

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

AND: MORSEN BENUA AND PERSONS LISTED IN
THE SCHEDULE ATTACHED

Interested Party

Coram: Justice D. V. Fatiaki

Counsels: Mr. J. Kilu for the claimants
Mr. G. Blake for the Interested Party

Date of Decision: 31 May 2013

DECISION

1. This is an urgent application by the interested party to be added as a defendant to these proceedings in order that their concerns can be aired before this Court which delivered a judgment in this case on 22 June 2012.
2. Although the application is unusual in so far as it seeks to re-open a proceeding which has been concluded by a final judgment of the Court, over 11 months ago, claimants' counsel supported the application and in the very particular circumstances of the case, the Court agreed to hear the applications.
3. The brief background to the present application is that after the Court delivered its judgment upholding the claim, the successful claimant commenced to take steps to survey the areas that were sold to the second defendants by the claimant's late father pursuant to a Deed of Conveyance dated 22 May 1985. During the course of undertaking survey works the claimants' surveyors met with opposition from the second defendants and the interested party who claim to be '*beneficiaries*' of the Deed of Conveyance.

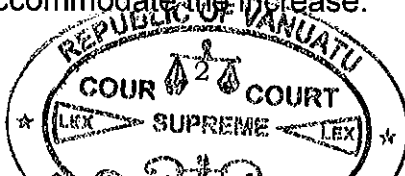


4. In particular, the interested party which numbers more than 80 named individuals all claim to be "*the people*" and subjects of Chief Remy Tusai who was a named purchaser in the relevant Deed of Conveyance. Their claim is not expressly denied by the claimant, but, in the interests of clarifying this issue for the parties and avoiding further misunderstanding, I shall deal with it.
5. It is only necessary to refer to the precise wording of the relevant Deed of Conveyance which clearly and unequivocally identifies '*The Purchaser*' under the Deed as being:

"... Chiefs namely Joseph Harnbel, Noel, Christopher, Remy, Vital, Simon and their people of Unmet and Uri (hereinafter called The Purchaser) of the other part..."

(my underlining)

6. The underlined words are fully consistent with historical accounts of the movement of the named chiefs from their highland home at Amok to their coastal settlements at Unmet and Uri, and, in light of the undisputed evidence regarding the contributions of the interested party towards the purchase price of the land comprised within the relevant Deed of Conveyance, there can be **no** argument that "*the people*" of each respective chief who accompanied him in his coastal migration and settled at Unmet and Uri villages are expressly included as unnamed co-purchasers of the land comprised within the Deed of Conveyance dated 22 May 1985 by which date, they had been living at Unmet and Uri for in excess of 20 years.
7. Given the above and with claimant counsel's agreement, I have no hesitation in granting the declaration sought in the interested parties application to the effect that the interested parties rights to use and occupy the parcel(s) of land currently occupied by each of them are protected and comprised within the area of land sold to Chief Remy Tusai in the Deed of Conveyance dated 22 May 1985 and must be included within any survey of the boundaries of such land.
8. Whatsmore any survey of the area(s) of land sold under the Deed of Conveyance must take account of the following relevant considerations. This pilgrimage of no less than six (6) named "*chiefs and their people*" in pursuit of their religious faith was never going to be a temporary one and was undertaken within the customary practice of "*paving a road*".
9. Although total numbers are unknown, a fairly large area of land would have been required to sustain their subsistence lifestyle. Furthermore, it must be accepted that such a mass migration of people including families, would result in a natural increase in their numbers over the years and, with that, more land would be required to accommodate the increase.



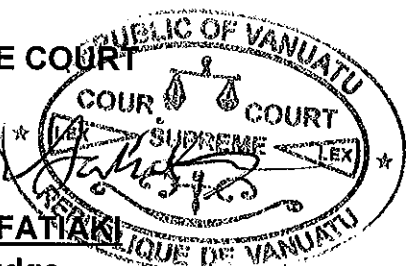

10. The increase in numbers over the 20 years of settlement would have been obvious to the chiefs at the time they entered into the Deed of Conveyance and they would have been conscious to negotiate for an area of land that not only met the immediate needs of their people at the time of the Deed but, more importantly, would accommodate their future generations.
11. I note that since the execution of the Deed of Conveyance which unfortunately did not include a survey plan or a detailed description of the areas sold under it, there has been a further generation added to "*the people*" who originally accompanied their chief to the coast.
12. From exchanges with counsels a further factor or issue appears to have arisen between the parties which concerns not only the precise bounds of the area(s) that were sold under the Deed but, also the possibility that the interested party would be required to pay the difference between the current market valuation for the surveyed area(s) and the purchase price paid under the Deed of Conveyance. I cannot agree with such a possibility.
13. In the first place the value of the land sold under the Deed of Conveyance was mutually agreed and fixed by the contracting parties at the time of the Deeds' execution in May 1985 and cannot now, be ignored, or unilaterally changed or artificially altered either by any increase in the value of the land since it was sold or by any disagreement over the area or the boundary(ies) of the land that was sold under the Deed.
14. In other words in May 1985 the claimant's late father sold and conveyed certain areas of land to the six (6) named chiefs and their people for an agreed sum. The present surveying exercise seeks to define the boundaries of the areas of land that was sold under the Deed and, once defined, whatever its present-day valuation might be, the value of the surveyed areas was conclusively fixed in 1985.
15. As presently advised, I consider that the survey of the land being presently undertaken by the claimant was commenced in a most unfortunate manner without proper advance notice and/or close consultation with the affected "*chiefs and their people*" as might be expected in a rural customary setting between indigenous people. It is this factor that has led, in my view, to the not unexpected resistance shown towards the claimant's surveyors and which in turn, has given rise to proceedings before the Lakatoro Magistrate's Court in **Civil Case No. 8 of 2013** filed on 8 May 2013.
16. Again, with the agreement of counsel, the Magistrate's Court proceedings in **Civil Case No. 8 of 2013** filed in Lakatoro, Malekula are hereby stayed until further order of this Court.



17. Although the claimant asserts that the boundaries of the areas of land sold by his late father under the Deed of Conveyance are well-known, it is not absolutely clear that the surviving chiefs or "*their people*" agree. What is clear however, is that the original migrants settled in two (2) different village settlements or areas namely, Unmet and Uri and would have also had nearby areas were they cultivated and maintained their subsistence gardens.
18. I am also informed by claimant's counsel that the land boundaries in another Deed of Conveyance involving three (3) parcels of land sold in March 1985 to the John Mathew family for the sum of VT100,000 have been agreed and surveyed. Logically, this surveyed area might be used as a possible "*comparator*" for the area(s) sold under the Deed of Conveyance dated 22 May 1985, to the six-named chiefs and their people which had a purchase price almost five (5) times more than the parcels sold to the Mathew family.
19. In my view agreement on the original boundaries under the 22 May 1985 Deed should be achieved through respectful and conciliatory discussions undertaken with goodwill in a customary manner and mindful that what is being attempted by the survey exercise is to identify, not so much, the areas that were sold by the claimant's late father, but rather, to indentify the areas that remain outside the Deeds and which the Court has already recognized in its judgment as rightly belonging to the claimant as the accepted successor of the late Harry Killet who sold the areas.
20. In the circumstances and upon the Court's indication, claimant's counsel very properly agreed to stay further survey works under the relevant Deed to allow for talks to proceed between the parties in order to agree the boundaries under the said Deed assisted by the Court's observations in this decision.
21. Needless to say, although the matter is not insurmountable, resolution of the boundaries under the 22 May 1985 Deed is better arrived at by the parties undertaking mutually beneficial, open, honest and transparent discussions in a proper conciliatory and customary manner rather than by legal posturing and insistence on perceived legal rights and entitlements or resorting to adversarial court proceedings.

DATED at Port Vila, this 31st day of May, 2013.

BY THE COURT



D. V. FATIAKI
Judge.

The seal of the Supreme Court of Vanuatu is circular and contains the text 'REPUBLIC OF VANUATU' at the top, 'COUR SUPREME' in the center, and 'COURT SUPREME' at the bottom. It also features a scale of justice and the word 'LEX'.