

**IN THE MALEKULA ISLAND COURT**  
**OF THE REPUBLIC OF VANUATU**  
(Land Jurisdiction)

Land Case no.2 of 1993

**BETWEEN:** LEKOLAN GONGI & APRIL KALWATSIN  
( Represented by Kalrong Kalwatsin)  
**Applicant**

**AND:** ESAU WILLIE (Represented by Billison Nibwen)  
**Original claimant**

**AND:** BERSI TIMOTHY (Represented by Walter Kilman)  
**Counter claimant 1**

**Coram:** Magistrate Voghia Edwin Macreveth  
Island Court Justice Robert Niptik  
Island Court Justice Shema Tasvalie  
Island Court Justice Freddy Malres

**Clerk:** Collyn Tete

**Date of hearing:** 3-5 August, 2015

**Date of decision:** 5<sup>th</sup> of August, 2015

**CLARIFICATION JUDGMENT**

This court sat at Lakatoro pursuant to a direction order issued by the Court of Appeal in Civil Appeal Case no. 15 of 2009 directing the Malekula Island Court to provide clarification over the applicant's claim. The questions sought for clarification are framed in these words.

- 1. What was the capacity of Esau Willie in pursuing the claim before the Malekula Island Court in this land case no 2 of 1993.*
- 2. If it was in a representative capacity, then who were the other persons that he was representing besides himself, and*



3. *If those other persons included Lekolan Gongi and April Kalwatsing then, what were their interests in the land*

The Court after having heard and considered the evidence gathered by the three parties in this proceeding makes the following findings to the above questions. The answer to the first issue suggests that Esau Willie was acting on a representative capacity and not on an individual standing. The evidence illustrating such conclusion are as follows;

First, there is evidence from witnesses that Esau Willie had asked members of his adoptive family to team up and give support to his claim through his father's adoption against Bersi Timothy. Esther Malterong, having a mother relationship to the applicant was a witness who testified in support of Esau Willie's claim for ownership over the land.

Secondly, George Kalwatsin son of April Kalwatsin was the person who launched the claim at the Island Court given arising disputes over the land. He had paid the Court fees with intentions that Esau Willie will act as spokesperson on behalf of their family. This evidence was not disputed.

Thirdly, the law enshrined under the articles of the 1980 Constitution relation to land ownership is very clear. Article 73 stipulates that all land in the Republic of Vanuatu belongs to the indigenous custom owners and their descendants. In our mind, this Article is guaranteeing prerogative rights to the indigenous customary owners and their descendants. And that would inevitably include natives who are directly linked to the customary owners by blood irrespective of their gender through the matrilineal and patrilineal lineage.

We note the original claimant's defence argument is based on custom principles that the applicants have married out to other tribes and would be barred in custom to claim ownership of land and would only be given a lesser right. This debate clearly marginalizes female from male. That argument cannot be sustained given the following reasons.

Women's rights are well protected under the provisions of the Constitution under Article 5(1). It provides - "*The Republic of Vanuatu recognises that all persons are entitled to the following fundamental rights and freedoms of the individual without discrimination on the grounds of sex. . .*

*(d) protection of the law;*

*(k) equal treatment under the law or administrative action, except that no law shall be inconsistent with this sub-paragraph insofar as it makes provision for the special benefit, welfare, protection or advancement of females..."*



The intention of the Constitution is to guarantee equal rights for women with men. A law or custom rule which discriminates against women would be in conflict with this aim. Females ought to be equally treated under the law without discrimination on the grounds of sex. Equally, parliament has adopted Human Rights Convention on the Elimination of all form of Discrimination Against Women (CEDAW) with respect to women's rights. The Supreme court had upheld the above principles by applying them in the case of Jean Noel - Obed Toto Civil Case no 18 of 1994.

Article 74 provides that the rule of custom shall form the basis of ownership and use of land in Vanuatu. Our understanding of that provision, is that it must be subjective to the fundamental rights recognised under Article 5. Section 10 of the Island Court Act Cap 167 also reminds us that when applying customary rules prevailing within the territorial jurisdiction of the Court, it ought bearing in mind to ensure that it must not adopt and apply any customary rule that is in conflict with any written law and is contrary to written justice, morality and good order.

Further, according to the Maltur -Ran- Nefat Council of Chiefs customary law relating to land ownership, Part 2.7 says that in the event where there are no surviving descendants of the patrilineal line, surviving bloodlines from the matrilineal line has the right to claim ownership of the land. The circumstances of this case provides that Esau's father Willie Prey belongs to the land of Livok and is not a family of Lolonmal father of Thomas whom adopted Willie Prey. The only surviving descendants of the land are the children of Thomas' daughters Lekolan and April. They would no doubt in custom have some rights or interest over the declared land.

In addition, it is common practice in the area that ownership of customary land is communal or collectively owned based on common descent, residence within a nasara and participation in common activities. Land ownership is inherited patrilineally. The only exceptional condition to the general principle of land ownership is that in circumstances where there are no more surviving male heirs to the land from the patrilineal line then, ownership will pass on to the matrilineal offspring.

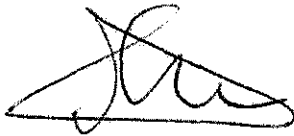
Having decided on issue 1 in light of the foregoing considerations, the finding to the second query as to who Esau was representing indicates that Esau Willie was appearing on behalf of his himself and his adoptive family namely Lekolan Gongi, April Kalwatsin and their descendants. Their interest on the land would be on an equivalent capacity with Esau Willie as customary owners of the declared land beside Bersi Timothy. Sharing of the declared land and any rental proceeds therein from any development will be on an equal basis among themselves.

With such, the order dated 18<sup>th</sup> of December, 2009, is hereby vacated. Parties are informed of their right of appeal within 30 days from today.



Dated at Lakatoro this 05<sup>th</sup> day of August, 2015

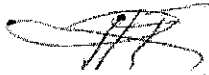
BY THE COURT



.....  
Justice Shemma Tasvallie



.....  
Justice Robert Niptik



.....  
Justice Freddy Malress



.....  
Magistrate Edwin A Macreveth

