

**IN THE SUPREME COURT OF
THE REPUBLIC OF VANUATU**
(Land Appellate Jurisdiction)

Land Appeal Case No. 076 of 2007

BETWEEN: FAMILY UTISSETS
Appellant

AND: TOLSIE AWOP and FAMILY
First Respondent

AND: DADDEE LAPENMAL
Second Respondent

AND: CERILO LAPEMAL
Third Respondent

AND: FAMILY LOLINMAL
Fourth Respondent

AND: MARCEL SARONGNEE
Fifth Respondent

AND: JEAN CLAUDE MULUANE
Sixth Respondent

AND: FAMILY BAIPA
Seventh Respondent

AND: JOSHUA KEN
Eight Respondent

AND: FAMILY LESINES
Nineth Respondent

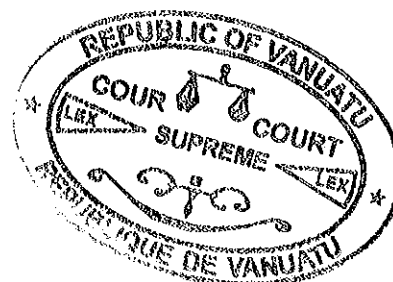
AND: FAMILY KILETEIR
Tenth Respondent

Coram: Justice D. V. Fatiaki

Counsels: Mr. C. Leo for Daddee Lapenmal
Mr. S. Stephen for Family Utissets
Mr. D. Yawha for Family Lolimnal
Mrs. M. G. Nari for Family Tolsie Awop

Date of Ruling: 9 December 2011

RULING



1. This is an appeal against a decision of the **Malekula Island Court** in **Land Case No. 10 of 1984** which was delivered on 15 October 2007 and concerned custom land known as "**Amelprev**" situated at Rano in North East Malekula.

2. The decision of the Island Court was in the following terms:

"1. The First Respondent Tobie David and Family be custom owner of the Land of Amelprev as advertised therein;

2. That the claim by Jean Claude Muluane is dismissed;

3. That all other parties to the case (including the Appellant) have the right to use the land. Such granted right is given effect in light of the fact that Claimant to the land have for many years caused development to it. It is for that reason that they will maintain their existing properties but are subject to the authority of the declared custom owners of the land.

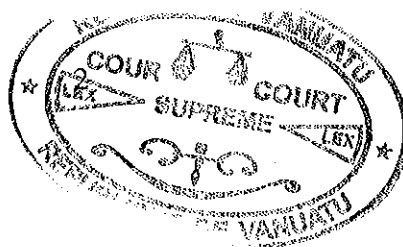
For ease of clarity, it is noted that some parties have no properties in their respective claimed land. The conferred rights will not mean that they are now given the mandate to use such save in consultation with the owners."

3. At the outset, I observe that the wording of **Order (3)** and the clarification (above) is unfortunately unclear and gave rise to a multiplicity of allegations and counter-allegations and a flurry of competing urgent applications for stays and restraining orders. In some instances, the parties even became involved in physical confrontations which required police intervention.

4. Be that as it may several of the unsuccessful claimants in the Malekula Island Court lodged appeals against the above decision including **Family Daddee Lapenmal** (originally represented by Mr. S. Joel and later by Mr. C. Leo), **Family Utissets** (Mr. S. Stephens) , **Family Kileteir** (Messrs. Ridgway Blake). At a later stage **Family Lolinmal** was represented by D. Yawha but has not really participated in the case.

5. Finally and with the agreement of counsels the Court issued Consent Orders on 19 November 2009 restraining all parties to the original Land Case No. 10 of 1984 with a view to maintaining the status quo pending the determination of the appeals.

6. Written responses and submissions were ordered from counsels and these were filed after some time.



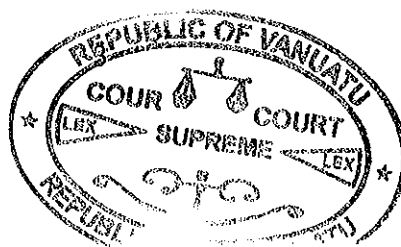
7. As part of the relevant history of these proceedings which were instituted in 2007, I note that the appeals of Family Lapenmal were struck out and reinstated by **Dawson J.** and, likewise, the appeal of Family Utissets was struck out by **Butler J.** and eventually reinstated by this Court.
8. Although the responses and written submissions related generally to all grounds of appeal filed by appellants and the respondents' opposition to the appeals, with the agreement of the parties the common ground of appeal alleging apprehended bias against the presiding magistrate was isolated to be dealt with first as a discrete preliminary issue that could be determinative of the appeal in the event that it was upheld by the Court.
9. The specific appeal ground(s) alleging bias against the presiding Magistrate in the Malekula Island Court reads as follows:
10. In **Daddee Lapenmal's appeal:**

*"**Ground 6:** The presiding magistrate in this land matter resided wrongly and in biased circumstances at the same village of the spokesperson (Elseim Utissets) of the respondent Tolsie Awop and Family during the entire duration of the hearing";*

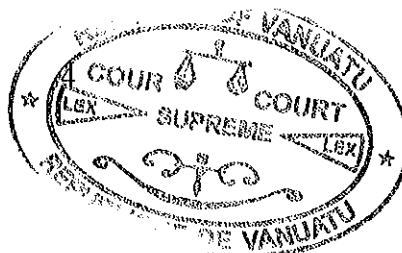
and in **Family Utissets' appeal** (as amended)

*"**Ground (b):** the presiding magistrate in this land matter had been residing with Mr. Elseim Utissets spokesman for Tolsie Awop and family throughout the entire duration of the proceeding in the Land Case No. 10 of 1984 and at the conclusion of the case passed judgment in their favour."*

11. In separating this ground of appeal from the remaining grounds which address the merits of the Island Court decision, this Court was of the view that this was a discrete legal factual issue which could be determined by the Court without the assistance of assessors. Certainly none of the counsel representing the parties objected to this course of dealing with the matter and, although counsel for the first respondent (Mrs. MG Nari) objected on the basis that it would unnecessarily prolong the hearing of the appeal, nothing was said about the composition of the Court or the jurisdiction of the Court to determine that limited and narrow issue without assessors.
12. In the result I proceeded to hear evidence in Court from various witnesses called by the parties in support of and in opposition to the ground of bias of the presiding magistrate in the Malekula Island Court.



13. The witnesses whose sworn statements were relied upon and called and cross-examined at the hearing of the bias ground were:
- **Daddee Lapenmal** (called by C. Leo);
 - **Wilfred Utissets** (called by S. Stephens);
 - **Elseim Utissets** and **Bernard Lapenmal** (both called by Mrs. MG Nari).
14. Written submissions were also ordered and these were finally concluded in March 2011 when the matter was adjourned for ruling.
15. Since that adjournment, the Court of Appeal has delivered its decision in **Matarave v. Talivo** [2010] VUCA 3 and, more recently, in **Bule v. Tamtam & Others** [2011] VUCA16.
16. In the **Matarave's** case which also concerned an appeal from an Island Court decision, the Court of Appeal found that "... *apprehended bias on the part of the judge (who presided with 2 assessors at the hearing of the appeal) has been established*" and the Court, without dealing with the merits of the appeal, "*declared the decision void*" and directed "... *that the appeal from the Santo/Malo Island Court be returned to the Supreme Court to be heard afresh by another judge and assessors*".
17. In **Bule's** case an order was made by a single judge of the Supreme Court which dismissed an appeal against the decision of an Island Court in **Land Case No. 2 of 2009** on the basis that counsel for the appellant was not present despite having received adequate notice of the hearing date. The effect of the order for dismissal was to finally determine the appeal albeit not on its merits.
18. The Court of Appeal allowed the appeal:
- "... on the basis that a single judge sitting as the Supreme court does not have jurisdiction to finally determine title to custom land. Jurisdiction to do so, as this Court has previously held, can be exercised only by a Supreme Court judge sitting with 2 assessors."*
19. The above decisions effectively renders the approach taken by this Court in dealing with the bias issue in the absence of assessors as irregular and doomed to failure in the sense that, if this Court should uphold the appellant's complaint of apprehended bias on the part of the presiding magistrate, then, that would dispose of the appeal and the case would have to be returned to the Malekula Island Court to be reheard before a different presiding magistrate and two assessors.



20. I very much regret this result after all these months when the decision on this appeal has been pending, but, it is preferable that the hearing and determination of this appeal should be undertaken and completed by a properly constituted Court, comprised of a judge sitting with two assessors knowledgeable in custom, rather than, by allowing this preliminary issue (which itself requires findings of fact to be made on disputed evidence), to proceed to a conclusion under a defective procedure that the Court of Appeal has already twice-ruled that a single judge has no jurisdiction to exercise.
21. Accordingly, I decline to give a ruling on the apprehension of bias ground as already heard and argued, and order that the entire appeal be reheard after 2 assessors knowledgeable in custom have been appointed to sit with me.
22. By way of further directions and with a view to bringing this matter to an early conclusion I direct:
- (1) The Chief Registrar with the assistance of the Malekula Island Court Clerk to appoint 2 assessors to assist this Court at the hearing of this appeal not later than **20 December 2011**;
 - (2) That the parties prepare and submit 4 properly bound, tabbed and indexed volumes of the grounds of appeal, sworn statements in support (with English translations) and written submissions that each relies on in this appeal by **13 January 2012**;
 - (3) That this appeal be adjourned for review on **20 January 2012 at 9.00 a.m.** to fix a hearing date during the first Malampa Circuit of this Court in **February 2012**.
23. Given the quite unexpected result that this matter has taken I make no order as to costs.

Dated at Port Vila, this 9th day of December, 2011.

BY THE COURT


D. V. FATIAKI
Judge.

