There is a need for the claimants to have the opportunity to present their case on the appeal.
33. The question of costs arises. Given the conclusion reached in this decision, it is clear that I consider that the responsibility for this case having to return for re-hearing by the Malmetenvanu Island Land Tribunal falls fairly and squarely on the shoulders of the claimants. This would not have been necessary if the claimants had exercised better judgment and attended the appeal hearing rather than deciding to boycott it.
34. The application is allowed principally to protect the integrity of the land tribunal system for resolving disputes as to customary land. The decision of the Malmetenvanu Island Land Tribunal dated 28 October 2008 is set aside and the case is now returned to the Malmetenvanu Island Land Tribunal for rehearing. Given the central role that Chief Temo and Chief Owen have occupied in this case, it would be preferable for them not to sit on the rehearing although that should not be taken as a criticism of either of them or that they were members of the first tribunal. However, I see no reason why the other members of the Malmetenvanu Island Land Tribunal, who sat on the case in October 2008, should not sit on the rehearing just by reason of having been member of the first tribunal.



35. Costs are awarded to the Defendants against the claimants (notwithstanding the success of their claim) but on a standard basis. I see no reason at all why either set of defendants should be left completely "out of pocket" because of the deliberate actions of the claimants that have created this difficulty. Costs are left on that basis to be either agreed or taxed.

**BY THE COURT**

