

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

Civil Case No. 176 of 2009

BETWEEN: **WILTON KILLET, JOHN MATHEW and JOSHUA MATHEW**

Claimants

AND: **ROBERT NIPTIK, ALEXIS NIPTIK and MAXWELL NIPTIK**

First Defendants

AND: **JOSEPH HARNBEL, NOEL KALNPEL, CHRISTOPHE TULILI, REMY TUSAI, VIRTAL AULI and SIMON ABTIR**

Second Defendants

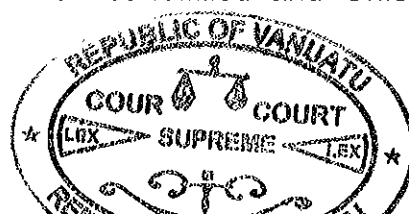
Coram: *Justice D. V. Fatiaki*

Counsels: *Mr. J. Kilu for the claimants*
Mr. C. Leo for the defendants

Date of Decision: *22 June 2012*

JUDGMENT

1. This case dates back to the 1960s with the establishment of the Catholic Mission at **Unmet village** situated on the coast within the boundaries of **Timbun customary land** at **North West Malekula**. Prior to that the Catholic Mission was located inland at **Amok**. When the Mission moved to its coastal location the missionaries persuaded their followers to come down and live near the Mission.
2. It is common ground that the people of **Amok** being tribal highlanders had no customary lands in the coastal areas on which to settle when they moved to live near the Catholic Mission at **Unmet**. It is also undisputed that the first –named claimant's family are the long recognized and **since 3 November 1988**, are the declared custom owners of **Timbun land**.
3. The leader of the **Amok** people at the time was **Chief Virambhat**. In order, in custom, to "*pave the road*" for his people to settle near the Catholic Mission at Unmet, Chief Virambhat reached an agreement with the first claimant's chief to bring with him a woman to marry the eldest son of **Swale Harry** who was the first claimant's grandfather. Unfortunately, the traditional betrothal was not fulfilled and Chief Virambhat and his



people were obliged to purchase the lands that they settled on near the Catholic Mission.

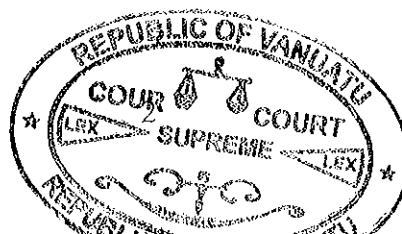
4. On **26 November 2003** the Malekula Magistrate's Court (Macreveth E) delivered its decision in **Civil Case No. 204 of 2003** between Maxwell and Alexy Nibtik (claimants) and Gillet Harry (defendant) dismissing the claim for reimbursement of VT330,500 paid to the defendant, on the basis of "*no sufficient evidence proving their case*".
5. The claimants appealed the decision to the Supreme Court which heard and allowed the appeal on **25 August 2004**. The Court ordered that the case be returned to the Magistrate's Court to be "... *reheard by the same Magistrate simply by allowing both parties to call further evidence*". In the appeal judgment the Supreme Court identified the "error" in the trial magistrate's decision in the following 2 passages:

"Mr. Gabriel Nibitk therefore speaks on behalf of the appellants. He responds to Mr. Kalses submissions. He refers me to page 2 of the judgment of the Court below at paragraph 1 in which the respondent/defendant made confirmations that he received 2000 pounds in 1972 and VT200,000 in 1982. He makes reference to a Mr. Joe Mala (SIC) the then Secretary General. That should have been Mr. Keith Mala.

That is the appellant's strongest point of argument. The defendant had confirmed two payments and made reference to the Secretary General. If it was doubtful to the learned Magistrate, the proper thing to have done was to adjourn the hearing and require Mr. Keith Mala to be available to give evidence. When the Magistrate omitted to do that and therefore proceeded to conclude there was no evidence, in the light of a clear admission by the defendant, it was an error on the part of the Court.

That is sufficient to allow this appeal and to order a rehearing."

6. A year later on **25 November 2004** the Malekula Magistrate's Court delivered its judgment in **Civil Case No. 8 of 2003** between Maxwell and Alexi Niptik (applicants) and Killet Harry (defendant). Before the Magistrate's Court the plaintiff claimed "*delivery of a receipt for an amount of VT330,500 paid to the defendant towards a sale of certain parcel of lands situated at the land of Timbun, customary land of the defendant*". Although the case bears a number that is sequentially earlier than **Civil Case No. 204 of 2003**, it was heard later and concerned an identical underlying issue albeit that the relief sought and the result achieved, was different. The issue at trial was: "*whether there was any agreement to purchase land?*"



7 During the course of his judgment in the case the trial magistrate wrote:

"The parties have agreed that there is an agreement to purchase land called Tibun in the amount of 4000 pounds (VT800,000). The plaintiff being the purchaser made their first payment in 1972. Paramount chief Virhambat and his subordinate chiefs were involved in this transaction. The defendant agreed and confirmed this payment.

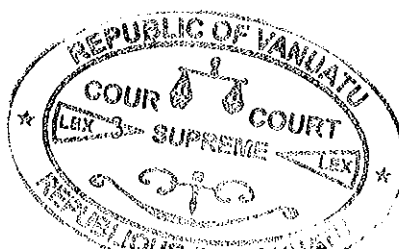
In 1982, the plaintiff made the second installment of 2000 pounds. This payment was witnessed by Maxime Kali, Erikson Niptik and Benoit Virahambat on the part of the plaintiff and chief Joel and Milo of Laravat village on behalf of the defendant. This transaction is confirmed by a letter dated 5 December, 1981 annexed as 'P6' in the sworn statement of Keith Mala. This document was not challenged by the plaintiff. Such payment amounted to the completion of the sale payment.

Due to internal differences between the purchasers, some of the head chiefs decided to sign a separate deed of conveyance for a portion of the subject land. An amount of VT469,500 was receipted and dated 22nd of May, 1985 marked as 'P4' including a deed of conveyance annexed as 'P3' in Keith's sworn statement."

8. The trial magistrate having accepted that there was an agreement between the parties to sell and purchase "**certain parcels of lands situated at the land of Timbun**", then ordered "... the defendant to issue a receipt in the amount of VT330,500 to the plaintiffs for the land purchased in 30 days". The magistrate also cryptically ordered:

"If the defendant wishes to dispute the boundaries of the said land as described in the instrument of sale, he should then file a separate case in the Supreme Court to interpret such sale agreement".

9. I say, cryptically, because earlier in the judgment the trial magistrate had clearly recorded the agreement (as described in the instrument of sale) was to sell and purchase "*certain parcels of lands situated at the land of Timbun*" NOT the "*whole of Timbun land*". Although the defendants rely heavily on this judgment to support their assertions (that the claimants sold all of Timbun), the better view is that the above "*boundary*" order is directed at ascertaining the respective boundaries of the "*parcels of land*",



that were sold, rather than the boundaries of the whole of Timbun land which was already well- known.

10. Finally on **12 September 2007** the Malekula Magistrate's Court (Macreveth) delivered its judgment in **Civil Case No. 56 of 2005** between Alexi Niptick and Maxwell Niptik as claimants and John Mathew and Deoume Alick and Killet Harry as defendants. Although the Court was "*satisfied with the plaintiff's claim*", it nevertheless refused to order the eviction of the first defendants from the land of **Nasim, Nawirir, Pleane and Nuatak**. A permanent injunction was granted however against Wilton Killet (the son of the second defendant who had died during the course of the proceedings) restraining him "*from dealing with the land described in the deed (of conveyance dated 22 May 1985)*".

11. The above findings were iterated in the judgment (at paragraphs 3 and 4 on p. 2):

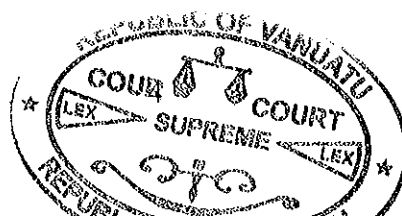
"There is ample information adduced by the claimants to show that they and 6 other chiefs were in fact one package of parties to the payment of the land at Tibun. See file note dated 5 December, 1981 and a letter dated 3 December, 1986 and other contained there in Keith Mala's sworn statement dated 25th November, 2004.

It is evidenced that full payment of VT800,000 towards the land transaction was completed before the end of 1983 according to Keith Mala's sworn statement at p. 6. A deed was not drawn since then. Later due to internal differences between the complainants and others, only the six chiefs and their followers entered into a deed of conveyance on the 22nd of May 1985 in account of the amount of VT469,500. The land has been paid in full prior to the defendants dealing with John Mathew. My observation during trial is that differences seemed to remain between the plaintiffs and their chiefs over the questioned land."

12. The earliest mention of litigation between the parties is **Civil Case No. 16 of 2001** which was a suit by Wilson Nibtik for the issue of a receipt in the amount of VT800,000 also in the Malekula Magistrate's Court.

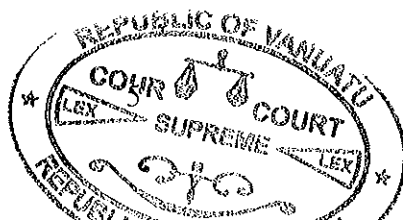
13. From the foregoing it is sufficiently clear that over a period of 6 years there has been continuous litigation about the purchase of Timbun land including the payment of the purchase price, between the claimants and the first defendants families in the Malekula Magistrate's Court.

14. Having said that, I do not consider that any of the above- mentioned judgments are binding on this Court, nor do they raise an "*estoppe*" on



any of the legal and factual issues in this present case. Certainly none has been pleaded.

15. If I may say so understanding the Magistrate's Court litigation thus far has not been assisted by a failure to maintain any consistency in the spelling and arrangement of the names under which the parties are suing or being sued. For example, the first-named claimants' family name "*Killet*" has been spelt "*Gillet*", "*Kiliot*" and "*Kellet*" and his deceased father has been variously described as "*Harry*" and "*Ar*" and "*Killet Harry*" or "*Harry Killet*". Likewise there are at least 2 variations of the first defendant Niptik family's surname including "*Nibtik*" and "*Niptick*".
16. Neither are the competing claims assisted by naming individual members of the same family as singular combined claimants or defendants when custom land is owned communally and parties would be more accurately identified by the family name *eg.* "*Family Killet*"; "*Family Niptik*" and "*Family Mathew*" and including the name of their representative or spokesperson if considered appropriate.
17. I also note that the combined claimants in this case belong to 2 different and unrelated families with quite different "*interests*" in Timbun land. They should not have been grouped together as a single combined claimant even if they were united in opposing the **Niptik Family** claim. The first named claimant is the "*custom owner*" of the land as the eldest son and successor to **Harry Killet** and the second named claimants belong to the **Mathew family** who claim to have purchased 3 plots or parcels of land at Timbun for VT100,000 in 1985.
18. The land in question is also variously described as "*Timbun*" (in the claim and in the Deeds of Conveyance); "*Tibun*" (in the Magistrate's Court decisions) and "*Tibune land*" (in the plan dated 5 March 2006 not drawn to scale). Needless to say all of the above features do not assist with the Court's understanding of this case and/or the issues in it.
19. At this juncture it is convenient that the Court makes one thing clear to all parties which concerns the alienability of customary land. Prior to independence there were many instances of customary land being alienated to early traders and missionaries and even to indigenous ni-Vanuatu who had either settled or been accepted and taken in by traditional chiefs of customary lands to which such ni-Vanuatu had no customary claim or entitlement.
20. At independence with the return of all non-public lands to the indigenous people of Vanuatu all prior land alienations and titles were extinguished and the lands were returned to their traditional custom owners and their descendants. Since independence with the exception of compulsory



acquisition by the State for public purposes (see: Article 80 of the Constitution) it is no longer possible to sell or permanently alienate land so as to extinguish customary title. It is now only possible to lease land in Vanuatu.

21. **Cooke CJ** recognized this when he observed in **Manie v. Kilman** [1988] VUSC (a case dealing with custom ownership of **Lakatoro**) at p. 2:

"before independence the Government of the Condominium did not have to even think of the custom owner. It was only when the Constitution came into being in November 1979 that it was clear to the people of this country that all land reverted to the custom owner".

(my underlining)

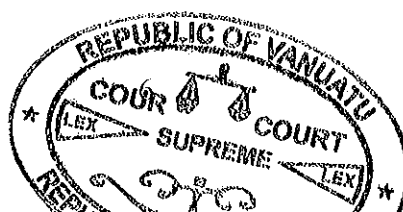
22. As was said by the Court of Appeal in **Ratua Development Ltd. v. Ndai** [2007] VUCA 23 after setting out the provisions of Articles 73, 74, 75, 79 (1) and 80 of the Constitution (at para 17):

"The result of those Articles is that only indigenous citizens and the Government may own land in Vanuatu. There is however, nothing in the Constitution to prevent land being leased to other persons, indigenous or non-indigenous, citizen or non-citizen or for such leasehold estates to be sold, mortgaged or otherwise dealt with by their proprietors. Indeed, immediately after Independence, Parliament passed the legislation referred to above to enable that to happen and in particular to provide the opportunity for non-indigenous persons who held freehold titles over land before Independence to acquire leasehold titles over that land. However, the only persons who can be lessors are indigenous citizens who are custom owners or the Government."

(my underlining)

23. Be that as it may, on **3 December 2009** the claimants issued the present Supreme Court claim seeking the court's interpretation of 2 Deeds of Conveyance dated **8 March 1985** and **22 May 1985** respectively. In particular the claimants seek 3 declarations as follows:

- "1. A declaration that the first Deed of Conveyance dated 8th March, 1985 conveyed the right to use and or occupy the three named parcels of land identified in that Deed to John Matthew and Joshua Matthew;
2. A declaration that the second Deed of Conveyance dated 22nd May, 1985 conveyed the right to use and or occupy small parcels of land by



each of the six purchasers located within Timbun land and did not convey the right to use and or occupy the whole of Timbun land to either the First or the Second Defendants;

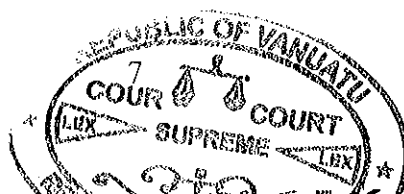
3. *A declaration that the Claimant land owner, Wilton Killet is at liberty to formalize these Deed of Conveyance arrangements into proper formal leases in accordance with the Vanuatu laws."*
24. In their defence the first defendants assert that the first named claimant is no longer custom owner of Timbun land since the land between **Brenwei River** and **Anowatak Creek** was purchased by the defendants families for **£4000** pursuant to an agreement entered into between the defendants **Chief Virambhat** and **Harry Killet** (the father of the first named claimant) in 1972.
25. In support of their defence the defendants depose that the purchase price for Timbun land was paid in 2 installments, an initial sum of **£2000** paid in **1972** and a final payment of the vatu equivalent of £2000 in 1982. However neither sum has been clearly receipted and this has led to the Magistrate's Court cases earlier referred to.
26. Although there does not appear to be any complete written agreement evidencing the sale of the whole of **Timbun land** to the first defendants (by name), they rely on judgments of the Malekula Magistrate's Court in **Civil Case No. 8 of 2003** and **Civil Case No. 56 of 2005** (referred to earlier) as confirming that such an agreement did exist and further, that the purchase price for the land was fully paid up to the claimant's father in 2 installments.
27. Before referring to the evidence I set out below in date sequence, the three (3) Deeds of Conveyance under consideration in this case:

DEED (A): (the Matthew Deed)

*"This Deed of Conveyance made at Lakatoro Malekula on **8th March 1985** between Killet Harry of Laravet (here in after called "The Vendor") of the one part and John Mathew (here in after called "The Purchaser") of the other part whereas the Vendor is the customary owner of the land intended to be hereby conveyed free from incumbrances and whereas the Vendor has agreed with the Purchaser for the sale to him of the land here in after described:*

Now this indenture witnesseth as follows

*In pursuance of the said agreement and in consideration of the sum of **(100,000vt)** one hundred thousand vatu now paid by the purchaser to the*



Vendor (the receipt of which the Vendor hereby acknowledge) the Vendor as customary owner here by conveys unto the purchaser (3) three parcel of land more or less situated at a place called TIMBUN (North West Malekula).

1st parcel is village called PLLANE.

2nd parcel is situated near NAWERIR Creak.

3rd parcel is situated near NASINO (Kiliet Harry's Nasara)

In witness here of the said parties here to have here unto set their hands and seals the day and year first above written.

Signed sealed and delivered by the said Kiliet Harry the Vendor.

In the presence of Keith A. Mala Malekula Local Government Council Secretary.

Chambat Chief of Diaru.

Graham Lingo Representative of Laravat.

Witness

Signed sealed and delivered by the said John Mathew the Purchaser.

In the presence of Keith A. Mala Malekula Local Government Council Secretary.

Chambat Chief of Diaru.

Graham Lingo Representative of Laravat."

(my underlining)

DEED (B) -- (The Deed relied upon by the Defendants)

"This Deed of conveyance made at Lakatoro on **22nd May 1985** between Kiliet Harry of Laravat (herein after called "the Vendor") of the one part and chiefs namely Joseph Harnbel, Noel, Christoph, Remy, Vittal, Simon, and their people of Unmet and Uri (herein after called "The Purchaser") of the other part where as the Vendor is the Customary owner of the land intended to be hereby conveyed freed from incumbrance and whereas the Vendor has agreed with the purchaser for the sate to them of the land herein after described:

Now This Indenture Witnesseth as follows

In pursuance of the said agreement and in consideration of the sum of **469,500vt** (four hundred and sixty nine thousand five hundred vatu paid in installment by the purchaser to the Vendor (the receipt of which the vendor hereby acknowledged) the vendor as customary owner hereby conveys unto the purchaser (1) one parcel of land more or less situated at a place called TIMBUN between Brenwei River and Nuatak creek, (North West Malekula).



In witnesseth where of the said parties here to have here unto set their hands and seals the day and year first above written.

Signed sealed and delivered by the said Kiliet Harry the Vendor.
In the presence of Keith A. Mala Malekula Local Government Council Secretary.

Kalman chief of Brenwei.
Joel Tawi chief of Leviamp.

Witness

Signed sealed and delivered by the said chiefs:

Noel

Christoph

Remy

Vital

Simon

Joseph Harnbel Chiefs Representating the purchasers."

(my underlining)

DEED (C)

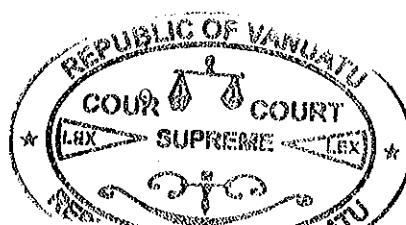
"This Deed of Conveyance made at Lakatoro Malekula on **22nd May 1985** between Kiliet Harry of Laravat (herein after called "The Vendor") of the one part and the chiefs of Nuatak namely Rabsai Luhambat, Estellio Rehambat, Michel Tavi, Noel Kalinbel and their people (herein after called "The Purchaser") of the other part whereas the Vendor is the customary owner of the land intended to be hereby conveyed free from incumbrances and whereas the Vendor has agreed with the purchaser for the sale to him of the land herein after described:

Now this Indenture witnesseth as follows

In pursuance of the said agreement and in consideration of the sum of **(270,000vt)** Two Hundred and Seventy Thousand Vatu paid by the purchaser to the vendor (the receipt of which the Vendor hereby acknowledged) the Vendor as customary owner hereby conveys unto the purchaser one parcel of land more or less situated at a place called TIMBUN between Pinear Creek and Nuatak Creek (North West Malekula).

In witness where of the said parties here to have here unto set their hands and seals the day and year first above written.

Signed sealed and delivered by the said Kiliet Harry the Vendor.



In the presence of Keith A. Mala Malekula Local Government Council Secretary.

Ohambat Chief of Wiaru.
Joel Lingi Chief of Laravat.

Witness

Signed sealed and Delivered by the said chiefs:

Rabsai Luhambat
Estellio Rehambat
Michel Tavi
Noel Kalinbel

In the presence of Keith A. Mala Malekula Local Government Council Secretary.

Ohambat Chief Wiaru
Joel Lingi Chief of Laravat.”

(my underlining)

28. The draftsman of the Deeds has plainly adopted a uniform legalistic format in the Deeds and in his description of the land conveyed by the Deeds. In this latter regard the common demoninator is the expression:

“... parcel of land more or less situated at a place called TIMBUN ...”

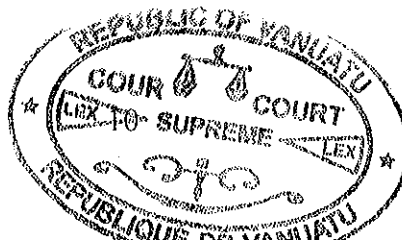
followed by a more precise location of the parcel(s) of land. In my view what is being conveyed by each Deed is a “*parcel of land*” and NOT all of the land contained within boundary lines.

29. It is also immediately apparent from a comparison of the above Deeds that the “*Mathew Deed*” pre-dates by almost 2 months the **Deeds (B) and (C)**, and further it conveyed three (3) parcels of land “*situated at a place called TIMBUN (North West Malekula)*”. All of the parcels are within the two (2) boundary marks referred to in Deed (B) namely “*between Brenwei River and Nuatak Creek*”.

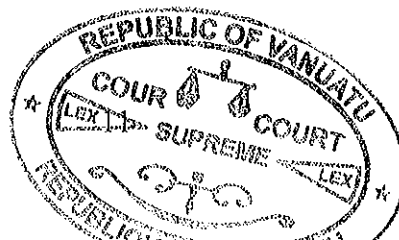
30. At the trial the claimants called:

- **Wilton Killet** who produced three sworn statements dated 25 January 2010, 8 February 2011 and 13 July 2011; and
- **Joshua Matthew** who produced a sworn statement dated 26 January 2010;

The claimants also produced a sworn statement of **John Mathew** dated 25 January 2010.



31. The defendants called 3 witnesses in support of their case:
- Remy Tusai who produced a sworn statement dated 19 January 2010;
 - John Nelbard Niptik who produced a sworn statement dated 28 June 2011; and
 - Keith Andrew Mala who produced a sworn statement dated 7 October 2011.
32. All witnesses were cross-examined and each left the court with a clear impression.
33. **Wilton Killet** denied any knowledge of the sale of the whole of Timbun land. He became interested in the land deals relating to Timbun land after the Island Court decision in 1988 declaring his father **Harry Killet** the custom owner of Timbun land. At the time he was 22 years of age and he began collecting the Deeds of Conveyance and receipts to clarify, for himself, the various land sales that his father had been involved in. He denied knowing his great grand aunt **Virtermhal**. Although much of his evidence about Timbun land comprised recollections of things his deceased father had told him while he was still alive, he did not attempt to deny any of the Deeds or exaggerate his evidence which I accept.
34. The Mathew brothers, **John and Joshua**, deposed that their father had purchased 3 parcels of land at Timbun from Harry Killet when he moved his family to the coast as evidenced in a Deed of Conveyance dated **8 March 1985**. They generally supported Wilton Killet's claims about Timbun land and, in particular, his assertion that his father, **Harry Killet**, never sold the whole of Timbun land to the **Niptik** family. In cross-examination **Joshua Mathew** confirmed that his father **Hammock Matthew** was part of Chief Virambhat's people who had moved down to the coast and his father was a party to the agreement to pay £4000 to Harry Killet in 1972. His father had separately bought the 3 parcels of land at Timbun to provide security for his family in case their immediate spokesman **Chief Christophe** "*disagreed with us or disowned us*". I accept their evidence.
35. Unlike the claimants, the defendants witnesses claimed to be personally and directly involved in the movement of Chief Virambhat's people from **Amok** to **Unmet** and in the purchase of Timbun land. For instance **Remy Tusai** an elderly man, testified that he was alive before the Catholic Mission started at Unmet and he was part of the group who cleared the land for the Mission. He was adamant that there was an original agreement "*between Killet and Harry Swale*" to purchase the whole of Timbun land and the purchase price was to be paid in 2 installments. He recalls the agreement was recorded by one Keith Mala and he distinctly



remembers when Harry Killet received the purchase price he cried and said "*today (he) lost (his) mother*".

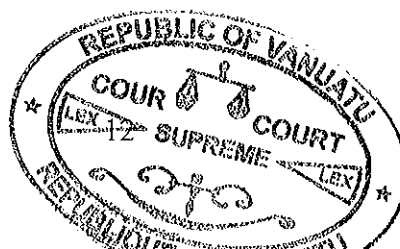
36. He came down to **Unmet** after the agreement was reached. He is the "**Remy**" named in the Deed of Conveyance dated 22 May 1985. He could not explain the other Deeds of Conveyance that pre-dated that date other than to suggest that Harry Killet illegally resold 3 parcels of land to the Mathew Family. In cross examination this witness often responded: "*mi no save*" (I don't know). I do not accept his evidence as to details.
37. **Keith Andrew Mala** was a generally impressive witness. He was knowledgeable, well spoken and careful in his answers. He had worked as an executive officer during the colonial administration in the 1970s and, after independence, as Secretary General of the Malekula Local Government Council in the 1980s. He is 58 years of age and has an impressive record of service in **Penama Province**. In respect of the sale of Timbun land he deposed:

"2. There have been some agreements between Chief Virambhat and Henry Swale, the father of Killet and Harry Killet that Chief Virambhat and his people would purchase the land named Timbun at a price of VT800,000 at today's currency (Note dated 5 December 2008 and ref. 5/9/2).

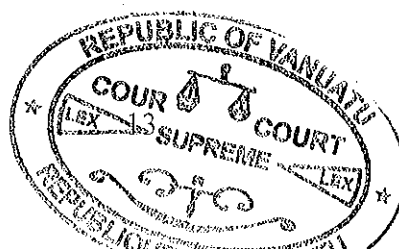
3. The land boundary begins from Brenwei River to Nowatak Creek including the sea reaching the boundary of Amoi (river that crosses the road to Amok) I confirm that the VT800,000 was the purchasing price of Timbun land according to my true knowledge and belief as facilitator of the Deed of Conveyance.

4. Payments have been done two times. The first payment was done by Chief Virambhat along with his people in or around 1972 in front of the British District Agent, Mr. Darval Wilkins the second payment was done with the sum of VT400,000 plus in front of me since I was the Secretary of the Malekula Local Government Council (sic). Killet Harry was the one who received the payment in cash ..."

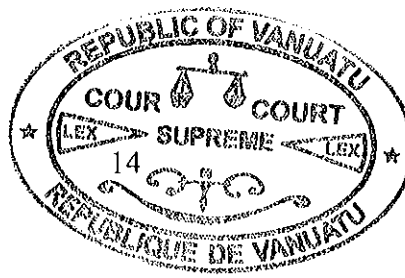
38. Under cross examination, he frankly admitted that he had **not** seen any agreement for the sale of the whole of Timbun and had merely heard of it from Mr. Wilkin and Chief Virambhat. Plainly **Remy Tusai's** recollection of this event was inaccurate in asserting that "*the agreement was recorded by Keith Mala*".



39. Keith Mala admits however drawing up three (3) Deeds of Conveyance dated **7 April 1982**; **8 March 1985** and **22 May 1985**. The deeds were all "drawn up because of insecurity that existed at that time" and "internal dispute between Chief Virambhat and his chiefs and people". He had intended to cancel these Deeds in 1986 and replace them with a single comprehensive Deed covering the whole of Timbun land, but was unsuccessful.
40. It was he who had used the expression:
- "(1) one parcel of land more or less situated at a place called TIMBUN between Brenwei River and Nuatak Creek (North West Malekula)"***.
- in the Deed relied upon by the defendants to describe the land being purchased under the Deed. The use of the expression "one parcel of land ... situated at a place called TIMBUN" to indicate or mean "the whole of TIMBUN" is both confusing and misleading.
41. He claims he was aware of the "**Schedule**" to the "October 1960 Agreement" relating to Timbun land which correctly described the boundaries of the whole of Timbun land, but, had not actually seen the agreement referred to in the "**Schedule**". Unfortunately again, no reference is made in the Deed that he drew up on 22 May 1985 to a prior verbal agreement to purchase the whole of Timbun land nor does the Deed clearly indicate that it is entered into in part performance of the earlier verbal agreement covering the whole of Timbun land.
42. In this latter regard, the evidence of **John Nelbard Niptik** who is 37 years of age is that the "October 1960 Agreement" was a "verbal agreement between Harry Swale and Chief Virambhat". When asked if the verbal agreement was to pay for the whole of Timbun land he replied: "yes, as in *Magistrate's Court Case No. 8 of 2003*".
43. He was questioned about the Deed dated **22 May 1985** and he agreed that he relied on the Deed as evidencing the purchase of the "whole of Timbun land". For other parts not covered by the Deed, he relied on the **Malekula Magistrate's Court** judgments earlier referred to. He was unable to find anything in the Deed which unequivocally recorded the sale or purchase of the whole of Timbun land.
44. In my view the description of the "*parcel of land*" conveyed by the Deed could **not** on any sensible and reasonable interpretation, mean or include the whole of Timbun land without mentioning the other two boundaries of Timbun namely, the coastline to the South and the hills of Awok to the North.



45. In answer to the Court he confirmed that he wasn't born at the time of the "verbal agreement" to purchase the whole of Timbun and he first heard about it when he was 6 years of age. He also accepted that his family (Niptik) is not mentioned in the **Deed of 22 May 1985**. I was unimpressed with this witness who appeared shifty, argumentative and over-confident. His evidence in all material aspects was also inadmissible hearsay and is rejected as untrustworthy.
46. During the hearing of this case in late November 2011, the Court took the opportunity to visit Timbun land with the parties and their respective counsels. The Court visited the mouth of "Brenwei river", the "Catholic Mission Station" at **Unmet** and the mouth of "Anawatak Creek".
47. The area is quite large and slopes gently down to the coast from the main Brenwei/Lakatoro road which bisects the land between its northern boundary at the foot of the hills that form a backdrop and its southern coastal boundary.
48. Within the area comprised in Timbun land are 2 established settlements at Unmet village near the coast and the larger Uri village on higher ground. Otherwise the area is relatively sparsely populated.
49. So much then for the evidence in the case. I turn next to consider the 6 agreed issues identified by counsels at the end of the trial as follows:
- (a) Whether the defendants purchased the whole of Timbun land? (accept for the purposes of this issue that defendants should be treated as belonging to one clan namely Chief Virambhat's clan).
 - (b) If answer to (a) is No, then what rights do the defendants have under their respective Deeds?
 - (c) If answer to (a) is Yes, then what rights do the Mathews Family have relative to their Deed of Conveyance?
 - (d) What effect (if any) does the later Island Court declaration in favour of the claimant's father have on the Deeds?
 - (e) What is the status and effect of the 2 Magistrate's Court decisions in Civil Case No. 8 of 2003 and 56 of 2005?
 - (f) What declarations and orders (if any) should the Court make to implement its answers to Questions (a) to (c) above?



50. Closing submissions were ordered but unfortunately none had been received from defence counsel by the date of this judgment. I propose however to consider defence counsel's earlier submissions that were filed in response to the Court's Orders of 9 May 2011 directing the parties to file written submissions on "*the meaning and effect of the 3 Deeds of Conveyance under consideration*".
51. Defence counsel submits that the construction and interpretation of the 22 May 1985 Deed of Conveyance which is partly relied upon by the defendants ought to be viewed against its historical background "*having regard to the 1960 Agreement the official documents created at the time and the Magistrate's Court judgment in particular in Civil Case No. 8 of 2003 in which Harry Killet voluntarily admitted in Court that there was an agreement to purchase the Timbun land for VT800,000*".
52. The claimants' response is that the "*1960 Agreement*" relied upon by the defendants appears to be merely a "**Schedule**" to some other document and not an agreement as such. The two chiefs named in the Agreement "*are neither the landowners of Timbun land nor the chiefs of Timbun so as to have the proper standing to sell Timbun land. Chief Virambhat is from Amok while Chief Tavrambat is from Brenwei, two separate areas altogether. They could not agree to sell someone else's land*" and counsel submits that the "**Schedule**" has been detached from the principal Agreement and is now being used out of context. In counsel's words: "*The simple fact is that there is no evidence whatsoever showing that the first defendants (Niptik) did purchase the whole of Timbun*".
53. The so-called "*1960 Agreement*" referred to in defence counsels submissions is a photocopy document which reads as follows:

**"New Hebrides Condominium
Central District No. 2**

SCHEDULE

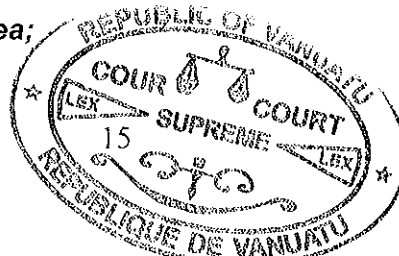
To an agreement made between Chief VIRHAMBAT of AMOK and Chief TAVRAMBAT or BRENWE, made at BRENWE on 9th October 1960.

The land situated near Brenwe which is the subject of the agreement is known as "TIBUN". The boundaries of the land are:

To the WEST: The Brenwei river, on the west side of which lies Brenwe village;

To the EAST: the creek known as Nowatakin, on the east side of which lies the land of Portarlib, belonging to Sale;

To the SOUTH: the sea;



To the NORTH: the lands of Amok, property of Chief Virhambat and his people.

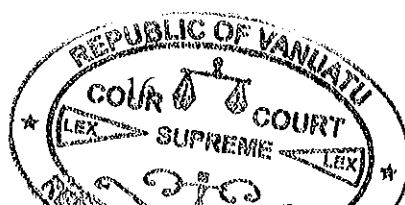
French District Agent,
Central District No. 2
(hereafter referred to as "the Schedule")

British District Agent,
Central District No. 2"

54. Nowhere in the "**Schedule**" is there any indication of what the nature and terms of the "agreement" reached between the 2 chiefs might have been – whether it was an oral or written agreement to sell and purchase the whole of TIBUN or only parts of it, or, was it merely an agreement for a licence or lease to occupy and cultivate the land?
55. Additionally, there is no mention at all in the "**Schedule**" of either **Henry Swale** or **Harry Killet** who were the acknowledged custom owners of Timbun land and with whom, several witnesses testify, the "agreement" was reached to purchase the whole of Timbun. Furthermore, even if assuming for the sake of argument, that the "agreement" was for the sale of the whole of TIMBUN land, such an "agreement" could not survive the extinguishing effect of the Constitution earlier referred to.
56. Even if there was a "verbal agreement" to purchase the whole of Timbun land as the defendant and their witnesses assert (which is strongly denied by the claimants), such an agreement would not be enforceable and could not prevail over the various Deed of Conveyance that were produced in Court.
57. As the Court of Appeal relevantly said in **Nutley v. Kam** [2003] VUCA 29 (at p. 6):

"The problem in legal terms can be expressed quite simply. The appellant has a duly signed transfer of the leasehold title No. 03/0192/022 in his name dated 24th February 2000 and for which stamp fees in the sum of VT75,000 have been paid as evidenced by an endorsement on the face of the transfer. The first respondent, on the other hand, has an unwritten oral agreement with the registered proprietor of the land which the trial judge found was entered into in December 1999 and "... is good in law and remains valid and it preceded the appellant's written sale and purchase agreement of 17th December 1999."

We are in no doubt that of the two competing claims the appellant's is the better and stronger and must prevail over the first respondent's unwritten oral agreement which is rendered unenforceable in terms of Section 40 of the Law of Property Act 1925 (UK) which we are satisfied has application as part of the laws of Vanuatu. The section reads:-



"No action may be brought upon any contract for the sale or other disposition of land or any interest in land, unless the agreement upon which such action is brought, or some memorandum or note thereof, is in writing, and signed by the party to be charged or by some other person thereunto by him lawfully authorized."

58. The claimants also produced an unscaled survey plan of Timbun land (described as "TIBUNE") which shows that the outer limits of Timbun land are the Brenwei river to the West; Anwatak creek to the East; the coastline on the South and Bottom of the Hills towards Amok to the North. More relevantly, the plan clearly marks the locations of "Unmet Village" and "Uri Village" within the boundary of Timbun land. The significance of these 2 locations is that they are both expressly referred to in the Deed which the defendants rely upon, as being the places where the named purchasers and their people then resided.

59. The claimants also produced a fourth Deed of Conveyance dated "7 April 1982" between Kiliet Harry (the vendor) and Doume Alick (the purchaser) where for "*the sum of (100,000vt) one hundred thousand vatu*" the vendor conveyed to the purchaser:

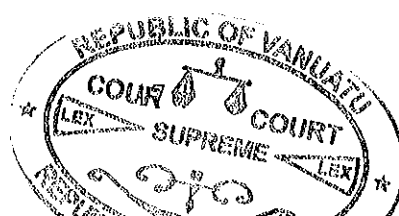
"one parcel of land more or less situated at the place called Timbun near NWATAK (North West Malekula)."

This place is also situated within Timbun land and is clearly shown on the sketch plan as a circle and the name ANAWATAK at the end of a dead end road.

60. Finally, it is undisputed that on the same day as the Deed of Conveyance which the defendant relies upon, namely, 22 May 1985, **Kiliet Harry** (the first-named claimant's father) executed another Deed of Conveyance in favour of the "*the chiefs of Nuatak ... and their people*", (Deed (C)), conveying to them in consideration of the sum of (270,000vt) Two hundred and seventy thousand vatu:

"one parcel of land more or less situated at a place called TIMBUN between Pineaeer Creek and Nuatak Creek (North West Malekula)."

61. Such a conveyance is manifestly inconsistent with a simultaneous conveyance of "*the whole of Timbun*" (which is what the defendant's claim is the meaning and effect of the Deed they rely on). The inconsistency would have been glaringly obvious to **Keith A. Mala** who authored and witnessed both Deeds and who himself was of the view that Chief Virambhat and his people had purchased the "*whole of Timbun*".



62. In this latter regard I do not accept that **Keith Mala** would have drafted the Deed which disposes of part of Timbun land on 22 May 1985, if he really knew and believed that Harry Killet had sold "*the whole of Timbun land*" on that same day. On this matter his evidence is contradicted by the executed Deeds and cannot be relied upon.
63. In similar vein I can find no assistance in the "**Schedule**" and am not satisfied that it provides any support for the nature and terms of "*the (1960) agreement*" that it refers to between **Chief Virambhat** and **Chief Tavrambat** nor does it support the defendants assertion that the first claimant's father had sold "*the whole of Timbun*" in 1960.
64. For the foregoing reasons I reject the defendants' assertion of having purchased the whole of Timbun land and I grant all 3 declarations sought by the claimants together with costs on a standard basis to be taxed if not agreed.

DATED at Port Vila, this 22nd day of June, 2012.

BY THE COURT


D. V. FATIAKI
Judge.

