

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

Land Appeal Case No.2 of 2011

IN THE MATTER OF: MALAWORA LAND

AND IN THE MATTER OF: The decision of the Efate Island Court
in Land Case 3 of 1993 dated 22 July
2011

BETWEEN: **TERRY SAEL URITALO** as
representative of Masaai family
First Appellant

AND: KALCHIRAU LUA THESA ANATU
as representative of the Thesa Anatu
Family
Second Appellant

AND: MAHIT CHILIA as representative of
Narewo Kaltolu Lulu Family
First Respondent

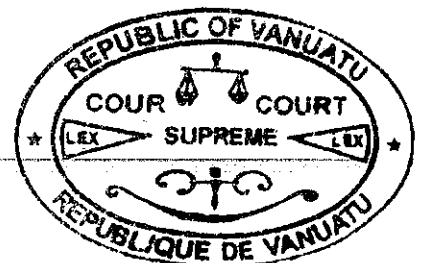
AND: NAKMAU SAMPO as representative
of the Lakeotaua Manawora Family
Second Respondent

AND: SIMEON POILAPA as representative
of family Mariki Langani Vate Lapa
Third Respondent

Date of Hearing: Tuesday 4 August 2015

Date of Judgment: Thursday 13 August 2015

Before: Justice Stephen Harrop
Ary Kaltavara – Assessor
Jerry Shem - Assessor

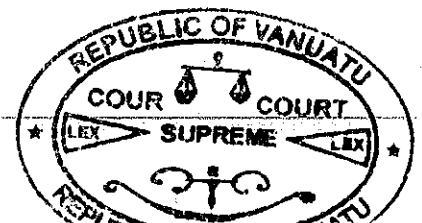


Appearances: **First Appellant – Daniel Yawha**
 Second Appellant – Bryan Livo
 First Respondent – Kiel Loughman
 Second Respondent – James Tari
 Third Respondent – Jack Kilu

RESERVED JUDGMENT ON PART OF APPEAL

Introduction

1. This case concerns a customary land dispute over ownership of land called Malawora in the vicinity of Mele Village on the island of Efate. It began with a claim lodged by Family Sopuso in the Efate Island Court on 16 July 1993.
2. On 2 April 2004 the Island Court delivered its judgment but on 1 November 2005 the Supreme Court allowed an appeal against it: see *Masaai Family v. Lulu* [2005] VUSC 124. The primary reason for the appeal being allowed did not relate the merits of the case but rather to the way in which the members of the Island Court had conducted themselves during the hearing; they had had lunch with some of the parties in the absence of the other parties. Also, the requisite inspection of the land was done in the company of only some parties, in the absence of others.
3. The matter came back before a differently-constituted Island Court in 2010 and its judgment was issued on 22 July 2011.
4. An appeal to this Court under section 22 of the Island Courts Act [Cap 167] was lodged by the first appellants, with a number of

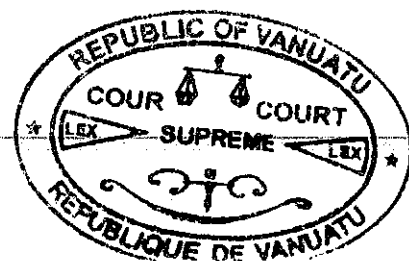


grounds later particularised. The second appellants were originally respondents but in the course of reconfiguring the appeals Spear J made them appellants. I have not seen their notice of appeal, which was apparently filed by their then counsel Mr Timakata. For present purposes this does not matter since they support the first appellant's grounds.

5. In the course of case management of these appeals it was agreed by all parties that it would be sensible to have an initial hearing focusing on a primary ground of appeal because, in the submission of the appellants, success on that ground would, regardless of the various other grounds raised, require the Court to set aside the 2011 judgment and to send the matter back to the Island Court under section 23 (b) for a rehearing.

Issue

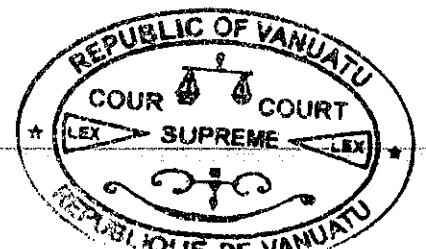
6. The preliminary issue identified by the parties is: did the Island Court err in including title number 69 in its declarations in favour of the third respondent family?
7. The appellants say title number 69 was outside the disputed area of the Malawora land as shown both on the map lodged with the original claim and the map used during the hearing in 2010. They also contend that in breach of the mandatory requirement of rule 6 (10) of the Island Courts (Civil Procedure) Rules 2005, the Court did not visit the 308 hectares comprising title number 69 and inspect its boundaries.



8. The respondents say that the inclusion of title 69 in the Island Court declaration was not a mistake but rather was entirely deliberate. They say that in the 2004 Island Court judgment the land known as Malalede, which comprises at least part of title 69, was described as part of the disputed area. They say that in reliance on its being part of the disputed area they made submissions about it to the Court in 2010. Accordingly, it was no surprise to them, and should have been no surprise to the appellants, to see the inclusion of title 69 in the Court's declarations.
9. At the outset of the hearing Mr Tari was granted leave to withdraw because his client abided the decision of the Court in respect of the issue now before it. He had earlier filed a sworn statement by his client Nakmau Sambo, as representative of the Lakeotaua Manawora Family, indicating that he and his family could not say anything about the title 69 issue and confirming that he would abide any orders of the Court in relation to it.

Was the Island Court mistaken in including title 69 in its declarations?

10. After considering the evidence and arguments put forward on this issue, I am satisfied that the Island Court was in error in including title 69 in its declarations. Apart from anything else, that follows from the breach of rule 6 (10) of the Island Courts (Civil Procedure) Rules 2005 which provides: *"If a claim is in respect of ownership or boundary of customary land, the Court must visit the land and inspect the boundaries before making judgment."*



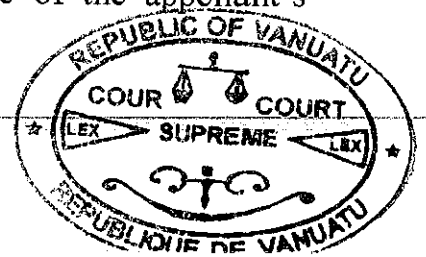
11. It is mandatory that the Court visit and inspect the boundaries before making judgment. In this case the unchallenged evidence indicates that no such inspection occurred in respect of title 69 which contains a substantial area, 308 hectares. Inspecting that land would in itself have taken a substantial time: I note that two full days were required by the Court to inspect the much larger area of the Malawora land between the Mele (or Tepukoa) and the Prima rivers.

12. Directly addressing this question in his sworn statement on behalf of the first appellant dated 8 May 2015, Ian Taravaki said at paragraphs 8 and 9:-

"8. I also confirm that Paoni land was not disputed in Malawora land case, because during out (sic) site visit as part of the proceedings Paoni or title 69 was not paid a visit. If the land was disputed, then it would be a procedure as I understand it, that Court would visit the land. The land itself (ie. title 69) is 308 hectares (sic) which is massive and would take almost a whole day to circumference its boundary, however we did not walk around 308 hectares on the other side of the river.

9. I confirm we only follow Malawora boundary which was along river edge of both rivers. We did not cross one of the rivers to walk the Paoni land at all."

13. The respondents were given an opportunity to respond to that evidence, and other statements. Simeon Poilapa, who effectively is the primary opponent of this appeal, went to the trouble of filing separate sworn statements in response to three of the appellant's

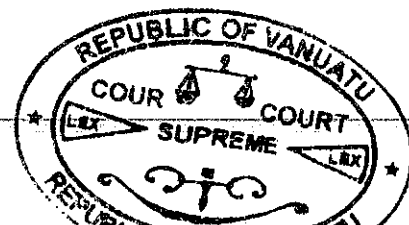


witnesses including Ian Taravaki. Significantly in my view, his statement in response to that of Mr Taravaki makes no comment at all on paragraphs 8 and 9.

14. Mr Poilapa, as is apparent from his several sworn statements is an articulate and thorough witness. I have no doubt that if there had been a site visit to the title 69 land then he would have said so and gone into some detail as to that visit. His failure to comment at all on Mr Taravaki's clear assertion, in what is a relatively brief sworn statement, is in my view telling. The unchallenged evidence is therefore that there was no such visit.

15. Mr Kilu and Mr Loughman drew to my attention the comments of the Island Court at page 24 of its judgment under the heading "Visit Long Land". Although these comments are general and do not identify any particular area of land visited, it was submitted that working back from the inclusion in the decision of title 69 it could properly be inferred that the Court must have visited that land as well as the rest of it. I am not satisfied that that inference is justified, especially given the undisputed evidence of Ian Taravaki that there was no such visit and that the visit which was undertaken was limited to the land between the two rivers.

16. That conclusion is sufficient to warrant the allowing of the appeal because, even if there were no doubt that the title 69 was part of the disputed Malawora land, no declaration can be made in respect of it unless there has been the mandatory visit and inspection. As that did not occur the inclusion of title 69 in the Island Court declarations must be found to be in error.



17. Although it is not necessary to go further, this conclusion is reinforced by various other aspects of the evidence. Even a cursory perusal of the map used in the original claim which was publicly notified, and of the map with the orange and yellow markings which was used at the 2010 Island Court hearing, clearly shows that title 69 is outside the Malawora land area.

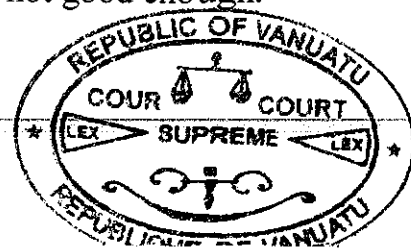
18. Furthermore, I do not accept that it is clear that the first Island Court either did or intended to include title 69 in its declarations. Mr Kilu noted that the court said in its declarations that:

“I gat wan ples tu we oli kolem Malalede we hemia I stap aotsaed long eria blong dispiut. Ples ia I wan nakamal blong Mariki Langa mo wanem we hemi impotent long ples ia from nomo se hemi stap kolosap long eria blong disput we I soem se hemi pat blong eria we I stap long disput.”

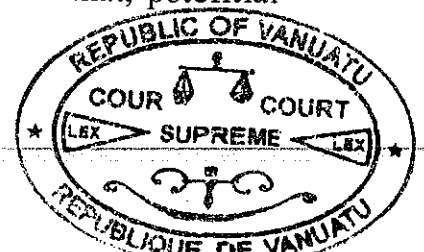
19. Mr Kilu says (and the appellants accept) that a fair English translation would be:

“There is an area called Malalede which is located outside the disputed area. This area is Mariki Langa’s nakamal and what is important is that this area is close to the disputed area, and so it is part of the disputed area.”

20. I agree with Mr Yawha’s submission in response that this does not make sense. How can an area which is acknowledged to be outside the disputed area be treated as part of the disputed area simply because it is close to it? In the important matter of determining disputed custom boundaries, near enough is simply not good enough.



21. Regardless, as Kalo Mariki points out in his sworn statement of 23 April 2015, the formal court orders made by the Island Court in 2004 make no reference to title number 69. Accordingly I am not satisfied that Mr Kilu's clients were entitled to proceed at the second hearing as if title 69 were part of the disputed area. There had been no order made in respect of it in the original hearing and the reason for the rehearing related to apparent bias not the merits of the claim.
22. Accordingly, contrary to Mr Kilu's submission, all of the parties should have proceeded on the basis that the areas of land in question were as contained in the orders made by the Court in 2004 and as defined by the original claim made by the Family Sopuso. As I have said, the map on which their claim was based clearly did not include title 69 but was limited to the area between the two rivers.
23. Mr Loughman submitted that because the Island Court in its 2011 decision had expressly referred to two areas of land, Maltari and Lokotave, as being outside the Malawora land then it would have similarly have referred to title 69 if it thought it was outside, rather than inside, the disputed area. While I accept there is some logic in this argument, it does not follow that the Court would necessarily refer to all areas of land which were outside or bordering the disputed area.
24. In any custom land case, the area in dispute is identified primarily by reference to the claim which is initially lodged, in this case in 1993 by Family Sopuso, and by the map used by that claimant. That claim and the map are publicly notified and, in reliance on that, potential



claimants can decide whether or not to be involved in the hearing. I accept the evidence of Kalo Mariki in his statement of 23 April 2015 about this:

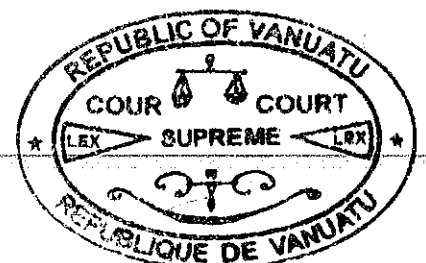
“If a person or group sees that the map of the land published by the Court does not encroach onto their land nor does it cover their land, they do not need to come to Court, because their land is unaffected by the dispute. I am advised that this is a fundamental legal requirement of fairness in order to avoid anybody the right to respond, if their land rights, interests will be affected.”

25. I am not satisfied that those who have, or who may think they have, a claim to title 69 have been properly heard. On the face of the maps used throughout, title 69 was simply not part of the land disputed in this case and it was therefore an error for the Island Court to include it in its 2011 declarations.

26. In further support of this conclusion I note Mr Yawha’s submission that the letter of 21 November 2005, sent by three claimants, including Simeon Poilapa, to the Chairman of the Imere nakamal indicates an intention to make a separate claim for title 69.

27. Dick Poilapa, Chairman of the Mele Village Council, filed a sworn statement on 6 April 2015 in which he says:-

“I confirm that Paoni land or title 69 was not a dispute land in the Malawora land case, but separately disputed in the lands tribunal and my Council has the file of the dispute. I annexe hereto marked with letter “DPI” true



copy of the claim from Simeon Poilapa lodging the dispute with us."

He goes on to say:-

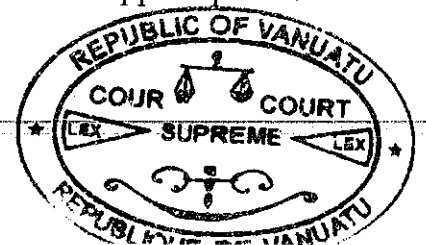
"I confirm the customary lands tribunal Act was repealed and the land Management Act replaces the repealed Act. I confirm my office will ensure that once the village gears up with the new Act, this outstanding matter had to be dealt with and I understand Family Taravaki is also claiming Paoni land and several other families."

28. In his sworn statement in response dated 27 May 2015, Simeon Poilapa discusses this letter but does not indicate why it should not be seen as inconsistent with his contention that the land appeal case encompassed title 69. It is difficult to understand why he was making a separate claim to title 69 if he believed the case, which had only recently, earlier that same month, been referred back to the Island Court by the Supreme Court, already encompassed it and would result in a decision as to its custom ownership.

29. For all these reasons I am satisfied that the Island Court was in error in including title 69 in its declaration four in favour of the third respondents.

Should the case now be referred back to the Island Court?

30. Mr Kilu and Mr Loughman submit that in the event that the Court concluded that title 69 should not have been included in the Island Court declarations, there is no reason why the rest of its declarations should in any way be seen as tainted or affected. Accordingly they submit that the proper course is for the balance of the appeal points

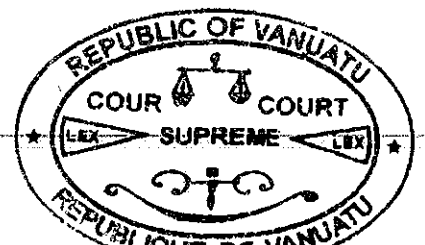


which the appellants wish to pursue to be heard at a second appeal hearing before the Supreme Court. They emphasise that this matter has twice been before the Island Court and the custom findings have been the same on each occasion in favour of their clients.

31. Mr Yawha and Mr Livo however submitted that the error in respect of title 69 is of such magnitude and significance that the rest of the Island Court judgment is irretrievably tainted and that under s 23(b) the whole of the judgment ought to be set aside the case sent back to the Island Court. They say the Court should not merely in these circumstances use the power it has in section 23(a) to make the order that the Island Court should have made.

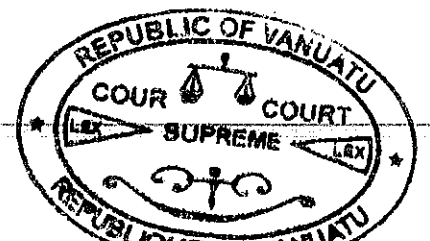
32. I am not persuaded that the erroneous inclusion of title 69 in the declarations made by the Court can properly be seen as adversely affecting in any way the legitimacy of the findings of the Island Court in respect of the land between the two rivers which *was* undoubtedly in dispute. The custom findings relating to that land following the inspections were based on the evidence and submissions made about them. There is no reason to think that those findings would have been any different if title 69 had been excluded from consideration. The references to title 69 in the judgment are brief and do not appear to affect either the other titles mentioned as claimed by the family represented by Simeon Poilapa (122 and 771) let alone other titles discussed in the claims of other families.

33. In the end, custom ownership is custom ownership and if, as the Island Court found, the respondents do have valid claims to the



Malawora Land, then it does not matter whether or not they may, or may not, also have valid claims to an adjoining piece of land such as title 69.

34. In their submissions Mr Yawha and Mr Livo were unable to articulate in anything more than general terms why excision from declaration four of the judgment's sole and brief reference to title 69 would be inappropriate.
35. I therefore conclude that the proper response of this Court is, under s23(a), to vary the declarations of the Island Court to exclude the reference in declaration four to title 69. With that change the rest of the judgment can and should stand, but of course that is subject to determination of the other appeal grounds which are mounted by the first appellants. They are entitled to pursue those grounds if they wish to do so; from the various conferences which I have convened it is unclear whether and if so to what extent their attitude to pursuing the balance of their appeal will be affected by this judgment.
36. It is appropriate that both appellants now have a reasonable opportunity to consider whether or not they wish to pursue their other grounds of appeal and, if so, which of them.
37. There will be a further case management conference to review the position and to make appropriate timetable directions as to any further evidence and submissions leading up to a second hearing, assuming the appellants wish to pursue their appeals.



38. This conference will be at 2 pm on Tuesday 1 September 2015 in chambers.
39. Until the future course of the appeals is finalised it is appropriate to reserve costs, but in principle the appellants are entitled to costs in respect of their success in appealing against the inclusion of title 69 in the Island Court's declarations.
40. It is the first and third respondents against whom the appellants will be entitled to such costs because the second respondent Mr Sambo took a neutral position.
41. I thank the custom assessors, Mr Kaltavara and Mr Shem, for their involvement in the hearing and in the post-hearing discussion, despite this judgment having ultimately turned on non-customary matters. I also thank the interpreter Judith Hopa for her assistance during and immediately after the hearing and for providing an English translation of the 2011 Island Court judgment. Apart from being useful in considering this judgment, it is likely to be valuable in considering any additional appeal points that the appellants elect to pursue.

BY THE COURT

Gene Mham

