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

Land Appeal Case No. 03 of 2011

**BETWEEN: FAMILY TURA**

Appellant

**AND: TAPTUMOL FAMILY**

First Respondent

**AND: LOYROR LIN**

Second Respondent

**AND: FAMILY KAVEN**

Third Respondent

**AND: FAMILY URI WARAWARA & FAMILY VARA VARA**

Fourth Respondent

*Coram:* *Mr. Justice Oliver A. Saksak*

*Assessors:* *Chief James Tangis*
*Chief Neman Tavue*

*Counsel:* *Mr. Paul Jerry Boe, agent for Mr. Colin Leo for Appellant*
*Mr. Felix Laumae for First Respondent*
*Mr. Saling Stephens for Second Respondent*
*Mr. John Malcolm for Third Respondent*
*Mr. Daniel Yawha for Fourth Respondent*

*Date of Hearing and Oral Decision:* *15th October 2013*
*Reasons Published:* *28th October 2013*

# JUDGMENT

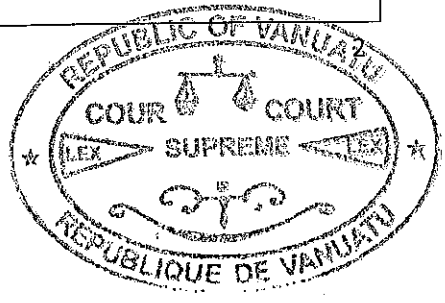
## Introduction

1. This judgment provides reasons for the oral decisions and orders delivered by the Court on 15th October 2013.

## Relevant Facts and Chronology of Events

2.

| DATE | EVENTS |
|---|---|
| 1992 | The First Respondent lodged Land Claim No. 4 of 1992 over ownership of Tambotal, Sevua, Beleru and Belmol. |
| 16 May 1995 | The Santo/Malo Island Court (S/MIC) published a notice of the First Respondent's claim. |
| 14 July 1995 | The S/MIC heard the dispute and gave its judgment. |
| 24 July 1995 | The Second Respondent lodged an appeal against the judgment in respect to Sevua Land. |
| 10 August 1995 | The Appellant lodged an appeal against the judgment in respect to Belmol. |
| 11 August 1995 | The First Respondent filed an appeal against the judgment in respect to Beleru and Belmol lands. |
| | The appeals were titled Land Appeal Case No. 4 of 1995. |
| 2005 | The Court took management of the appeal and issued directions for parties to prepare and file documents for hearing of appeals. |
| 12 December 2007 | The Court heard the appeal. Consent Orders were reached by the Parties |
| March 2010 | The S/MIC convened with a different Magistrate and 2 justices to rehear the claims. |
| 8 March 2010 | - Family Moltanaute of South Santo and the Fourth Respondents applied to be joined as parties to the case.<br>- Family Moltanaute claimed for Beljie and Belvos Lands while the Fourth Respondents claimed for Belvos overlapping with Belmol.<br>- Objections were raised by the Appellant, First and Second Respondents, nevertheless, the S/MIC proceeded to hear the case. |



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|---|---|
| 26 August 2011 | - The S/MIC delivered its decision in favour of the Appellants in respect to Beleru Lands, in favour of the First Respondent in respect to Tambotal Lands, in favour of the Second Respondent in respect to Sevua Lands, in favour of the Third Respondent in respect to Belmol/Lanbuea and also confirmed that Belvos Lands belonged to the Fourth Respondents. |
| 31 August 2011 | Mr. Colin Leo filed the Appellant's appeal and paid a fee of VT75.000. |
| 26 September 2011 | Mr. Sugden filed original notice and grounds of appeal with fees of VT75.000 on behalf of the First Respondents. |
| 22 November 2011 | Mr. Stephens filed an appeal out of time on behalf of the Second Respondents with a fee of only VT20.000. |
| 15 October 2012 | Mr. Laumae filed an amended notice and grounds of appeal. |
| 26 November 2012 | The Court heard application for extension of time by Mr. Laumae for the First Respondents and Mr. Stephens for the Second Respondents. The Court refused to grant the extensions. |
| 28 November 2012 | The Court published its reasons for the oral orders issued on 26 November 2012. |

**Appeal by Family Tura**

3. The only valid and live appeal therefore was the appeal by Family Tura (appellants). They appealed against the entire judgment of the Island Court dated 26 August 2011 so far as it relates to Belmol/Lanbuea Lands which the Island Court adjudged in favour of the Mr. Malcolm's clients. The following are their grounds of appeal:

> "(i) The learned Magistrate erred in law and in fact in not dealing with the Appellant's objections fairly so as to consider the real likelihood

of bias that the Appellant objected against the justice of the Sanma Island Court.

(ii) The learned Magistrate erred in fact and in law in holding at paragraph 4 of page 4 of the Judgment," kastom we olgeta parties oli kat mo oli agri blong folem hemi man or bloodline (partrilaenal) be ino woman (matrilineal) tribe mo boundary blong Claimant kastom ownership blong land ia" upon the premises that the Appellant and the parties never agreed for the Court to uphold such view.

(iii) Alternatively, pursuant to the Customary laws inherent in EVUN TUR MOLMOL Fanafo Canal to which the customary lands are subject to, recognition must be accorded to (i) Partrilineal line (ii) Bloodline (iii) any last surviving Female (blood). The Court erred in disregarding the last surviving female rights to Belmoli Customary Land.

(iv) The learned Magistrate erred in law and in fact in declaring family Tura to be custom owner of Beleru when Family Tura claimed for Belmol Customary Land in the Island Court.

(v) The learned Magistrate erred in law and in fact in holding that the Appellant's claim were for the ownership of Beleru Customary Land when in fact the Appellant's claim in the Island Court was for Belmol or Belmoli.

(vi) The learned Magistrate erred in law and in fact in applying wrong boundaries to the Customary Land Belmol.

(vii) Such further grounds as may be advanced through Appellant's Counsel."

## Discussions

4.1. The complaint in grounds (1) is about the objections raised in the Court below about bias on the part of an adjudicator, Chief Sam Vula that he is the cousin of Jimmy Kaven, the Third Respondent. Mr. Boe argued that from the evidence Sam Vula's mother and Jimmy Kaven's mother are straight sisters. It was contended that as such Chief Vula had a conflict of interest and that there was real likelihood of bias when the Court below found otherwise and allowed the Chief to continue to sit and make a decision in favour of the Third Respondents. Mr. Boe relied on the cases of Saxmere Company Ltd and Others v. Wood Board [2009] NZ SC 72 and Matarave v. Talivo and Others [2010] VUCA 3.

4.2. Mr. Laumae and Mr. Stephens supported the Appellants' appeal on the grounds of bias.

4.3. Mr. Malcolm readily conceded that if it there was bias, the matter must be sent back for a retrial but submitted there was not a shred of evidence to show bias. He submitted there must be evidence of wrong behaviour. He further submitted that at the hearing in the Court below the First and Second Respondents did not raise any objections to Sam Vula sitting as adjudicator. He submitted that having failed to raise objections at the beginning, they could not do it at the end. And even if they did, the Court below had considered the facts before it and ruled there was no bias or conflict of interest. Counsel relied on the case of Masaai Family v. Lulu [2005] VUSC 124: Land Appeal Case 57 of 2004. This case is distinguished on its facts and it does not bind this Court.

4.4. Mr. Yawha supported the arguments of Mr. Malcolm on the issue of bias.

## Conclusion on Bias Issue

4.5. We considered those submissions and held that –

(a) The case of Saxmere Company Ltd of New Zealand is distinguished as it concerned a lawyer and a judge nevertheless the Court of Appeal of Vanuatu acknowledged the test applied in that case in the case of Matarave v. Talivo.

(b) Matarave's case was considered and applied by the Court.

The Court of Appeal said:

".....In the case of an administrative tribunal the decision is, as a general rule, considered void if a tribunal member has a direct interest, or is affected by bias. However, in the case of a Court decision, the general rule is that a decision infected with error of this kind remains valid as part of the public record unless and until a court declares it to be invalid. In this sense the decision is voidable but not void until so declared.

The decision is voidable because the tribunal was not validly constituted, and therefore was not in a position to legally carry out the function which it was otherwise empowered to exercise.

In the present case, even though the allegation of disqualification for apprehended bias on the part of the Judge and the assessors is now raised after the delivery of judgment, we consider that if the ground of disqualification against one or more of the judge or assessors is established, that renders the decision of the Supreme Court voidable....." (see pp 7-8) (emphasis added).

(c) It was sufficient that when the Second Respondents raised the issue of bias and conflict of interest against adjudicator Sam Vula, he of all persons knew about his mother being the sister of Jimmy Kaven's mother. As such no further evidence was needed. Common sense would dictate that he should have recused himself. When he did not, he brought an impartial mind into the resolution of the matter. As such, the Island Court that made the judgment under appeal was not legally constituted and its decision therefore is declared void on the basis of bias and conflict of interest by adjudicaror Sam Vula. In our collective view the appeal should succeed on this ground. And we so ruled.

5.1. We considered grounds (ii) and (iii) together as they involve customary laws of inheritance in South Santo where the land in dispute is situated. The Appellants complained about paragraph 2 of the judgment of the Court below at page 4 which states:

> "Kastom blong usim blong harem land kes.
>
> Kot i bin lukluk long kastom we bae kot i folem long kes ia. Kastom we olgeta patis oli gat blong folem hemi man or bladlaen (partrilineal) be ino woman (matrilineal), tribe mo boundry blong claimem kastom ownership blong land ia. Mo storian we ol parties oli talem long kot blong pruvum se who naoi raet kastom owna blong land ia bae ikam aot nomo long kastom blong yumi long South East Santo." (Emphasis added).

5.2. The Appellants submitted that they never agreed to this custom. We saw no evidence by the Appellant to substantiate that contention. However, the two assessors of the Court advised that for the ruling by the Court below to exclude a woman or matrimonial consideration was an error. The assessors advised that a matrilineal lineage may only be followed or applied where there are no longer any survivors on the patrilineal lineage but where there is a woman surviving as the direct bloodline of the male lineage. As such, the assessors agreed that the Court below fell into error when they disregarded the last surviving bloodline female rights to Belmol customary land under which customary law the Appellant claimed Belmol.

5.3. Indeed when the Court below used the matrilineal rights to decide in favour of the Third Respondent in respect to Belmol/Lambue Lands, the Court found the Court below had acted inconsistently with the custom law they had indicated in the quoted part of their judgment the parties had agreed they would not use. We concluded that for those reasons the appeal should succeed on grounds (ii) and (iii). And we so ruled.

6.1. In relation to grounds (iv) and (v) it was the contention of the Appellant that when the Court below awarded Beleru Lands in their favour when they did not infact lodge any claim over those lands, the Court below had erred in doing so.

6.2. Mr. Malcolm conceded to these grounds and invited the Court to allow the appeal and substitute the Third and Fourth Defendants as custom owners of Beleru lands. We declined this invitation to make a substitution as it did not have the support of Mr. Yawha's clients who are the Fourth Respondents. Further, we had not heard any further new evidence in relation to Beleru lands by the Third and Fourth Respondents. We simply allowed the appeal on this ground as it was manifestly wrong for the Court below to award land to a party for which there were no claims and pleadings.

7.1. In relation to grounds (vi) the Appellant's contention was that the Court below had erred in applying wrong boundaries to the customary land Belmol. Further, the Appellant contended that the Third Respondent did not have a claim for Belmol land before the Court below.

7.2. Mr. Malcolm disputed this ground and submitted that there was a claim made which gave rise to them being given the opportunity to give evidence.

7.3. At page 100 of the Appeal Book, there is disclosed what appears to be a statement of Claimant by the Third Respondent. It is undated. At page 2 the land disputed is stated as "Belmol mo Lambue Kastom graon". At page 1 it states the "correct name location blong graon situated South West of Waileman Riva mo South East of Wambu River. No maps were attached or annexed to clarify the land and its boundaries as did the other Claimants. At page 2 their witness named "Vewa basis" where traders from Ambae would come ashore and trade pigs with Moltanaute. And it further states that in the old days if any inhabitants from the inland villages needed to go for a swim in the sea, they would normally get permission first from Moltanaute before getting access to the sea through Belmol and Lambue lands. These can also be seen at pp 9 – 11 of the judgment.

7.4. The agreement disclosed at page 142 of the Appeal Book is in French and concerns the sale of Senamaranda, Ponboua, Landevea and Bellamoule. The translated version appears at page 145. Here the land known as Belmoli is further south and shares a boundary with Penessy, Segoniarou, Tangonessi, Donaussi and Naove.

7.5. We found that –

(a) None of these names exist today or rather they exist but names have been changed.

(b) "Vewa basis" named by witness Peter Ngwele does not exist. No other witnesses made any reference to this name. When he was asked whether this referred to Kamewa, the witness said he did not know.

(c) Waileman River does not exist even on any maps presented by the other Claimants or Parties. Wambu River does exist on the maps.

(d) On the map presented by the Loyror Family at page 102 of the Appeal Book there are only 2 rivers: Sarakata River to the East and Wambu River to the West. In between are Sevua Lands, Tambotal, Beleru, Belmol and Belvos to the South to the Coast. Lambue lands exist between Beleru and the old airport.

7.6. With those findings we agreed that despite the Third Respondents making a statement of claim they omitted to include the most essential material which is a map of the lands they were claiming. With two different lands being called Belmol or Belmolie, anyone could easily be misled unless all claims were accompanied by clear maps to assist the tribunal to truly ascertain the boundaries of the lands in dispute. We conclude that this omission by the Third Respondents contributed

to the error made by the Court below. We therefore allowed the appeal on this ground.

8.1. In paragraph 3 of the oral decision dated 15 October 2013 we ordered that no new parties should be allowed to file their claims and that the rehearing should strictly be between the four parties to this appeal.

8.2. This case cries out for finality. It started in 1992 and it has been appealed twice. This is the third time it is being sent back for a rehearing before the Island Court. It is important that the Court does it properly this time around. The first reason for such order is the prejudice done to the three original parties to the dispute which were Taftumol, Loyror Lin and Tura Families. Secondly, the Act allows time periods in which certain things must be done by any persons having interests in land the subject matter of disputes as to ownership. Notices have to be issued by Clerk of Island Court inviting interested parties to lodge their claims within specified periods of time. These legal obligations are normally no longer performed when a case is remitted for rehearing when the Court allows in new parties. This practice creates a bad precedent and becomes a breeding ground for endless litigation in regard to customary ownership of land in Vanuatu.

**DATED at Luganville this 28th day of October 2013.**

**BY THE COURT**

REPUBLIC OF VANUATU COUR SUPREME COURT LEX LEX REPUBLIQUE DE VANUATU

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|---|---|---|
| **Chief Neman Tavue** | **OLIVER A. SAKSAK** | **Chief James Tangis** |
| **Assessor** | **Judge** | **Assessor** |