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

Civil Case No. 359 of 2014

BETWEEN: SOPE KALULU KALSRAP
Claimant

AND: KALOTITI KALTABANG
First Defendant

AND: DENNY KALOKIS
Second Defendant

AND: PATRICK HAINES
Third Defendant

AND: BERRY KALOTITI KALOTRIP.
Fourth Defendant

AND: PATAS PATON
Fifth Defendant

AND: JOSEPH KALRAN
Sixth Defendant

AND: BREAKAS BEACH ESTATE LIMITED
Seventh Defendant

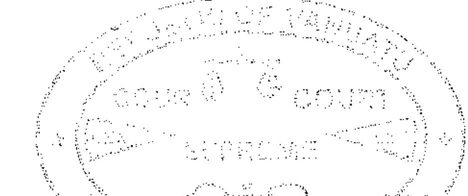
AND: MINISTER OF LANDS
Eighth Defendant

AND: DIRECTOR OF LANDS, SURVEY AND RECORDS
Ninth Defendant

Conference: ***31st August 2016***
Before: ***Justice Chetwynd***
Counsel: ***Mr Hakwa for the Claimants***
Ms Thyna for the 1st, 2nd and 3rd Defendants
The 7th, 8th and 9th Defendants excused attendance
No appearances for 4h, 5th and 6th Defendants

Decision on Preliminary Issue

1. Nearly a year ago I set this matter down for argument on a preliminary issue. The time table was set out in a Minute dated 5th November 2015. Although listed for



hearing early in 2016 the matter had to be adjourned because the death of Mr Nakou who represented many of the Defendants. Ms Nari now acts for the majority of those Defendants formerly represented by the late Mr Nakou. It is worth setting out the preliminary issue which is did the NHNC judgment in 1972 accord custom ownership of Emis Land only to the 16 named individuals ("the 16") in their own personal capacities and not to them as representatives of their respective families and therefore leaving the Claimant and John Needham as the only custom owners of Emis Land.

2. This question had arisen because the Claimant's stated position was that whatever rights and obligations the 16 persons named in the 1972 judgment possessed in respect of Emis Land they only stood possessed of them during their lifetime and that those rights and obligations died when they did. The Claimant argued that as he and John Needham were the only two still living then only he and John Needham were the custom owners of Emis land. That is a concept which is contrary to the two Supreme Court decisions and the two Court of Appeal decisions relating to this land and the 1972 judgment:

> *""Under paragraph (ii) of the 1972 NHNC decision, "EMIS shall be regarded as a group holding in collective ownership" of the 16 named people. This declaration is of fundamental importance. Those claiming under paragraph (ii) of the judgment do not receive individual entitlements. Their entitlement to ownership is only as a member of the group holding collective ownership. In other words, they cannot claim ownership of a particular part of the land, but only a share in the overall ownership of the whole of the EMIS land after the Kalran interest has been recognised.""* [1]

3. The Court of Appeal's view, as set out above, makes it crystal clear that the situation is not as put forward by the Claimant. The rights under the 1972 judgment are the rights of *"a group holding in collective ownership"*.

4. That is the answer to the preliminary question. The descendants and successors of the 16, including the Claimant and John Needham, are the custom owners of Emis Land.

5. Unfortunately that does not end the matter. As I indicated in my Minute dated 31st March 2016 I had concerns that the Claimant was resiling from his position that only the living survivors of the 1972 decision are entitled to rely on it. The argument then being advanced on the Claimant's behalf appeared to be mutating to include the additional claim that none of the Defendants were the descendants of the 16. I

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[1] *Kalotiti v Kaltapang* [2007] VUCA 25; Civil Appeal Case 11 of 2007 (30 November 2007)

ordered sworn statements to be filed to cover that point. Those that were filed by the Claimant argued issues of custom and seemed to be primarily about the original 16 not being true custom owners. They did not assist in the argument about whether the Defendants were the children, relatives, successors or descendants of the original 16. I suggest to the Claimant and his legal representative to argue matters of custom before a tribunal that is best suited to deal with such arguments. However I also remind the Claimant and his legal representative to remember that no matter how strongly the Claimant feels the 1972 decision is wrong, it has been upheld by the Supreme Court and the Appeal Court as being correct. That decision cannot be challenged in any Court.

6. It should also be remembered that part of the Claimant's claim is for orders setting aside the Consent Orders made by Justices Spear and Harrop. Those have been to the Court of Appeal and not found to be wanting in either merit or legality. I understand they are unhelpful to the Claimant's case. I understand that he says he was not a party to the proceedings which gave rise to the orders but that was of his own choosing. That may be an argument that can be developed but it appears to me he will still have a hard time showing that a finding of that nature will affect the outcome of this case. I am also aware that the Claimant says he is not bound by the "Findings and Recommendations" of the Five man Committee on which the consent orders were made. There seems to be clear evidence that he took part in the meeting or meetings of the Committee so again he may have a difficult time arguing they have no effect on him.

7. Having said that I would have to point out that the Claimant is one of the 16, one of the custom owners of Emis Land. What seems to have been forgotten by everyone are the comments of the Court of Appeal in *Kalotiti and Kaltapang*:

> *"The 1972 NHNC judgment anticipated that Kalran, and those other people named in Appendix A who had gardens or copra on the EMIS land would clear their boundaries and that their boundaries would be marked out, if necessary in the case of the collective ownership, by decision of a committee of five men chosen from among the listed owners, and with the final decision resting with the Native Court in the event of dispute. There is no evidence that these events happened, and the inference is that the boundaries were not properly marked out as envisaged by the judgment.*
>
> *In our opinion it does not follow that a failure to mark out the boundaries in 1972 renders the 1972 NHNC judgment meaningless or of no continuing relevance. The judgment awarded individual rights to Kalran, and difficult though it may now be, the boundaries of that land will have to be determined on the best evidence available as to where the boundaries exist. In our opinion that is a matter that is within the jurisdiction of the Supreme Court. It is*

a question which concerns the scope and effect of the Native Court decision. The Native Court has given a judgment on custom ownership. The Supreme Court would not be revisiting that issue, but would simply be making consequential orders to give a proper effect to the judgment.

The situation under paragraph (ii) of the judgment is less clear. The right to make gardens and to grow copra are transitory rights that will come and go with the passage of time. Thirty five years after the judgment, it is likely that the plots used in 1972 for gardens and copra have long since ceased to be so used. It seems to us on the information presently available that the qualification in paragraph (ii) relating to gardens and copra is probably of no continuing relevance. However the primary declaration in paragraph (ii) that the EMIS land (other than the Kalran land) is a group holding in the collective ownership of those named in Appendix A remains in full force. However the possible continuing relevance of the qualification in paragraph (ii) about the gardens and copra is a matter that should be considered by the Supreme Court along with the other issues that we have identified."

8. The Supreme Court did try to resolve the matter in Civil Case No. 64 of 2005 with its resulting consent orders. As in this case, the Claimant in that one decided that he still objected to the 1972 Judgment and distanced himself from all attempts to settle the matter. His sworn statement from May 2008 filed in CC 64 of 2005 is evidence of that. His problem is that he has now placed himself apart from the rest of "the 16" and is likely to be unable to ever reach a resolution which is totally acceptable or coincidental to his position. He also appears to have lost sight of the fact that the 5 man committee which made recommendations convened as the result of a Court order.

9. In this matter I have answered the preliminary point in favour of the Defendants. I have also said that his arguments about the Defendants not being true descendants of the original 16 are not supported by previous decisions of the Supreme Court and the Court of Appeal.

10. I will now fix a trial preparation conference. The Claimant (and of course the Defendants) will be expected to deal with the requirements of Rule 6.6 of the Civil Procedure Rules. It seems to me, but I will listen to further submissions and argument, that all that is left of the Claimant's claim is whether he was a party to Civil Case 64 of 2005 and even if he was not why should he not be bound by the decisions of the 5 man committee. I would suggest, yet again, the parties study closely the decision of the Court of Appeal in Appeal Case 11 of 2014. That surely must give both sides in this dispute ample guidance as to how this case should be resolved.

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SUPREME
LEX

11. I will fix the ***Trial Preparation Conference for 2:30 PM on Friday 21st October 2016.*** I will arrange for a copy of this Minute to be served on Mr Tevi as he is still on record as acting for the 6th Defendant. There still appears to be no one acting for the Fourth Defendant Berry Kalotiti Kalotrip so I will arrange for a copy to be served on him as well. I will also send a copy to the State Law Office. I believe they have agreed to abide the order of the Court but they might want some input to the trial. Similar comments apply to the 7th Defendant.

12. As for costs, I will reserve a decision on them. At the moment I am not convinced that the Claimant is not pursuing this case for ulterior reasons. He should be prepared to argue that point at a later date.

DATED at Port Vila, this 5th day of September 2016.

BY THE COURT

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D. CHETWYND

Judge