

IN THE MATTER OF: MALAFAKALO (LAKENASUA) TOGOLAPA KASTOM
LAND

AND:

IN THE MATTER OF: AN APPLICATION PURSUANT TO SECTION 45 OF THE
CUSTOM LAND MANAGEMENT ACT

BETWEEN: Chief Albert Manlaesinu and the People of Emua
First Applicant

AND: Toara Kalorip
Second Applicant

AND: North-East Efate Custom Area Land Tribunal
First Respondent

AND: Chief Philip Axem Matariliu & Touman Family and
Descendants
Second Respondent

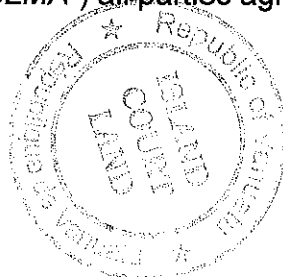
AND: Kaltu Silas Family and Kalpat Family
Third Respondent

Before: Justice D. V. Fatiaki (Chairman)
Justice Evelyn Nawen
Justice Allan Boblang
Justice Harry Joshua
Justice Roy Tinning

Counsels: Garry Blake for the First Applicant
Second Applicant in person
Sammy Aron for the Tribunal
George Boar for the second Respondent
Less J. Napuati for Third Respondent

REASONS FOR DECISION

1. On 26 June 2017 a first management conference was held where all parties appeared without counsels because they were under the misapprehension that this Court was part of the Island Court which was established by the Island Court Act [CAP. 167] in 1983 and which does not permit any legal practitioner "to take part in the proceedings of an Island Court" (see: Section 27). When it was pointed out to the parties that the **Island Court (Land)** was a new and different Court set up under the Custom Land Management Act 33 of 2013 ("CLMA") all parties agreed to instruct counsels to appear at the next conference date.



2. During the first conference which extended over 3 hours it became clear that there was a great deal of confusion and misunderstanding of the provisions of the CLMA and the various requirements and processes that needed to be complied with and undertaken under the CLMA before a customary land dispute could be determined by a "nakamal" or "custom area land tribunal".
3. In particular, the creation of "custom area land tribunals" and "nakamals" and the condition(s) precedent to them hearing a "land dispute" was little understood. For instance, it was not widely known that access to a "custom area land tribunal" is only possible after a "nakamal" has failed to resolve the dispute within 30 days and the parties do not agree to resolve the dispute by mediation and the unresolved dispute is referred by a "custom land officer" (see: Sections 29 and 34). In other words there is no direct access to a "custom area land tribunal" unlike a nakamal.
4. The difference between the provisions of Section 17 concerning "the determination of custom owners" by a nakamal and Section 25 concerning the "determination of a land dispute" by a nakamal was also not widely understood.
5. The absence of gazetted lists of "custom areas"; "custom area council of chiefs" and of potential qualified members of custom area land tribunals did not assist either, in clarifying the validity of the appointments made to the North East Efate Area Land Tribunal ("the respondent Tribunal") in the present case.
6. Likewise the absence during the conference of the relevant "custom land officer" who had dealings with the case and a complete certified record of the proceedings of the respondent Tribunal were stumbling blocks in the management of the case.
7. Be that as it may, at the second management conference on 2 August 2017 all parties were represented by counsels including the respondent Tribunal and matters progressed more quickly and with greater clarity and understanding.
8. At the conclusion of the management conference on 2 August 2017 and with the agreement of all counsels who conceded the appeal, the application was allowed and the decision of the North East Efate Custom Land Tribunal was set aside and the matter returned to be heard afresh before a differently constituted tribunal. I reserved the Court's reasons and indicated that it would be delivered in due course after the four justices had had an opportunity to consider and endorse the reasons.
9. During the course of lengthy discussions with counsels and in the several applications filed by the parties, mention is made of a **Supreme Court Case No. 636 of 2015** in which the present appellant successfully sought a judicial review of the decision of the respondent Tribunal concerning a dispute about custom land known as: "*Malasa Pokasi located within the custom boundary of Emua in North Efate*".
10. In this latter regard the Supreme Court on 16 March 2017 made the following orders:



"UPON HEARING Mr. Garry Blake counsel for the Claimants, Mr. Kent Ture Tari counsel for the First and Third Defendants and hearing from representatives of the Fourth Defendants in person in Court, noting the absence of the Fourth Defendants' counsel Mr. Willie Daniel,

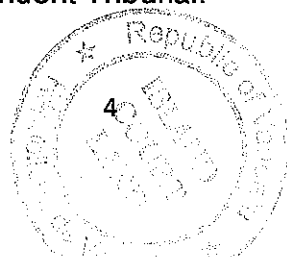
AND NOTING the prior consent of the First-Third Defendants to the relief sought by the Claimants as reflected in the Defence and submissions filed by the First-Third Defendants,

AND NOTING the concurrence of the Fourth Defendants through their representatives in Court including Mr. Sam Dan Avock to the relief sought by the claimants in the proceedings and the need for any challenge to the decision made by the Nakamal on 3 July 2015 to proceed to the Island Court (Land) it is hereby ordered as follows:

1. **ORDER** that the Third Defendants be prohibited from hearing the dispute over custom ownership of the custom land known as Malara Pokasi located within the custom boundary of Emua in North Efate ("the MP Land").
 2. **ORDER** that the Third Defendants be prohibited from making a determination on custom ownership of the MP Land.
 3. **DECLARE** that the decision of the First Defendant to order the Third Defendants to hear and determine the dispute over custom ownership of the MP Land is ultra vires and of no force or effect.
 4. **DECLARED** that the decision of the Second Defendant to order the Third Defendants to hear and determine the dispute over custom ownership of the MP Land is ultra vires and of no force or effect.
 5. **THAT** a quashing order is made quashing the decision of the First Defendant to order the Third Defendants to hear and determine the dispute over custom ownership of the MP Land.
 6. **THAT** a quashing order is made quashing the decision of the Second Defendant to order the Third Defendants to hear and determine the dispute over custom ownership of the MP Land."
(our highlighting)
11. In the absence of the relevant court file it is difficult to understand the relevance (if any) of the above orders which appears to be based on a breach of the provisions of the CLMA concerning the process(es) to be followed in challenging a determination of a "custom area land tribunal" (see: Sections 41 and 45). In particular, in seeking to invoke the provisions of Part 8 concerning the supervisory powers of the Supreme Court, without first exhausting the process under Part 7 by applying to the Island Court (Land).
12. Be that as it may the present case deals with customary land variously described as: "Lakenasua Plantation land"; "Malafakalo land"; and "Togolapa kastom land" situated in North East Efate. The claimants were:
- Chief Philip Axem Matariliu and Touman Family & Descendants (*original claimant*);
 - Kaltu Silas Family and Kalpat Family (*1st counterclaimant*);
 - Chief Albert Douglas Manlaesinu & Emua Community Council (*2nd counterclaimant*);



- Toara Kalorip and Kalorongo Maripongi (*3rd counterclaimant*).
13. The first applicant **Chief Manlaesinu** filed his review application in the Efate Island Court registry on 2nd May 2017. The application asserted *inter alia* that there were two (2) conflicting decisions made in the case and that the fees charged by the respondent Tribunal (**VT111,000**) were excessive and outside the permitted statutory fee structure. The application also challenged the legality of the appointment of the members of the respondent Tribunal on the basis that they were disqualified as their appointing authority the members of the Marakinavata Kaonsel blong Jifs had been terminated and replaced by the Efate Vaturisu Council of Chiefs.
 14. The application is supported by a sworn statement of Chief Albert Manlaesinu the head chief of Emua village. It annexed what is said to be an unsigned, unstamped decision of the respondent Tribunal dated 27 April 2016 in bislama (see: Annex '2bc') ("**Version 1**") as well as a stamped typewritten decision of the respondent Tribunal in English signed only by its secretary Chief Robert Tasaruru Tatalele Ameara-ra also dated 27 April 2016 (see: Annex '2br') ("**Versions 2**").
 15. On 27 June 2017 a second review application was filed by **Toara Kalorip** also of Emua village who was the third counterclaimant before the respondent Tribunal in Land Case No. 1 of 2016. The application was allowed on the basis that the decision of the respondent Tribunal although dated 27 April 2016, was not delivered to the parties until 27 February 2017 (see: Annex PA "11" in the response sworn statement of Chief Philip Axem Matariliu dated 2 August 2017). This third decision (**PA "11"**) of the respondent Tribunal is in bislama, stamped and signed by the secretary and only two (2) of the three (3) members comprising the respondent Tribunal. It purports to be a decision of the respondent Tribunal concerning "*Laken'nasua Plantation mo Laken'nasua Top Land*" ("**Version 3**"). The annexure however is seriously incomplete and is missing pages "4 to 62" (inclusive).
 16. The sworn statement of Toara Kalorip dated 27 June 2017 in support of his application annexes a fourth decision of the respondent Tribunal (see: Annex TK'1). This decision which is typed in bislama is also dated 27 April 2016 and is signed by all three (3) members. It includes a copy of a map showing the disputed land as well as a list of 19 leasehold numbers that are within the disputed land ("**Version 4**"). It appears to be the most complete except that the body of the judgment is unstamped with the respondent Tribunal's office stamp.
 17. There has been no sworn statement filed by any member of the respondent Tribunal or of a knowledgeable "*custom land officer*" explaining or clarifying the existence of the four (4) different "**versions**" of the respondent Tribunal's decision nor is there a sworn statement from the Chairman identifying which of them (if any) is the correct and approved judgment of the respondent Tribunal.



18. In the absence of such clarification and verification, the approved final judgment of the respondent Tribunal is unclear and the various "**versions**" cannot be allowed to co-exist and continue in that confusing state of affairs. Accordingly, all four (4) "**versions**" of the respondent Tribunal's judgment identified above must be and are hereby set aside.

19. The decision signed by the secretary of the respondent Tribunal issued at Port Vila in ("**Version 1**") includes the following declarations:

"Therefore, North East Efate Area Land Tribunal istap nao declarem se emi nao stret mo tru Custom Owners Malarua Land w Malarua Quarry istap insaed iko olsem:-

- 1) *Custom Owners blong Malarua Land area colored in **BLUE** we emi part blong Epua Customary Land emi Chief Raymond Morris Marangoe mo ol Descendants blong em blong Emua Village.*
- 2) *Custom Owners blong Malarua Land area colored in **YELLOW** we emi part blong Epua Customary Land emi Jimmy Kalorib mo ol Descendants blong em blong Emua Village.*
- 3) *Custom Owners long Malarua Land colored in **GREEN** we emi part blong Epua Customary Land emi Loren Bule mo ol Descendants blong em blong Emua Village.*
- 4) *Raymond Morris emi tru bloodline blong Chiefly Title ia Marangoe we hemi Sub-Ordinate Chief blong Chief Marik Nalae blong Emua mo hemi tru custom land owner long part blong Malarua Land we Malarua Quarry hemi stap long em. ..."*

20. We observe that this customary land boundary of "*Malarua land*" was **not** the subject-matter of the dispute referred by the "*custom land officer*" to the respondent Tribunal to determine. It should **not** have been considered and/or determined and such declarations are "*ultra vires*" and must be and are hereby quashed. They are also coincidentally in contempt of the highlighted Orders (1) and (2) in Supreme Court Civil Case No. 636 of 2015 (earlier set out at para. 10).

21. Earlier however in "**Version 1**" (at p.8) is the following relevant declaration that Kalsale Axem and his younger brother Philip Axem in the bloodline of Chief Matariliu and his descendants:

*"... nao oli tru custom owner blong **LAKEN'NASUA PLANTATION** we long custom oli kolem area ia **Malafakalo (Laken'nasua/Laken'nearu) or Malaraworasa** customary land ..."*

22. This declaration in "**Version 1**" in favour of the Chief Philip Axem Matariliu and his descendants may be contrasted with the declarations of the respondent Tribunal set out below in "**Version 2**" quashing the Certificate of Recorded Interest granted in favour of Chief Axem Matariliu and others over "*Malafakalo*" or "*Malaraworasa*" custom land (**see:** declarations 2 & 8) **and**, more importantly, the respondent Tribunal's substantive declaration (**No. 6**) that the Silas and Kalpat Families:

*"... nao oli stret mo tru kastom land ona blong **Tongolapa** ..." (not "*Malafakalo*" or "*Lakenasua*").*



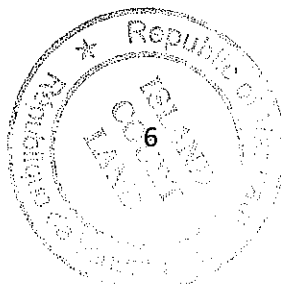
23. The subsequent declarations of the respondent Tribunal in "**Version 2**" issued at Savaki village farea are as follows (omitting non-material declarations and orders):

- "1. **Bifo North East Efate Area Lands Tribunal emi declarem Laken Nasua/Malafakalo/Tongolapa land case No. 1 of 2016 emi adressem fastaem first Judgment we Chief Robert Tasaruru Tatalele Ameara-ra, secretary blong Tribunal ia i mekem long Port Vila 27th April 2016 se, failure ia emi serious tumas from hemi actually breachem land Management Act No. 33 of 2013 procedures mo legal saed blong hem. Therefore Kot ia emi nao dismissim or quash Judgment ia.**
2. **Kot ia i deklarem tu se Green Certificate (Certificate of Recorded Interest) long Malafakalo or Malaraworasa Custom LAND North East Efate, Efae Shefa we national coordinator Customary Land Management Office Alicita Vuti i bin issuem long 3rd day of February 2017 lon name blong chief Matariliu and Descendant, Kalsale Axem, Willy, Nettie Dick Vuti, Ephraim Kaloran and Philip Axem long Shefa Province hemi finally Quash (see: Annexure "PA12" in the sworn statement of Chief Philip Axem Matariliu dated 02 August 2013).**
4. **Kot ia i declarem se Malafakalo emi wan smol barsel land we istap insaet long bik boundary blong Tongolapa.**
6. **Kot ia i declarem se, Kaltu Silas Family and Kalpat Family olgeta nao oli stret mo tru kastom land ona blong Tongolapa we i gat seven (7) farea (Nakamal) mo tu (2) Malala long em. Mark as red, green and blue. See skits map attached.**
7. **Kot ia idelcare se claim blong original claimant Philip Axem Marariliu and Family mo Touman family & desdendants i fail. ...**
8. **Kot ia i declarem se, claim blong Seken Counter Claimant, Jif Albert Douglas Manlaesinu and Emua Village Community Council i fail.**
9. **Kot ia i declarem se, claim blong 3rd Counter Claimant, Toara Kalorip and Kalorongo Kaltonga Mari-Pongi, i fail."**

(our highlighting)

24. It is clear from Declaration (1) above, that the respondent Tribunal disagreed with the decision of its secretary in "**Version 1**" viz "**Therefore Kot ia emi nao dismissim or quash judgment ia**". Furthermore, Declaration (2) purports to quash a Certificate of Recorded Interest issued in respect of "**Malafakalo or Malataworasa custom land**" (**not** Lakenasua) on 3 February 2017 in favour of Chief Philip Axem Matariliu and descendants.

25. We say "**purports**" advisedly because there is no power given in the CLMA to a "**custom area land tribunal**" to review, cancel, quash or set aside a Certificate of Recorded Interest once it has been issued and, secondly, the date of the respondent Tribunal's decision is "**27 April 2016**" which is 9 months before the Certificate of Recorded Interest came into existence. Given the above-noted declarations, we are driven to the irresistible conclusion that the date of the respondent Tribunal's decision in "**Version 2**" namely, "**27 April 2016**" is inaccurate and wrong.

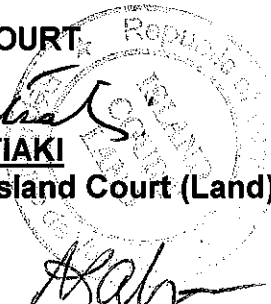


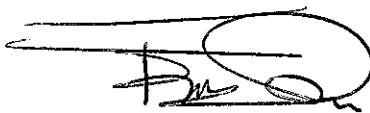
26. In similar vein, the respondent Tribunal's "**Version 2**" decision records that it conducted hearings over "8 days" whereas the secretary's "**Version 1**" decision asserts that: "... the hearing of *Lakenasua Land Case No. 1 of 2016* took '3 days'". Both could not be correct and is evidence of further significant inconsistencies and irregularity in the process undertaken in determining the customary ownership of "*Lakenasua land*".
27. When the above matters were brought to counsels' attention, all counsels agreed that the purported judgments should be quashed. Counsels were also united that the matter should be referred to a "*nakama*" and not returned to the respondent Tribunal.
28. However counsels were unable to agree on which "*nakama*" had jurisdiction over the disputed land. The appellant's counsel pushed for "*Emua nakama*"; State counsel representing the respondent Tribunal and the spokesman for the successful fourth and fifth respondent families (Silas and Kalpat) said it should be "*Malisa nakama*" in Togoraki land and counsel for the second respondent advanced "*Tasimalu nakama*" as the correct nakamal within which boundary "*Lakenasua land*" allegedly falls. In this latter instance, counsel accepted that the second respondent who is a claimant in the case, is the "*head of (Tasimalu) nakama*" and therefore it might be more appropriate in avoiding any "*perception of bias*" for the matter to be returned to the respondent Tribunal which does not suffer from the same perception.
29. Accordingly and as required in terms of Section 45(6) of the CLMA the four different "**versions**" of the respondent Tribunal's judgments disclosed in this case are all set aside and the dispute is referred back to the North-East Efate Custom Area Land Tribunal with a direction that the tribunal comply with the relevant provisions of PART 6 of the CLMA and follow the procedure outlined in Schedule 1 of CLMA. We make no order as to costs.

DATED at Port Vila, this 2nd day of August, 2017.

BY THE COURT


D. V. FATIAKI
 Judge/Chairperson of Island Court (Land)





Evelyn Nawen
 Justice of the Island Court



Allan Boblang
 Justice of the Island Court



Harry Joshua
 Justice of the Island Court



Roy Tinning
 Justice of the Island Court