

IN THE BANKS/TORRES ISLAND COURT
OF THE REPUBLIC OF VANUATU
(Land Jurisdiction)

Land Case no.1 of 1998

BETWEEN: SALATHIEL VAVAK & FAMILY
Original Claimant

AND: ABSALOM VANAV & FAMILY
Counter Claimant 1

AND: JOHN ASHWIN WETELWUR & FAMILY
Counter Claimant 2

Coram: Magistrate Edwin A Macreveth
Island Court Justice Philip Morris
Island Court Justice Aiston Railey
Island Court Justice Tom Moses

Clerk: Fredington Aru

Date of hearing: 23rd - 30th May, 2012

J U D G M E N T

This land dispute has been referred back to the Island Court for rehearing by the Supreme Court by way of a consent order dated 20th of March, 2012 due to uncertainty raised over the declared boundaries of the Tavlavere land. Oral decision was delivered on the 30th day of May, 2012.

The land in dispute is situated at the eastern part of the Island of Gaua. It is located between Gaua airfield on the north and Leqagor creek on the south. The issue for determination concerns land ownership of Tavlavere land.

Its boundary is generally described to commence at Lewesas down to Ngerevag at the sea shore indicated by a fallen namele palm. From there it follows the coastal line to Rock Vatdovlet at Leqagor creek on the south. It then traverses the area inland up to an oak tree on the western side. Its western frontier is indicated by a two nangai and a navel tree ending at another oak tree on the northern side. It then turns eastwards stretching and ending at the mentioned namele palm at Ngerevag. For specification purposes regarding its boundary limits, refer to the advertised map attached herein.



Before dwelling on the subject matter and to guarantee better understanding of the reasoning of this judgment; a brief discussion of the relevant laws and custom processes and usages of the contested area are outlined below.

THE LAW, CUSTOM AND HISTORY

The Law.

The starting point is marked by Article 95(3) of the 1980 Constitution stipulating that customary law shall continue to have effect as part of the law of the Republic of Vanuatu. Article 73 stipulates that all land in the Republic of Vanuatu belongs to the indigenous custom owners and their descendants. Article 74 provides that the rule of custom shall form the basis of ownership and use of land in Vanuatu. Article 75 adds on that only indigenous citizens of the Republic of Vanuatu who have acquired their land in accordance with a recognised system of land tenure shall have perpetual ownership of their land.

The function of the tribunal is to resolve proceedings according to law. Where there is no rule of law applicable to a matter before it, the court shall determine the matter according to substantial justice and whenever possible in conformity with custom.

Section 10 of the Island Court Act provides that customary matters and beliefs prevailing in a territorial jurisdiction of an Island Court are applicable in the court; so far as they are not in conflict with the written law and are not contrary to justice, morality and good order.

Customary Law a finding fact

To determine claims for land ownership, the court must always use custom as the basis for determination and bearing in mind that such customary norms about to be adopted by the court ought not be inconsistent with any written laws. Custom is regarded as a matter of fact. It therefore, should normally be proved by way of evidence through oral testimony of witnesses who can testify on what they have heard or seen and express their opinion about what they consider as custom.

The findings on rules of custom forming the basis for land ownership

There is sufficient information gathered from the hearing regarding customary principles of land ownership are summarised in the forthcoming paragraphs.

The rules of custom forming the basis of land ownership practiced in the area is founded on the matrilineal system. Meaning rights to claim ownership of land is acquired from the uncles or mother's line. To qualify for a right of ownership to the



land, descendants of a particular tribe are traditionally obliged to perform a custom payment of cultural items to the uncles or mother during their life time or either upon their death or subsequently during mourning period.

Ownership of customary land is communal or collectively owned based on common descent, residence within a nasara and participation in common activities. All members of the clan shared undivided interests on the land.

It is the common understanding that the first person and his family who explore, live build a nasara and take control of a particular territory becomes the original owners or ancestors of the land. It makes no difference if they left again for some other reasons, they would still be recognised as the custom owners. Tribal members who form the land owning are all related by blood relationship for having descended from a common ancestor.

Land is traditionally inherited through the original female ancestor (mother line). It is the uncles who would normally bear the responsibility for providing equal distribution of the mother land to tribal members and other relations. This is a predominated system which is twinned with the land tenure system handed down from generations to generation.

Visitation of the land boundaries

The court after courtroom hearing paid a visit to the land to inspect its boundaries and test the gathered information with direct evidence at the site. It is noted that most part of the land has significantly been developed with cattle farming, coconut plantations and subsistence gardening leaving very little reserved forests. Among others, the court also inspected cultural identities like nasaras, boundary marks and other mentioned identical phenomena.

Given the basic understanding of the traditional processes and the law, the relevant facts submitted before the tribunal are summarised as follows.

Original Claimant

Salathiel Vavak representing tribe Vaslab is claiming the advertised land as customary land belonging to his original female ancestor, Rowoqar. He is claiming upon the matrilineal lineage of Rowoqar having origins from the Vaslab tribe. She had two brothers namely, Mogmog and Vacal.

He went on to provide that chiefs from the area had once erected a tabu stone and had forbidden everyone not to walk around it. Anyone found disobeying would be put to death. It so happened that one day Rowoqar mistakenly walked around it



and was immediately reported to the chiefs. In fear of death, Mogmog decided to send her sister sailed away on a canoe in exile. Rowoqar sailed ashore to the sea passage of Metitar and settled at Luor station at Merelava Island. She afterwards espoused a man called Pisor whose descendants are traced to the present generation.

After some years of residing at the island, news reached Mogmog that she has been married with children and living at Merelava Island. With the assistance of one Wovine she was repatriated to her home island of Gaua and resettled at Tolu area. Upon her death, her son Matlav performed a traditional rite towards her funeral to inherit land ownership right to the uncles namely Mogmog and Vacal honoured with 19 pigs and 300 traditional shell money.

Since then, the land had always been in his family's custody. He related that the land was looked after by Matlav, his son Luke, then to Henry Vavak and passed down to the present occupation by his extended family.

In support of his claim he said that Amina (grand mother of CC2) had written them letters asking his family to come over to Tolu and occupy their own land. He also provided that around 1977, the Gaua Area Council of Chiefs had declared his family as owners of the land of Tolu. He added that his family had made payments of VT 9800 and a pig to Lealul brother of (CC2) to recompense him for his service in taking care of their land.

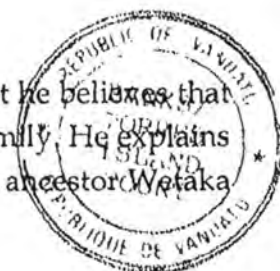
In his conclusion, he explains that his family has also performed a custom ceremony to their father Benjamin Vavak with the value of 7 pigs, 16 yams and VT25,000.

He called 3 witnesses in support of his claim. John Elman in his evidence told the court that a man by the name of Tele had informed his father that Benjamin Vavak is a native of Tolu. He says also that Henry after returning from Tolu to Merelava did send George to the land. His father upon his arrival to the area had been residing with two men by the name of Tele and Aren at the point of Tolu.

Witness, Elisabeth Rosur generally states that she has also heard her father telling her that the land of Tolu belongs to the original claimant and their descendants. Adson Aswell made a very similar statement to that of her colleague.

Counter claimant 1

Paul Lazarus representing Absalom Vanav in his address stated that he believes that the area of land claimed truly belongs to Absalom Vanav and his family. He explains that the basis of his claim is based on the patrilineal bloodline of his ancestor Wetaka



by reason that there are no more surviving issues of the matrilineal line of Roreo the original female ancestor. Wetaka had built a nasara at Telvavus.

The land territory disputed is said to begin at Abakiri (Kaska creek) at the shoreline extending up to rock Qusus. It follows on from there inland ending just before Dunter. It then turns southwards until it meets with Kaska creek which is the boundary limit on the south. The claimed land covers Santa Maria school.

Four witnesses are called to testify in his favour. Chief John Hubert in his statement generally said that he believes that Absalom Vanav is the true custom owner of the claimed land territory. He added on that he forms part of such land owning unit. Francis Toala made a very similar statement.

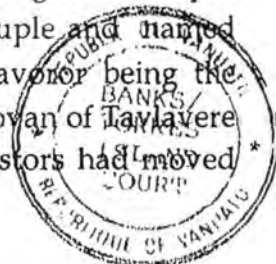
While, Patricia Tackasy made a statement which does not in any form at all support his claim but counter arguing CC2's claim. Besides other information mentioned, in brief she told the court that on a Wednesday 21st of January, 2009 around 9:30 Am at Lewesas, she had overheard Mary Magete saying that the land in contention does not belong to her brothers namely John Ashwin and Lealul Wetelwur because their father is originated from Lakona Bay. There are other indigenous natives of the area who rightly own the land.

Counter claimant 2

Father John Ashwin speaking on behalf of his family is disputing only certain part of the land advertised by the plaintiff. He is claiming through the matrilineal line of ancestor Robursavoror of Tavlavere land.

The area claimed is described to begin at a rock known as Vatdovlet and a namele palm at Leqagor creek running up the land westward following the original claimant's map and stops at a navel nut tree and the stone wall at Talvagos. From there, it turns northwards pass 2 banian trees ending at the third banian tree which marks the limit of the land territory on the north. It then turns eastwards passing by Vatqaratkolo, Lanqolul Vevenworvat, and down to Lewesas and onto Sombak by the sea shore. Its boundary on the east is bounded by the coastal line joining again up at Vatdovlet on the south.

In his genesis, he told that court that his ancestor Magete and her husband while on a trip to the sea to fetch some sea water discovered a baby girl crying inside a split bamboo cane. This infant was then taken and nurtured by the couple and named thereafter as Robursavoror. His tribal claim is rooted to Robusavoror being the original native of the land of Tavlevere. Robursavoror espoused Woyan of Tavlavere and begat descendants traced to the present generation. His ancestors had moved



from Tavlavere to other areas such as Vir (Kaska), Qobobu, Votou and Tarasag (Nobur).

He explained that he is claiming land rights from his uncles and mother. The first ceremony was performed by late grand mother Amina Rotang and Mary Magete Tackasy on the 10th day of the death of his uncle Telly Wendorgorvere. Two pigs and 2 fathom shell money were handed over. A second ritual was staged upon Amina's 10th day of death while he was in the Solomon Islands doing pastoral missions. His brother Chief Lealul Wetelwur and Mary Magete Tackasy took charge of it with a payment of a pig and 2 fathom shell money. George Tevir and his family have also performed a traditional ceremony for the land they currently occupy at Tarasag.

He called 4 witnesses. Joseph Quealav said that he believes the land in question originally belongs to CC2 from the tribe Bamboo. He added that in 1904 his great grand father Joseph Quealav had offered a customary payment to Cicilia Rotang (mother of Amina) in return for a plot of land to build a church. His ancestor had further offered 4 different ceremonies for land areas known as Votog, Nmar, Nobur and Rongnag.

Palma Robinson reconfirmed that he believes the land belongs to John Ashwin and his family. Jeffrey Wetug also maintained that he believes the land belongs to CC2. He recalls that in the 1970's Amina used to authorise them to fish at the coastal areas of Tarasag.

Simeon Vavak in his statement told the court that he had lived at Tolu for 35years and had never heard that his family the OC are native or custom owners of the land of Tolu and Tavlavere. He went on to point out that he and his father Benjamin Vavak had purchased land (around 1 and half hectare) at Tolu from chief Lealul Wetelwur. He emphasises that his family being natives of Merelava Island have their own customary land at Merelava.

He held on that he had attended 3 different meeting over the land in issue. He clearly recalls that the original claimant had made 3 changes to their genealogy tree. He says that the first claim was made with a claimed ancestor by the name of Riwotretov. This name was later changed to Vacal on the second meeting and this time again standing under a different personality with the name of Rowoqar. He concluded by stressing with concern that the original claimant is a liar and is not a native of Tolu or Tavlavere but are real natives of Merelava island.



ANALYSIS OF EVIDENCE & FINDINGS

By law, the primary disputant in principle bears the burden of proof on grounds of probabilities to substantiate his claim with clear and relevant evidence. But also other defendants who assert a fact must as well prove it by way of evidence.

Having made these clarifications, we now present the findings below in the usual order of presentation.

Original Claimant

The original claimant's position is as follows;

Firstly, it is obvious from the hearing that CC1 & CC2, Chief John Hubert and few of their witnesses have heavily made objections to his claimed boundary. Chief John Hubert whom had once witnessed his claim in 2005, is this time making opposing statements to his case stating that OC has exceeded the traditional boundaries of the land of Tolu and Tavlavere.

They are urging the court to realise that there are other existing land owners of the land whom are not parties to the case. The information gathered by the court provides that the area claimed by the original claimant has far exceeded the traditional boundary limits of Tavlavere land. The court is certain also that there other tribes of the area on the far western part of the land. Such land areas do not form part of Tavlavere land.

Secondly, there is lack of supporting evidence to give weight to his claim.

- a. First, his witnesses could only provide very generic information. Questions posed deeper into the case could not be answered because they have no real knowledge about the boundaries, family and the entire history of the primary disputant. Everyone of them could only answer questions regarding their proper statement which all constitute hearsay statements without backup.
- b. In addition, there is no seconded statement that the Area Council of Chiefs had made a declaration in their favour in 1977. A tendered copy of such meeting would have given some muscle to the case. However, such a document could not be made available.
- c. Further, there is also no corroborated evidence to substantiate his claim that letters were in fact written and sent by Amina inviting them to take custody of the land as owners. No witness made confirmation to this account nor was there any record of notes tendered before the court.



Thirdly, the traditional process for acquiring rights for claiming land ownership from their uncles could not be fully established given loop holes in their evidence.

For instance, first and foremost there is no proof that Mogmog, Vacal or their sister had paid their right of claim from ancestor Roteve. We note that the rights to land claim from the uncles had ceased upon Vavak's death. There is no presence of information suggesting that Vavak had performed his rights of obligation upon Matlav's death. Neither had Benjamin Vavak performed any customary rights to Vavak.

Such irregularity, has also brought questions before the court with doubt over the claimed payment of 300 shell money and 19 pigs upon Mogmog's death. We doubted that such event had ever occurred. Equally, it is very rare that such considerable amount of shell money and pigs had been paid in land rights related ceremonies.

Further, the original claimant is noted to have elicited inconsistent and imprecise information about the land. Some of his told histories do not conform with the rules of custom in terms of processes and values. Below are some of his weaknesses.

1. He has failed to locate Tavlavere nasara being the oldest nasara given its locality and surrounding environment.
2. He further made statements which do not correspond to the ordinary custom practices of the land. For example, alleging that Rowoqar had been buried beside a nakamal belonging to chief Mogmog at Tolu. Our view on his version is that in custom a woman cannot be buried beside a chief's nakamal. That is a tabu area only confined to the chiefs and men of higher status.
3. On the other hand, in the course of visitation to the ruins of Tolu nasara he had referred the court to a house foundation claiming it to be Mogmog's nakamal. After having verified the site and assessing other advanced statements from other parties, we are of the opinion that his account could not be right. The stone foundations are in fact remains of houses but not a nakamal because the stone walls were plastered with lime cement as witnessed. It was explained by CC2 that a man called Vaghal after returning from Queensland on the ship Southern Cross had used the new technology to imitate what he had seen in Australia.
4. Another finding concerns the story of Rowoqar's exile to Merelava. In reality, Rowoqar could never be brought back to Tolu because she would then inevitably be put to death by the chiefs for having violated their tabu. Unless a reconciliation is performed to the chiefs in compensation for the wrong



committed. The original claimant provided no information in clarity pointing in that direction. Such a story as told by the OC does not fall in line with the traditional patterns of life. We consider it as unreliable.

Furthermore, there is overwhelming evidence from the defending parties directly undermining his claim. Information reveals that CC2 is historically and always been regarded as the rightful customary owners of the land. For that reason, many present local occupants of the land had purchased land from CC2. His father Benjamin Vavak has also purchased 1 and half hectare of land situated at Tolu from Lealul Wetelwur, CC2. That piece of information is confirmed by Simeon Vavak brother of the OC and John Ashwin CC2. Among many others Joseph Qwealav and Patricial Tackasy also confirmed to have acquired land from CC2.

Counter Claimant 1

This claimant seems to have been coached by some third parties leaving his case with complete confusion and uncertainty.

Firstly, his family tree is questionable given the following facts. We noted in his statement of claim mentioning that his original ancestors are Mulvagtol and Roulmekol. This couple had three children namely, Stephen Welel, Wetaka and Rolegu. Whereas, his drawn family line on the contrary shows that his ancestors are Molvotol and Roreo. Key question posed querying over these differences of names could not be easily answered.

Secondly, this party has no definite knowledge of his own claimed boundaries. He has interestingly submitted three different sketch plans to the court. He had initially been claiming the whole area. However, on Wednesday 22nd of May, he then made amendments to his sketched boundary. While, on the following day after visiting his disputed territory he again made another application to the court seeking to withdraw all existing maps with intention to use a sketch map that had been used during the last court in 2005. This late application was rejected by the court.

These irregular steps, clearly indicate that he is absolutely not sure about the traditional boundaries of the land. Our record shows that during the walking party, he had shown the tribunal a stone purporting it to be a boundary mark. However, it was proven to be false because the identified rock is merely a stone wall marking an old foot path. Other parties and witness are in our favour.



Thirdly, he lacks evidence to reinforce his claim. His witnesses statements could not assist the court either given the fact that these statements are very general in nature. His 2 witnesses, Toala Francis and Skeva Roslyn have no knowledge about his history and land boundaries. While, Patricia Tackasy's statement has no relevance or support at all to his claim.

Another available evidence carefully considered is that his claimed nasara situated at Talvavus would impliedly show that his ancestral chiefs are "man kam" migrants from Merig island. They had re settled at Telvavus and later built a nasara while cultivating the nearby terrains. The reason for such conclusion is that it is historical that real natives of the land would normally have built their original nasara far inland prior to their movement to the coastal areas.

Our final consideration of his standing in this claim is that his claimed land cannot be sustained but fall as found by the circumstances of his case.

Counter claimant 2

John Ashwin the oldest person appearing in this proceeding aged in his 80s is claiming through the matrilineal line of Robursavoror of Tavlavere as original ancestor to the land. He is a very honest and reliable witness in this case.

Our immediate attention noted that the OC has strongly put forward an opposing argument expressing that CC2 has no real standing in custom to claim through the bloodline of Robursavoror. He stresses that in custom CC2 could only claim the lineage of Magete being the original ancestor of his family tree. Such argument could not prevail.

The court in determination of the issue raised is of the view that such argument has no profound grounds. It is logical and the understanding is that Robursavoror's birth place is Tavlavere. She is the founding ancestor of the Bamboo tribe (CC2). Although she was adopted and nurtured by Magete from Lembnav, however, such process or relationship makes no difference. Robursavoror would be still designated as original indigenous native of the land of Tavlavere.

Turning to Patricia's account which was also raised by Salathiel Vavak, we are hesitant to accept it given reservations over its credibility. It essentially cannot be admitted pursuant to the fact that such confronting words of Mary Magete were made amid existing internal differences with her relatives (CC2) over the sharing of VT 300,000 payment paid by one Kay in 2008 for a plot of land at Telvavus.



Given, this state of atmosphere of Mary Magete at the time its communication, the court concludes that such conversation relayed by Patricia Tackasy was purely not made in good faith but will ill feeling. It therefore, cannot be used a reliable or admissible evidence against the defendant's case.

Our overall observation on this party's claim is that he has very good memories of historical sites and boundaries other than Salathiel Vavak and Absalom Vanav. He appeared calm and very confident throughout the trial proceeding. Local names of places he gave or identified derived from the Gaua local vernacular corresponded to the landscape or has a story to tell. This disputant has identified many customary identities which neither parties had no complete say on.

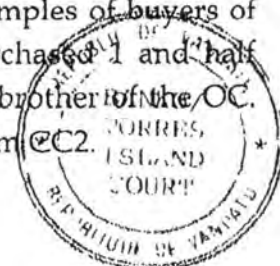
Example, Father John Ashwin had given a clear description of the land area of Tavlavere and Tolu. Tolu means "running out". Such name is given to the area given a number of existing spring waters by the seashore. The court had witnessed that fact to be true and correct during the site visit.

A further truthful piece of history shared by this party is that regarding the housing fashion witnessed at the nasara at Tolu. Their given explanation is accepted with reasonableness that the use of lime cement had only been lately introduced by Vaghal upon his return from Queensland. The visited housing remains could not be a nakamal but a residential area.

Moreover, it is apparent from the hearing that John Ashwin has been very honest in his claim. He is only claiming land which his tribe Bamboo originally owns as described in his statement of claim and sketch plan. He is very familiar with the land boundaries of Tavlavere land. He explains that the area claimed in the far western part of the advertised land belongs to other existing tribes whom are not parties to the present dispute. Paul Lazarus spokesperson for CC1, Chief John Hubert and other few other witnessing supporters have also sidelined themselves with him on the same reasoning.

Another convincing information favourable to this party is the fact that his family is highly regarded as the traditional owners of the land in dispute. Quite a number of locals including father of the OC and few witnesses to the case have purchased land from CC2.

On examination, it was told that the primary reason for such transactions to have occurred was because everyone in the area had habitually considered CC2 and his family as the traditional owners of the land. Here are a few examples of buyers of land from CC2. The father of the OC late Benjamin Vavak purchased 1 and half hectare of land situated at Tolu as confirmed by Simeon Vavak brother of the OC. Joseph Qwealav and Patricial Tackasy have also acquired land from CC2.



More importantly, unlike the original Claimant, CC2 had established a complete right of claim to the land of their uncles through the listed ceremonies as contained in the statement of claim.

In conclusion, while balancing the three claims as advanced by the respective parties, this tribunal could only find CC2's claim outweighing the remaining cases. That is to say that CC2's case has been established and proven more than probable concluding that Baboo tribe are the true and rightful owners of Tavlavere land.

DECLARATION

In light of the totality of the gathered findings and in application of the law and custom practiced in the subject area, the court hereby this day pronounce as follows;

1. That John Ashwin, Lealul Wetelwur representing Bamboo tribe are declared as custom owners of the land of Tavlavere as claimed accordingly.
2. All claims for land ownership by to the rest of the parties are entirely dismissed.
3. The declared land territory begins at the rock known as Vatdovlet and a namele palm at Leqagor creek running up the land westward following the original claimant's map and stops at a navel nut tree and the stone wall. Its western border is demarcated by 3 banian trees. The third banian tree marks the limit of the land territory on the north. It then turns eastwards passing by Vatqaratkolo, Lanqolul Vevenworvat, down to Lewesas and onto Sombak by the sea shore. Its boundary on the east is bounded by the coastal line joining up again at rock Vatdovlet on the south.
4. For ease of clarity to the parties and the public, all claimed boundaries sitting outside the advertised land do not form part of this judgment. While, parts of the remaining advertised land undeclared can be claimed at the Land Tribunal.
5. It is also reminded that this declaration does not also affect other property rights on the land, such as rights of claimants or other local occupants to harvest coconuts, garden, graze cattle and other existing development thereon. Needless to mention however, every occupiers of the land must bear in mind that these rights may be waived or varied by the owners. The exercise of these rights is limited to existing properties prior to this declaration.
6. As such, it is further directed that that all persons currently in use of the land undertake to cause appropriate arrangements with the declared owners to accommodate their continuous use of the land.

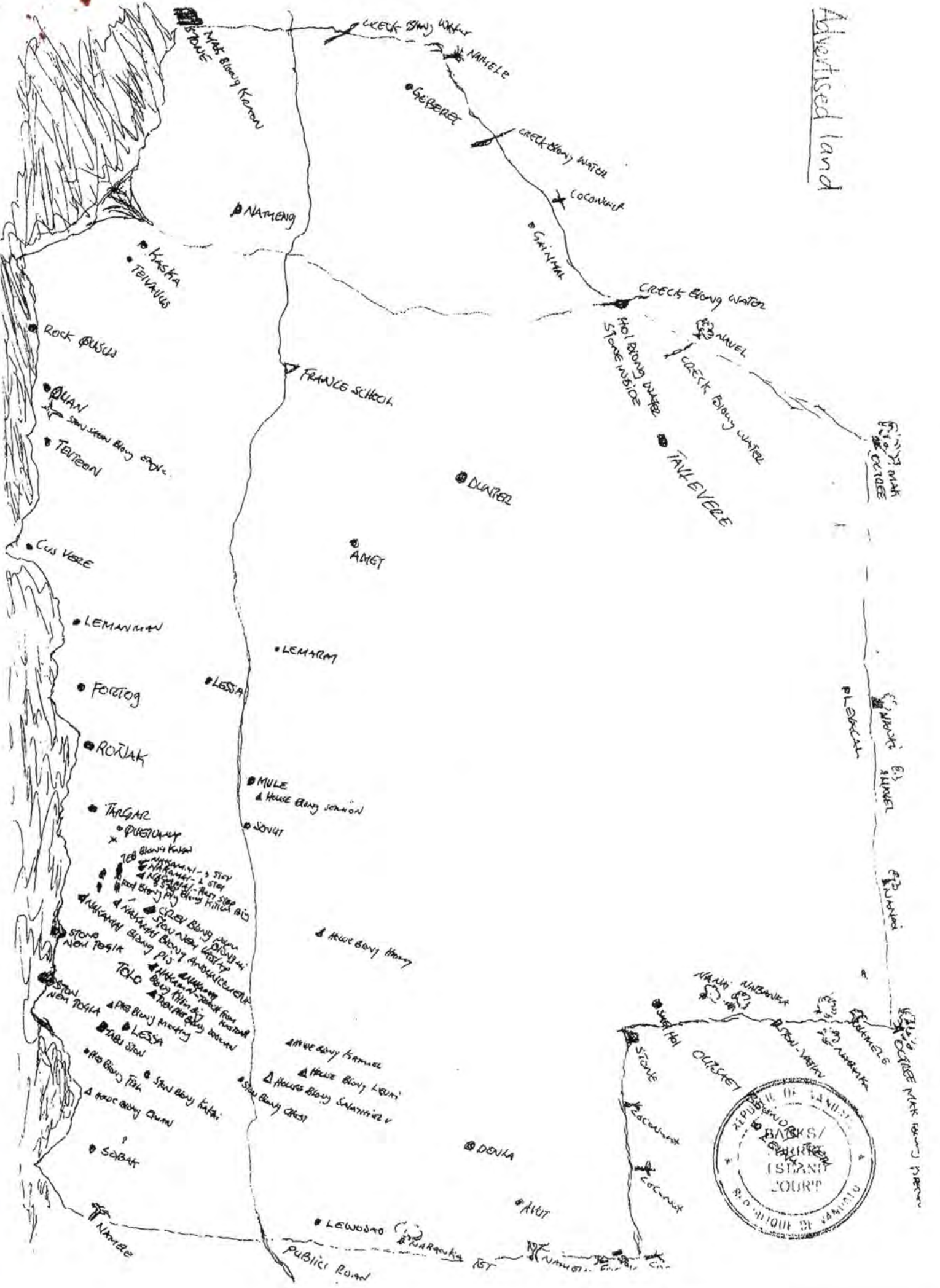


7. Any aggrieved party, their agents or relatives are reminded to keep peace at all times and not take the law into their own hands.
8. Parties are to pay their own costs necessitated by this proceeding.
9. Any party aggrieved by the decision of this court has the right to appeal within 30 days period at the receipt of this written judgment.

Attached to this decision is a copy of the advertised land of Tavlavere. Provided also separately is the same sketch map showing the declared land boundaries (see, shaded land area) to declared owners.



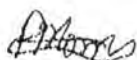
Advertised land



Handwritten notes on the right margin of the map, including 'PLANTATION', 'COURTNEY', and 'COURTNEY MARK FOR BOUNDARY'.

Dated at Wongras Bungalow, Gaua this 30th day of May 2012

BY THE COURT



Justice Philip Morris



Justice Aiston Railey



Justice Tom Moses



Edwin A Macreveth
Presiding Magistrate