

IN THE MAGISTRATES' COURT
OF THE REPUBLIC OF VANUATU
(Civil Jurisdiction)

Civil Appeal case No. 1 of 2013

BETWEEN: BEN MATARITAP

Applicant

Appellant's Lawyer:

Mary Grace Nari of NARI &
CO LAWYERS
Port Vila, Efate, Republic of
Vanuatu

AND: WILLIE WATI
WILLIE KALNASEI
WILLIE JACK TIMAU
TOM MASAMORIMATA
WILLIE TINAPUAROTO
JAMES WILLIE
FRAIRE KALO
GUILLOME ROVO

Respondents

Defendant's Lawyer:

Brian Livo of PSO
LAWYERS
Port Vila
Efate, Vanuatu

Coram: Moses Peter
Court Clerk: Florina Ephraim

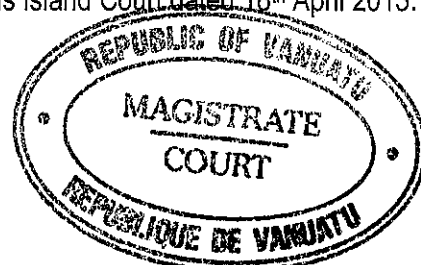
Assessors: Justice Kalfau Pakoa
Justice Joseph Charlie

Appearances: Mary Grace Nari for Appellant
Brian Livo for Respondents

Date of Hearing Appeal: 9 June 2016
Date of delivering judgment: 17th June 2016

JUDGMENT

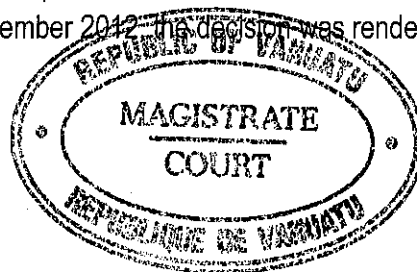
1. Appellant appealed the judgment of Tongoa/Shepherds Island Court dated 18th April 2013.
2. The grounds of appeal are that:



- 1) The Tongoa/Shepherds Island Court erred in law and its procedures by proceeding to review the judgment dated 19th September 2012 without the presence of the Appellant. He had no knowledge of the application for review of Civil Case No. 5 of 2011. He was not served any notices of such hearing.
- 2) The court erred in custom and law in allowing a person who is not ordained as Tinapuamata of Lumbukuti Village, Tongoa Island (Whose title is still in dispute in the Supreme Court) to ordain another person to the title Tinapuamata at Nambua Nakamal, Fenonge Village, Emae Island. Willie Kalnasei had no authority to ordain Joseph Wati.
- 3) The court failed to apply the correct custom process for chiefly title Tinapuamata of Fenonge Village, Emae Island.
3. The Appellant sought for orders to set aside the declarations of the Island Court in respect of chiefly title Tinapuamata of Nambua Nakamal, Fenonge Village, Emae Island, and orders to declare that proper custom process for the title Tinapuamata must be followed for the title belonging to Nambua Nakamal, Fenonge Village, Emae Island.
4. In response to the Appeal filed by the Appellant, the Respondent Willie Wati engaged Public Solicitors' Lawyers for representation. An appeal book was filed on 21st of October 2013.

5. CHRONOLOGY OF FACTS

- Parties have been disputing chiefly title Tinapuamata of Nambua Nakamal, Fenonge Village, Emae Island.
- Respondent was ordained by Chief Willie Kalnasei Tinapuamata on Emae Island on 15th June 2011.
- On same date, Mr. Philip Tarikoto applied on behalf of the Appellant to the Magistrates Court for orders to restrain Respondent from being ordained as chief Tinapuamata.
- Magistrates granted the order which was served on Respondent on 17th June 2011.
- Mr. Philip Tarikoto again filed application for contempt of court to the Magistrates Court on 19th July 2011.
- Magistrates' court issued another order on 11 August 2011, in respect to Mr. Tarikoto's application.
- The Respondent disagreeing with the orders of the court dated 11 August 2011, applied for review of the order to the Magistrates' Court.
- The Court further issued an order on 7th September 2011, which restrained Respondent from using chiefly title Tinapuamata and orders Mr. Tarikoto to file a chiefly title Tinapuamata claim in the Tongoa/Emae Island Court in 30 days from when the order was made.
- The Appellant filed a claim in the Tongoa/Shepherds Island Court which was heard on 17th to 19th September 2012. On 19th September 2012, the decision was rendered in favour of the Respondent Willie Wati.



- On 6th February 2013, the Respondent applied to Tongoa/Shepherds Island Court to have the declarations of the Tongoa /Shepherds Island Court reviewed by the Supervising Magistrates because of the inconsistencies in order 1 and order 2 of the judgment.
- The Supervising Magistrate reviewed the judgment of Tongoa/Shepherds Island Court on 10th April 2013 and amended the orders by deleting order 1 which states that the ordination of Respondent Joseph Willie Wati by Willie Kalnasei as Chief Tinapuamata is void because of the pending chiefly title dispute before the Supreme Court. Order 2, 3 and 4 remained.
- The Tongoa/Shepherds Island Court confirmed the review orders on 18th April 2013.
- The Appellant not being satisfied with the orders of the Tongoa/Shepherds Island Court, appealed to the Magistrates Court on 7th August 2013.

6. Both counsels have identified the following issues for determination by this court:

- i. *Whether the Supervising Magistrate for Tongoa/Shepherds Island Court has the power to review the Judgment of the Tongoa/Shepherds Island Court without presence of all parties involved?*
- ii. *Whether Mr. Willie Kalnasei whose chiefly title Tinapuamata of Lumbukuti is being challenged in the Supreme, can ordain Respondent Willie Wati as chief Tinapuamata of Fenonge Village, Emae Island?*

7. Law

Island Courts Act [CAP.167]

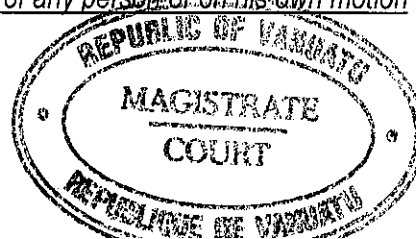
- (1) *"Subject to subsection (2) and other provisions of this Act, the civil jurisdiction of an Island Court extends to the hearing, trial and determination of all civil matters in which the defendant is ordinarily resident within the territorial jurisdiction of the court or within which the cause of action arose."*
- (2) *"An Island Court has no jurisdiction to hear and determine civil proceedings relating to land."*

Section 10 Application of customary law

"Subject to the provisions of this Act, and Island Court shall administer the customary law prevailing within the territorial jurisdiction of the court so far as the same is not in conflict with any written law and is not contrary to justice, morality and good order."

Section 21 Revision

- (1) *The supervising Magistrate of an Island Court shall at times have access to the Island Courts in his jurisdiction and to the records of such courts.*
- (2) *Subject to subsection (3), ~~on the application of any person or on his own motion~~ such supervising magistrate may-*



- (a) *Revise any of the proceedings of an island court, whether civil or criminal, and may make such order or pass such sentence therein as the island court could itself have made or passed:*

Provided that no sentence of fine or imprisonment shall be increased without first giving the accused an opportunity to be heard: (My underlining).

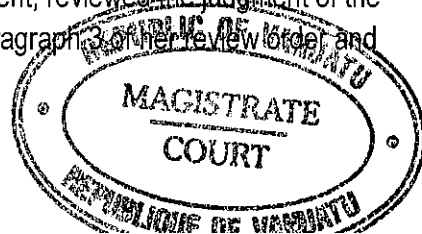
And provided further that if any such sentence shall be increased upon revision by the magistrate, there shall be an appeal from the order of the magistrate to the Supreme Court which may reduce, remit or increase any such sentence;

- (b) *Order any case to be retried either before the same court or before any other island court of competent jurisdiction for which he is the supervising magistrate or may at any stage of the proceedings, either before or after judgment has been delivered transfer any case for hearing before him.*

8. **Issue 1**

Whether the Supervising Magistrate for Tongoa/Shepherds Island Court has the power to review the Judgment of the Tongoa/Shepherds Island Court without presence of all parties involved?

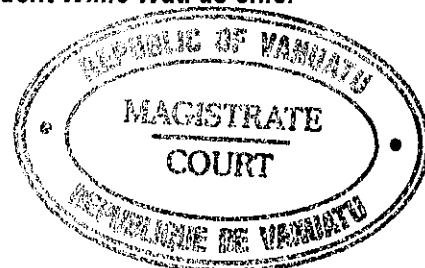
9. The Tongoa/Shepherd Island Court in its judgment dated 19 September 2012 made the following orders.
- 1) *"According to the Supreme Court order of the civil case 229 of 2004 between the claimant Morris Kalran and the defendant chief Tinapuamata of Tongoa, the Tongoa/Shepherds Island Court respects the orders which means that the ordination of the first defendant Mr Joseph Willie Wati which took place on the 15th day of June 2011 on the Island of Emae is null and void or not recognised until a final judgment is made from the Supreme Court of Vanuatu of the said pending case."*
 - 2) *In accordance to custom, the custom ordination ceremony that took place or happened on the 15 day of June 2011 on the Island of Emae in which the second defendant ordained the first defendant was proper according to custom procedures. AND*
 - 3) *The chiefly title TINAPUAMATA was not the dispute in this court, which means the Chiefly title Tinapuamata of Emae Island is still owned custom property for the Nambua Nakamal of the Fenonge Village.*
 - 4) *According to the Island Court ACT CAP 167 section 22 "if both parties are not happy about or disagree with the Island court decisions made, have the right to appeal within 30 days to the Magistrates court after receiving the final judgment".*
10. The parties were unable to understand the orders of the Tongoa/Shepherd Island Court since it appears that orders one and two respectively are contradictory to each other.
11. The Respondent through his counsel requested a review of the orders of the Tongoa/Shepherds Island Court by a letter dated 19th February 2013.
12. The Supervising Magistrate on the letter of the Respondent, reviewed the judgment of the Tongoa/Shepherds Island Court, which she stated in paragraph 3 of her review order, and



which she referred to the orders of the Supreme Court in regards to chiefly title dispute of Tinapuamata of Tongoa that *"this order is clear and it does not stop the chief to exercise his role as chief but the order has stopped him from completing the ceremony on the matter in Tongoa of which the case is in the Supreme Court. This is only for that particular case."*

13. The Supervising Magistrate having said that, ordered the Tongoa/Shepherds Island Court to amend the orders by deleting order 1 of the orders, and accepting orders 2, 3 and 4 to remain.
14. The Tongoa/Shepherds Island Court complied with the orders of the Supervising Magistrate and amended the previous orders on 18th of April 2013 by deleting order 1 of the initial judgment.
15. The Supervising Magistrate in reviewing the orders of the Tongoa/Shepherds Island Court was acting on the provisions of section 21 of the Island Courts Act [CAP.167]. While Rule 10 of the Island Court Rules of 2005 provides for clerks to make arrangements with Supervising Magistrate of an Island Court to revise decision of Island Court at interval of not more than 3 months, the Respondent in this case identified the inconsistencies in the judgment and sought for rectification from the Supervising Magistrate pursuant to the provisions of section 21 of the Island Courts Act.
16. The senior Magistrate considered the letter of request to review the decision of the Tongoa/Shepherds Island Court, and made the orders. The Respondent was not present in the review.
17. Section 21 (2) empowers the Supervising Magistrate to revise a decision of the Island Court. The Supervising Magistrate can act on an application of a person or on his/her own motion, and make orders or pass sentences which the Island Court could have made or passed.
18. This relevant section of the Island Courts Act only stipulates that the Supervising Magistrate upon increasing sentences of fine or imprisonment must first give an opportunity to the accused to be heard. There is no specific provision for civil cases on review.
19. The court is of the view that the Supervising Magistrate reviewing the orders of the Tongoa/Shepherds Island Court has acted within the provisions of section 21 (2) of the Island Courts Act and whether parties are present not present is immaterial. Therefore, this ground fails.
20. **Issue 2**

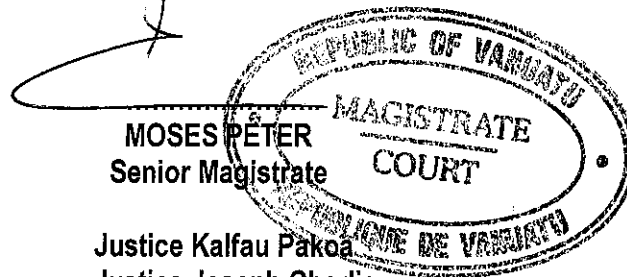
Whether Mr. Willie Kalnasei whose chiefly title Tinapuamata of Lumbukuti is being challenged in the Supreme Court, can ordain Respondent Willie Wati as chief Tinapuamata of Fenonge Village, Emae Island?



21. As I have discussed in the preceding ground that the Supreme Court recognises Willie Kalnasei acting himself in the capacity of Chief Tinapuamata, however, he is restrained from performing rituals and for perfecting or completing the custom process of chiefly title Tinapua which is a dispute before the Supreme Court.
22. He has been recognised as chief Tinapuamata of Lumbukuti and has engaged himself in many custom ceremonies until the chiefly title dispute was challenged in the Supreme Court. He has ordained head chief under his nakamal in Tongoa Island.
23. I see no reasons why Willie Kalnasei as Chief Tinapuamata of Tongoa cannot ordain Joseph Willie Wati as Chief Tinapuamata of Emae Island.
24. Needless to say, the chiefly title Tinapuamata of Tongoa which was in dispute before the Supreme Court has been struck out for want of jurisdiction and the Claimant before it is asked to file his claim before the Tongoa/Shepherds Island Court.
25. As to which place the custom processes require for such ordination to be performed, the court is satisfied that the ordination can be performed at any of the two Islands i.e. Emae Island and Tongoa Island. This ground must fail also.
26. The court therefore orders that:
 1. Appeal is dismissed.
 2. Cost for Respondent to be taxed if not agreed.

Dated at Port Vila this 20th day of June 2016

BY THE COURT



MOSES PÉTER
Senior Magistrate

Justice Kalfau Pakoa
Justice Joseph Charlie
(Assessors)