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

Land Appeal Case No. 01 of 2010

IN THE MATTER OF: **MALASA CUSTOMARY LAND**

AND

IN THE MATTER OF: **An Appeal from Efate Island Court Land Case No. 1 of 1990**

BETWEEN: **CHIEF HENRY MANLAEWIA**
First Appellant

AND: (FAMILY MAALU) **CHIEF MANAVILALU and CHIEF LAKELEOWIA and Descendants**
Second Appellant

AND: **CHIEF SIMEON PETER MARIPOPONGI and Descendants**
Third Appellant

AND: (FAMILY VAMELE) **CHIEF MARIPONGI FAMILY and FAMILY TANMIALA**
Respondent

Before:	***Justice D. V. Fatiaki*** ***Assessor 1 – Chief Kas Kolou*** ***Assessor 2 – Chief Arvy Kaltavara***
In Attendance:	*Counsel – MNF Patterson for the First Appellant* *Counsel – B. Kalotiti for the Second Appellant* *S. Kaltoi and R. Tasaruru for the Third Appellant* *Counsel – W. Daniel for the Respondent*
Date of Delivery:	*30 November 2018*

JUDGMENT

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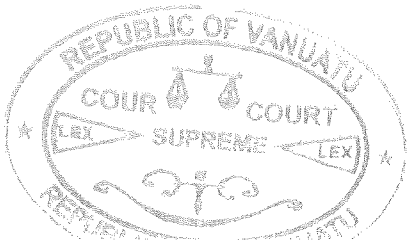
1. In a 32 page typewritten judgment in **Land Case No. 1 of 1990** the Efate Island Court ("EIC") comprised of the late Senior Magistrate Rita Bill Naviti and three (3) Island Court justices declared the customary ownership of "*Malasa land*" in favour of: "*Chief Maripongi & Family Tanmiala*" (**Counterclaimant No. 2**).



2. The EIC also recognized the Chiefly title "*MANLAEWIA*" (albeit under Chief Maripongi) with "*reign mo government*" over part of "*Malasa land*" (**Counterclaimant No. 1**). In this regard the EIC observed:

> "*... se Henry Manlaewia hemi custom ruler blong Malasa. Title Manlaewia hemi never stop blong work/reign. Hem nao hemi take care long bigfalla boundary blong Malasa within Tanmiala Kastom boundary*".

and in its final declarations the EIC declared:

> "*Dekleresen Tree:*
>
> *"MANLAEWIA" hemi title blong chief we ireign since establishement blong Paunagisu kasem tudei mo who ever we iholem title ia hemi should rule under Chief Maripongi. ...*
>
> *Henry Cyrel hemi gat perpetual rights over long olketa lands we Cyrel mo Ann irrecievim followem custom. Lands blong Solomon ishould go long Morrison mo ol boys blong Thomas: Shem mo Kalo; under long care blong current Henry Cyrel Manlaewia III*".

3. In the foregoing declaration(s) the EIC mentions the concept or position of a "*custom ruler*" who takes care of and reigns over a piece of land (within a larger customary boundary) without being declared its customary owner. The concept may be relevant in a consideration of a hierarchy of chiefly titles and governance of a chiefly domain but, in our view, it is irrelevant in the determination of the ownership of customary land and merely serves to confuse primary principles of land tenure and succession which follows the patrilineal bloodline from the original settlor on the land without reference to any chiefly title(s).

4. In similar vein the EIC recognized the chiefly titles of the original claimant (MAALU Family) namely: "*MANAVILALU*" and "*LAKELEOWIA*" (also subject to Maripongi) with "*perpetual rights*" over unidentified small areas within "*Malasa land*" which were acquired during the establishment of "*Paunangisu*". However their claim to customary ownership of "*Malasa land*" (unlike the first appellant's) was clearly rejected ("*ino save succeed*") by the EIC.

5. Although partially successful in their claims, the above-named counterclaimants appealed against the decision of the EIC along with Family Simeon Peter Maripopongi (**Counterclaimant No. 4**) whose claim was dismissed altogether by the EIC. In doing so, the EIC noted that:

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"... oli no klemem kastom rait blong pipol blong Malasaliu (Malasa) be oli wantem klarifaem samfala point long issue blong Malasaliu baondri we istap".

In the absence of a claim to customary ownership of "*Malasa land*" we agree with the EIC that this counterclaimant lacked a sufficient locus to be heard in the dispute before the EIC. The dismissal of this claim was plainly correct.

6. Be that as it may their claim was considered and the EIC was greatly assisted by this counterclaimant in its understanding of the relevant applicable customary land tenure principles as follows:

"... se long taem befo. ***Chiefly title hemi pass through long Naflac. However land hemi pass through long man (Male) ... so kastom owner blong land hemi followem blood line blong man.***

Taem big Jif hemi givim out land igo long olketa head blong tribe mo klan, lands ia oli become land blong tribe ia or klan".

and concerning traditional chiefly authority:

"*Insaed long each land kastom owner hemi ordainem olgeta chieves blong olgeta naflac we oli existe insaed long marae blong then hemi allocate "Siloa" blong each chief wetem jurisdiction blong ruling blong hem mo newly ordained chief ijust allocatem lands we olketa people blong hem oli needim blong work long.* ***However land hemi remain blong original kastom owner***".

7. Despite the EIC's recognition of the separate customary ownerships of the above-named Counterclaimants 1 & 2 and the original claimant of "*Malasa land*" and its constituent parts, the EIC made four general "*observations*" about "*Malasa Land*" as follows:

> "***1. MALASA land hemi part blong TANMIALA;***
> ***2. Ownership blong hem imust followem blood blong man TANMIALA;***
> ***3. Insaed long disputed land igat overlap blong EMUA igo long MALASA; mo***
> ***4. Insaed long MALASA land igat 2 part: MALU mo NAWI".***

8. If we may say so it is unfortunate that the EIC made those observations as "*TANMIALA*" land was <u>not</u> the subject matter of the dispute before the EIC and such observations clearly coloured the eventual declarations that the EIC made about "*MALASA*" land. In particular, <u>Observations 1 & 2</u> was <u>not</u> common ground between the parties and are based on conflicting evidence which is neither discussed nor resolved in the judgment of the EIC. Neither

did the EIC unequivocally declare that Chief Manlaewia's claim to ownership of "*Malasa land*" was unsuccessful ("*ino save succeed*").

9. For instance, what is meant or to be understood by Observation (1) – does it mean that "*Malasa*" is not recognized as a separate customary land boundary at all? and if so, what is it? a village? or a "*tabu*" place? and how then is it possible for the EIC to grant customary ownership of "*Malasa* (a village or "*tabu*" place) to Chief Maripongi & Family Tanmiala without also declaring the ownership of "*Tanmiala*"?

10. However, if "*Malasa*" is a separate customary land boundary capable of being owned as Observation (2) appears to suggest, then why does its ownership depend on the bloodline of a different and separate chiefly title (Maripopongi) with its own customary land boundary (TANMIALA)?

11. It may well be that there is a traditional hierarchical relationship existing between the chiefly titles of "*Manlaewia*" and "*Maripopongi*" but that does not, in our view, necessarily exclude or deny the separate existence of the "*Malasa*" customary land boundary which is clearly defined in the EIC judgment and bounded on the north eastern side by the sea coast facing Kakula Island and within its boundary is to be found the settlement or village of "*Paunagisu*".

12. Indeed if, as the EIC observed "*Malasa*" was not a separate and distinct customary land boundary, then, the proper course to take was for the EIC to dismiss the claims altogether and refuse to make any declarations about an area of land or customary boundary which had no separate existence from the larger customary land boundary of "*Tanmiala*" and direct the claimants to issue fresh claims to "*Tanmiala*". The fact that the EIC declared the customary ownership of "*Malasa*" in favour of the respondent speaks volumes of its separate existence as a recognized customary land boundary capable of being owned.

13. Neither has the EIC attempted to clarify the connection or difference (if any) that exists between the chiefly titles: "*MARIPONGI*" and "*MARIPOPONGI*" after it had allowed the latter to join the case three (3) days after the trial had commenced. It was not just a matter of different spellings. The third appellant ("*Maripopongi*") didn't claim customary ownership or rights over "*Malasaliu (Malasa)*" land, yet, the respondent with a similar sounding name ("*Maripongi*"), did claim ownership of "*Malasa*" land. The confusion is obvious and material.

14. The failure to clarify this matter is also unfortunate because with the belated admission of the third appellant Chief Simeon Peter Maripopongi as a claimant in the case, the EIC unwittingly enabled an on-going dispute between the third appellant and the respondent over the "*MARIPOPONGI*" chiefly title to become embroiled in the dispute concerning the custom ownership of "*Malasa*" land which was the substantive dispute before the EIC in Land Case No. 1 of 1990.

15. It is doubly unfortunate that Justice Ann Carlo who was sitting as an assessor in the present land claim in November 2009 and, who had earlier sat in the "*Maripopongi*" chiefly title dispute in Civil Case No. 54 of 2002 in May 2003 where the EIC invalidated the respondent's 1996 ordination with the title "*MARIPOPONGI*" and returned the title into the possession of the third appellant family (***see:*** [2003] VUIC 4), did not see fit to intervene in the present claim and require the respondent to revert to the name that it originally used in registering its counter-claim namely: "*FAMILY VAMELE*".

16. In our view, with hindsight, the present case should not have been allowed to continue without the parties names being clarified and/or altered so as to avoid any possible misunderstanding or confusion over the chiefly title "*MARIPOPONGI*" entering into the EIC's deliberations and declarations.

17. Needless to say it was always common ground that the title "*MARIPOPONGI*" is inextricably bound with the chiefly governance and customary ownership of the "*Tanmiala*" customary land boundary and therefore, once the EIC formed the view that: "*Malasa land hemi part blong TANMIALA*", it was a small step for the EIC to then declare either one of the counterclaimants using the name "*Maripongi*" (respondent) or "*Maripopongi*" (third appellant) to be the custom owner of "*Malasa*" land as it eventually did in the respondent's favour by default.

18. We also note that the original claim of the second appellant was lodged by "*Family Maalu*". It later unilaterally changed its name in a letter dated 14 September 2007 to the EIC clerk to: "*Chief Manavilalu/Lakeleowia and descendants*". As to why that occurred or was allowed is unclear and is itself confusing, in so far as this was never a chiefly title dispute and the accepted basis for chiefly succession ("*... through long Naflac*") is dissimilar to land ownership which "*... followem bloodline blong man*" (patrilineal). By this change two (2) chiefs and their descendants were now claiming "*Malasa land*" as opposed to the original unitary "*FAMILY MAALU*" from which they are both derived.

19. Likewise the successful respondent which commenced its claim under the name: "*Family Vamele*" unilaterally changed its name to: "*Chief Maripongi Family and Family Tanmiala*" when it was common knowledge that "*Tanmiala*" is not a family name and the chiefly title: "*MARIPOPONGI*" was vigorously disputed by the third appellant whose family had two (2) Island Court decisions in its favour regarding the title in 2003 and 2005 and where the first witness of the respondent family namely Kalorong Kaltonga was an unsuccessful claimant to the title and therefore presumably disqualified from claiming ownership of any land under the "*Maripopongi*" title.

20. Be that as it may the first appellant's amended grounds of appeal filed on 21 May 2011 contains no less than eleven (11) separate grounds as follows:

"1. The Appellant has the right to appeal to the Supreme Court from a decision of the Island Court under section 22 of the Island Court Act [CAP 167] if aggrieved by the decision of the Island Court.

*2. **The Island Court ("The Court") erred in law** in allowing Mr Kalfau Kennedy to present a claim as representative of Family Simon Peter Maripopongi as Counter claimant no 3 and to start his case right away as witness after the Court hearing had started for 3 days <u>without</u> giving an opportunity to the other parties in the Case to respond to the counter claimants no 3's claim breaching the rights of natural justice of the other parties.*

*3. **The Court erred in law** and in fact in allowing Counter claimant no 2 to present a claim in this case on behalf of the Chief Maripongi and Family Tanmiala.*

*4. **The Court erred in fact and in law** in accepting Family Simon Peter Maripopongi as counter claimants no 3 in presenting a Claim in this case and presenting themselves under the title and name Maripopongi in breach of the Island Court Judgment of 6 May 2005 (confirming the substantive decision of Case No 1) in Civil Case No 16 of 2005 (**"Case no 2"**) against Kennedy Kalfau, Johnson Kalfau Kala, Erick Tom, chief Abel Amera and Peter Henry Kala, members of the group of the counter claimant no 3 who appointed illegally Peter Henry Kala as chief Maripopongi in the Case. ...*

*5. **The Court erred in law and fact** in failing to consider that in fact the real representatives of the Chiefly title Maripopongi have never lodged a Claim on Malasa Land in this case and in other cases:*

*6. **The Court erred in fact and in law** in not taking into account the advice and experience of the assessors: Anne Kalo, one of the assessors was part of Island Court Case no 54 of 2002: Family Maripopongi v Kaltong [2003] VUIC 4 and was part of the Cases 1 and 2 as assessor. The case of 2002 declared that The Counterclaimant No 2, Kalorong Kaltonga's ordination as Chief Maripopongi in 1996 was invalid ... and therefore removing his ground to lodge a claim in this case.*

*7. **The Court erred in fact and in law** in ignoring the facts contained in the evidence presented by Chief Henry C. Manlaewia in his statements even though the Court found Chief Henry C Manlaewia to be a person of high responsibilities and of good attitude and with "toktok blong hem igat weight".*

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8. ***The Court erred in fact and law*** *by ignoring the successive decisions of the Chiefs Councils all taking similar decisions against the Counterclaimant No 2 in favour of Chief Henry C. Manlaewia and his family as custom owners of Malasa land ...*

9. ***The Court erred in law in ignoring the former decisions of the Island Court*** *on the same subject matter contradicting the former decision ...*

10. ***The Court erred in Custom Law of North Efate and in facts***

    (i) *In stating that the inheritance of a boundary goes through the clan and not the blood and contradicted itself in the Judgment. (ex. paragraph 8 of page 3) and &2 of page 21 and distinguishing between the ownership of land being transferred by blood and the chiefly title by clan when both are transferrable by blood line and*

    (ii) ***in stating that the custom land of Malasa was under and part of Tanmiala***

    (iii) ***in stating that the title of Manlaewia is under the Chiefly title of Maripopongi*** *and that in fact they were 2 paramount chiefs for Pangarisu which is contrary to the custom of Efate.*

    (iv) *in finding that "Whoever rules with the title Manlaewia" rules under the Chief Maripopongi by ignoring the evidence presented by Chief Henry C Manlaewia and the real representative/guardian of Tanmiala/Maripopongi title never claimed Malasa.(pre-independence deeds of sale, Missionaries records and different ordinations and decisions of Malfatumauri and Vaturisu Councils of chiefs). In declaring that* ***"There was enough evidence to declare that chief Manlaewia was the custom ruler of Malasa",*** *as in Custom you cannot rule on the land of another man or chief in Custom and therefore the only declaration the Court could make was that Chief Malaewia was the Custom Owner of Malasa.*

    (v) ***when declaring that Chief Manlaewia had claimed in this case as an individual called Cyrel ignoring the Chiefly structure*** *ie: that he was given the birthrights of the Chief Manlaewia in 1976 by the former Chief, Solomon Manlaewia , his grandfather while his uncle was still alive in the presence of most of the Claimants in this case from the Yam Clan (etc...) and that this ordination as Paramount Chief had never been challenged.*

    (vi) ***In breach of the Custom Law as defined in the decisions of the Chiefs councils*** *and in Efate Vaturisu Kaonsel blong Jifs Efate Vaturisu Kastomari Loa dated 2007*

11. ***The Court erred in law and facts*** *in accepting on the balance of probabilities the family trees of the Second and Third Counterclaimants as the evidence was not strong and as the Island Court in the 2 cases above of 2002 and 2005 had found that the evidence was not strong and was incomplete".*

21. On 16 September 2011 the first appellant added an additional ground of appeal as follows:

"*12.* ***The Court erred in law and in fact*** *in changing the name of the second counterclaim from the name: "Family Vamele" to "Chief Maripopongi Family and*

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Family Tanmiala" without any application from the second counterclaim in the final judgment. The name Family Vamele was the name used during Land Case No. 1 of 1990. ***By changing the name without any legal basis of the second counterclaim this judgment grant the title Maripopongi to the second counterclaimants.*** *This decision was outside the boundary of the land case*".

(our highlighting)

22. It is clear from the first appellant's Grounds (1) to (6) and (12) that they are directed at the late involvement of the third appellant at the hearing before the EIC and the unauthorized changes that were allowed to occur in the description of the respondent in direct conflict with earlier decisions of the EIC in favour of the third appellant. Whilst there is merit in these complaints the fact remains, that this case is not about a chiefly title dispute and, in any event, the third appellant was entirely unsuccessful before the EIC. Additionally the first appellant has had every opportunity provided it by this Court, to respond to the appeal by the third appellant.

23. The second appellants who were also partly successful before the EIC, lodged an appeal with grounds that are slightly shorter as follows (dated 11 July 2009):

"*1.* ***That the Efate Island Court did not thoroughly examine the evidence*** *that were being admitted before the court and weight them against the principles of customary land tenure of the Island of Efate.*

2. Efate island has a written customary law codifies all the norms that regulate the practice of customary land tenure. This law was being produced by the Efate Vaterisu Council of Chiefs. Such law was made under the auspicious of Article 73, 74 and 75 of the Vanuatu Constitution. ***Under that law, the principles of land tenure is being twighted*** *(sic)* ***with the chiefly system that governs over a customary land territory. They cannot be separated from each other. Under that law, people own land according to the hierarchy of the chiefly system. On top of the hierarchy, you have the Paramount Chief who owns the boundary of a customary land territory. Under the Paramount Chief, you have the head chiefs who can be more than one, who are being responsible to govern different parts of the customary land territory of the Paramount Chief.*** *Under the head chiefs then you have assistant chiefs who assisted the head chiefs. Under the assistant chiefs, you have the head of the clan and their members of the clan. The way land is being distributed within a customary land territory runs along that patterns of custom land tenure. So people would only gain land rights according to that category that they belong to.*

3. ***In custom of Efate, people cannot own land according to the tribal system known as naflak****. Therefor such declaration by the Island Court that Malasa is siloa or belongs to the tribe of naflak Nawi is erroneous in custom. In the custom one head Chief has only one Malala (Nakamal) it would be error in custom of Efate to state that one head chief had two Malala.*

4. ***The Efate Island Court made a confusion in regards to family trees****, when it stated that Manlaewia, Manavilalu and Marvatutipua originated from the same family tree. Manlaesinu is from Emua, and he did not exist in the family tree of*

Chief Manavilalu/Lakeleowia & Descendants. Chief Manavilalu/Lakeleowia & Descendants had never rejected Keith Kalmar Marvatutipua, they have included them in their history. According to custom, Chief Marvatutipua is only a subordinate chief and so he cannot claim the full boundary".

(our highlighting)

24. Despite the appeal grounds which only challenges the declaration of ownership in favour of the respondent, the second appellant's written submissions clearly recognizes and accepts that the first and second appellants are "*... related and connected ...*" and "*... the first appellant is part of Malasa Land Boundary ...*" but like the respondent's claim, counsel submits "*... the first appellant is a lesser chief of the second appellant*" who apparently ordained the first appellant. Counsel verbally confirmed the close ties between the first and second appellants at the hearing of the appeal when in answer to questions from members of the Court counsel said: "(they) *are one family*".

25. The third appellant who had not claimed "*Malasa land*" and who was completely unsuccessful before the EIC nevertheless filed the following grounds on 11 February 2015. Their standing to appeal as a "*... person aggrieved by an order or decision of an island court ...*" must be considered doubtful if non-existent. Be that as it may its grounds of appeal are:

"1. *The Island Court erred in facts and law in declaring that Chief Mari-pongi Family and Family Tanmiala represented by Kalorong Kaltonga of Paunagisu Village, North Efate in the Republic of Vanuatu is the custom owner of Malasa land (boundaries coloured in PINK & YELLOW) which covers including Paunagisu village;*

2. *The Island Court erred in facts and law* ***in not taking into account the advice of the experience of the assessors: One of the assessors (Justice Ann Carlo) who participated in the decision of the Island Court Case No. 54 of 2002 relating to Chiefly Title Mari-popongi****, Paramount Chief of Tanomiela; Family Peter Mari-popongi v. Kalorong Kaltonga. The Chiefly Title Case NO. 54 of 2002 declared that Kalorong Kaltonga's ordination on Friday 17 May 1996 as Chief Mari-popongi was invalid.* ***This decision removed Kalorong Kaltonga grounds to lodge a claim on Malasa land case.***

3. *The Island Court erred in facts and law in that Chief Kalorong Kaltonga was ordained with the Chiefly title "MARI-PONGI" on Friday 17 May 1996 and NOT "MARI-POPONGI".*

4. ***The Island Court erred in facts and law in deciding that Chief Kalorong Kaltonga Mari-pongi who ordained as the Paramount Chief of another custom governance area of TAREANG on Friday 17 May 1996 to become the custom land owner from Malasa land.***

5. *The Island Court erred in facts and law* ***in ignoring the former decisions of the Island Court on the same subject matter*** *contradicting that former decision of the Island Court that:*

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a) *The Ordination of Kalorong as Chief Mari-popongi on Friday 17 May 1996 was invalid and*

b) *That the title Mari-popongi was under the responsibility of Tukurau Pielau Peter Simeon MARI-POPONGI, the wife of late Peter Simeon MARI-POPONGI and their adopted son Harry Simeon Peter and adopted daughter Lucy Peter.*

6. *The Island Court erred in facts and law in that CHIEF MARI-PONGI's BROTHER is NAMELE and they have one sister whose name is TURITA.*

7. *The Island Court erred in facts and law in its finding that the family tree of Kalorong Kaltonga as Chief MARI-PONGI in this case incomplete and that Kalorong Kaltonga's statement is misleading, contradictory and could not be believed.*

8. ***The Island Court erred in facts and law in ignoring the Ordination of three Chiefs of Paunagisu Village on 16 January 1968*** *and the custom ceremony was properly documented by Kalfau Johnson Atavi-rua, the assistant chief to Chief Mari-popongi of Tanomiela and assistance chief of Tangaraspokasi of Suasu.*

9. *The Island Court erred in facts and law in finding that Peter Mari-popongi whose father is Chief Simeon Mantaura Tapangtamate, Paramount Chief of Suasu whose wife is Chief Tukurau Taliemaire, Paramount Chief of Tanomiela and they had no offspring so they adopted five (5) children, namely Tasaruru, Dick Kalmer, Leitonga, Varlet and Henry.*

10. ***The Island Court erred in facts and law in not properly assessing the custom rights of Chief Simeon Mantaura Tapangtamate as the Paramount Chief of Suasu and his wife Tukurau Taliemaire Mari-popongi as the Paramount Chief of Tanomiela.***"

(our highlighting)

26. It is clear that the third appellant's grounds of appeal are almost entirely concerned with the chiefly title "*Maripopongi*" and its improper claim and assignation to the successful respondent when prior decisions of the Efate Island Court made it clear that the so-called ordination in 1996 of Kalrong Kaltonga (the first witness for the successful respondent) with the chiefly title "*Maripopongi*" was invalid. The uncertainty and confusion surrounding the titles and their spelling as: "*Maripopongi*" and "*Maripongi*" remains unresolved. We nevertheless observe that the preponderance of the evidence led before the EIC favours the spelling: "*Maripopongi*". We note in this latter regard, that the submissions of the respondent's counsel treats both names and "*Mariki Pog*" as interchangeable alternatives.

27. At the outset we observe that many of the grounds of appeal are similar in their complaint and thus to avoid repetition, we propose to deal with all the grounds of appeal under the following headings or questions:

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(A) Is "*Malasa*" a separate and different customary land boundary from "*Tanmiala*"?

(B) Is Chief Manlaewia merely a "*custom ruler*" of "*Malasa*" land under Chief Maripopongi or is he also the customary land owner of "*Malasa*"?

(C) Did the EIC properly and fully consider all the evidence led before it by the appellants?

(D) Does the EIC declaration in the respondent's favour correctly follow relevant customary principles?

28. As for question (A) and (B): Respondent's counsel in seeking to uphold the EIC's decision submits:

> "*There is so much material evidence and prove* (sic) *in the Island Court that Malasa is contained within the custom boundary of Tanomiala and is part of the custom land whose custom owner is Chief Maripongi or Maripopongi*".

29. Other than a reference to the decision of the EIC in **Land Case No. 10 of 1984** concerning the ownership of "*Kakula Island*" and to a Trust Deed dated 14 June 1882 vesting certain identified lands in North Efate in the New Hebrides Mission Synod of the Presbyterian Church of Victoria "*as ... trustee*", no other "*material evidence*" or proof has been identified in the submission.

30. The Trust Deed refers amongst others, to a piece of land called: "*Malisa*" which counsel submits is synonymous with "*Malosa*" and "*Malasa*", and the 4 recorded owners of the land includes a: "*Mariki Pog*" which counsel suggests is the same as "*Maripopongi*". Noteworthy by its absence however, is a map or sketch locating the various lands and, in the Trust Deed the various named signatories are identified as: "*... we, the headman and chief representatives and others of our various villages ...*". We do not accept that the Trust Deed which makes no mention of "*Tanmiala*", is of any assistance in answering question (A).

31. However the decision in **Land Case No. 10 of 1984** concerning "*Kakula Island*" in which all the present parties in this appeal were successful counter-claimants albeit under different names, contains a relevant finding:

> "*... **se Tanmiala hemi bigfala baondri mo insaet long baondri ia igat ol narafala baondri we oli stap olsem Malasa mo Suasu***".

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This is later confirmed in the EIC's observation:

"*(c)* ***se baondris olsem Malasa mo Suasu tufala istap insaet long bikfala baontri ia we hemi Tanmiala***".

32. Earlier in its discussion of the evidence of "*Family Malu*" (the present second appellant) the EIC said:

"*...* ***olgeta italem tu se Kakula istap anda long baondri blong Malasaliu mo hemia iminim se Malasaliu imas gat wan jif blong hem from se long kastom long Efate evri baondri imas gat wan jif blong olgeta****. Malu family ino bin mekem iklia se baondri blong Malasaliu whu nao jif ibin stap lukaotem kam kasem tedei*".

In this latter regard, the EIC in discussing the evidence of Jif Henry Manlaewia (the present appellant) after referring to "*trifala document we hemi impotent tumas*" concluded that "*... jif Manlaewia ibin exist long taem bifo ikam long baontri blong Malasa*".

33. In our view the bislama expression "***insaet***" and "***istap insaet***" are <u>not</u> references to ownership, rather, they are a description of physical location and proximity. It has the meaning of encircling or surrounding or having some common borders but, the enclosed land is, nevertheless, a recognized land "*baontri*". The above extracts makes it abundantly clear that "*Malasa*" like "*Suasu*", is a separate and distinct land "*baontri*" from "*Tanmiala*" land boundary and whatsmore for a long time it has been under the control of Chief Manlaewia.

34. Of greater significance in the present case is the evidence of **Chief Raymond Marango** who testified on behalf of the original claimant (Family Maalu) and whom the EIC accepted as a witness of truth. In his evidence reproduced in the decision (at page 10) the witness after confirming that he had walked the Malasa land boundary on 3 separate ceremonial occasions involving relatives of all the claimants said:

"*Long taem ia oli identifaem boundary blong Malasaliu mo Tanomiala. Long taem ia ino been gat dispute.* ***Tanomiala mo Malasaliu tufalla different lands****. Long kastom 1 namarakian igat 1 mualal nomo.*

Hemi confirm se Malasaliu hemi wan flat land, ino gat stone so oli stap markem boundary long trees, time one tree long boundary ided, oli plantem narawan blong replacem".

35. This evidence appears to have been either overlooked or ignored by the EIC in its findings and declarations.

36. Before leaving **Land Case No. 10 of 1984** and the EIC judgment which declared the equally shared custom ownership of all claimants, including the parties in the present appeal, in "*Kakula Island*", we reproduce what the EIC said concerning the "*Kastom blong Efate*" as it relates to chiefly authority as follows:

> "*Long saed blong* ***kastom blong Efate jif nao hemi lukaotem ol graon we ol man blong hem oli stap insaed be ol graon ia jif ino onem*** *be ol man we oli wok long graon ia nao oli ona long hem. Fasin blong lukaotem ol pipol olsem iminim se* ***wan wan jif oli gat baontri blong olgeta we oli lukaotem mo wan jif long narafala baondri ino save kam insaet long baondri blong wan narafala jif.*** *System ia idifren long Shepherds grup ...*".
>
> (our highlighting)

37. The above extract which coincides with our view, makes it clear that a chief may control or oversee a customary land boundary without necessarily being the custom owner of the land(s) within it and, whatsmore, a chief's control of a customary land boundary is strictly exclusive such that no other chief may enter or seek to control the same customary land boundary.

38. In similar vein the Chief Justice relevantly observed in **Family Kaltapang Malastapu v. Family Kaltongo Marapongi and others** in Land Appeal Case No. 58 of 2004 (unreported judgment delivered on 14 September 2009):

> "*It is important to note that some land cases before the courts reveal that customary land is attached to a chiefly title, and the holder of the chiefly title has power under custom to determine what is done with the land attached to his (or her) title.* ***Land court may appreciate that the power is a very different thing from beneficial ownership. The land courts may appreciate in relevant cases that a chief holding land under his unlimited customary administrative powers, may hold the land in the capacity as trustees of his people but not for his personal benefit.*** *The chief may have rights of control rather than ownership rights*".
>
> (our highlighting)

39. In this latter regard the distinction is also apparent in the Efate Vaturisu Council of Chiefs publication of "*Kastomari Land Loa*" which states at Chapt. 4.1 under the heading: **STRET FASIN BLONG ONEM WAN KASTOMARI GRAON**:

> "*Folem stret fasin blong ol kastom Jif blong Efate mo ol offshore aelan, Bigfala Jif we hem nao hemi gat ful kastomari kastodial raets* (full customary custodial rights)

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ova ol graon insaed wan vilej baondri, hem nomo hemi save aloketen graon igo long wanwan Kastom Ona" (custom owner).

40. Applying the above customary land tenure principles to the present case Chief Manlaewia would have "*ful kastomari kastodial raets*" over "*Malasa*" customary land boundary to the exclusion of Chief Maripopongi who would, equally, have exclusive control over "*Tanmiala*" customary land boundary. Furthermore even assuming that "*Tanmiala*" is the bigger boundary encircling the "*Malasa*" land boundary that does not mean that Chief Maripopongi is the custom owner of "*Malasa*" customary land boundary.

41. Consistent with the principle that every customary land boundary must be ruled by a chief, is the undisputed evidence of the ordination of three chiefs on 16 January 1968 at Paunangisu village namely, Chief Solomon Manlaewia of "*Malasa land boundary*", Chief Peter Maripopongi of "*Tanmiala land boundary*" and Chief Dick Tangarasipokas of "*Suasu land boundary*". (***see also:*** **Chapt 7: Seremoni blong kam wan Jif mo onem land** of the Vaturisu Council of Chiefs).

42. The written record of the ordination clearly identifies the three different customary land boundaries, including Paunagisu (Malasa) beginning at: "*Noai Aruse*" on the coast and extending in a crudely semi-circular shape to "*Launragoa*" on the coast and passing through "*Nearu*"; "*Marumatamate*"; "*Neavu*" and "*Vatuvarau*".

43. The document also records that the 3 separate boundries were walked by each respective chief **viz** "*... fofala Jif ia oli go sidaon long mat we oli putum sam lif blong namele blong wokbaot long em*" and concerning Suasu boundary: "*Jif Tagarasipokasi mo Jif Tapagatamate tufala ikat tu defren nem bat tufala iwok long wan baontri nomo ...*" Chief Solomon Manlaewia's land boundary is also described as: "*... emi spessol blong klan olgeta smol yam*".

44. The oldest written record confirming the separate existence of "*Malasa*" and "*Tanmiala*" is to be found in the writings of Rev. Dr. J. Graham Miller in "**Live a History of Church Planting in the Republic of Vanuatu** (Book Five) – *The Central Islands, Efate to Epi from 1881 – 1920* where he writes about Kakula Island:

"Here the first wholly Christian village in the Nguna district was formed on 3 January 1884. It was made up of a migration of north Efate people, mainly from the nearby coastal village of "Malasa", with some from "Tanomiela". They said they wanted to withdraw from their heathen surroundings and escape from malaria on Efate".

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45. The book also records the conversion of "*Maripopongi chief of 'Tanomiela'*" in the following extract:

> "*Turita was a strong minded woman, sister of the Chief Maripopongi of Tanomiela north Efate. She urged him to join the migration to Kakula. The chief was converted. In their fiery zeal, some of the young migrants from Malasa and Tanomiela set fire to the ancestral napeas* (idol-drums) *as a mark of their abandonment of heathenism*".

46. In light of the foregoing we answer Question (A): "***Yes***" and Question (B): "***No, Chief Manlaewia is the customary land owner of 'Malasa'***".

47. We turn next to consider Questions (C) & (D) which deals inter alia with the customary ownership of "*Malasa*" land and the evidence led by the appellants in support of their claims.

48. We note in this regard that the EIC distinguished between the calling names of the first appellant namely, "*Henry Cyrel*" and his chiefly title: "*Manlaewia*" and land inheritance by virtue thereof. As far as his calling names are concerned the EIC said:

> "*Long saed blong Bloodline blong Henry Cyrel as kastom owner ino save succeed. However hemi land owner blong olketa* (unidentified) *eria we hem inheritem from Solomon (papa blong Anne Cyrel)*".

49. That distinction as the EIC explained in its judgment was drawn because:

> "*... kastom loa ino save discussem issue long land without chiefly title or visa-versa, kot ia hemi no must loosum track long issue we stap long foret blong hem which is "determination of custom ownership of lands ...*".

50. By drawing that distinction however, the EIC ignored the maternal bloodline of the first appellant which traces itself back to a previous patrilineal holder of the chiefly title namely, Chief Solomon Manlaewia III and through him in an unbroken patrilineal bloodline to the original Chief Manlaewia Matua I.

51. In this latter regard in **Maseiman v Natongrau** [2009] VUICB 2, Land Kes 03 of 1995 the EIC whilst declaring the primary land tenure principle that: "*... Kastomeri land onaship hem based generally long Patrilineal system (**ie.** land hemi pass followem bladlaen blong man)*", nevertheless accepted, that there are well-known "*exceptions*" to the principle including:

> "*(a)* ***Last surviving bladlaen****: Land isave pass igo long woman, sapos ino gat surviving male long famli laen;*

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(b) ***Napumas or Pumas*** *(will): man or woman isave ownem land through long gift or present;*

(c) ***Naflac or Klan****: Jif blong naflac isave ownem land; and*

(d) ***Adoption****: Kastom ona isave passem raet blong hem long wan pikinini we hemi adoptem. But ... hemi must kamaot long bladlaen blong kastom ona ia ...".*

52. In similar vein the EIC appears to have ignored or failed to appreciate the significance of earlier official decisions such as the East Efate Area Council of Chiefs determination of **2 July 1987** declaring the first appellant as the custom owner of "*Malasa*" and the respondent's predecessor's recorded statement at that same hearing "*... se hemi nokat eni kastom rait blong tok long graon blong Malasa*". There is also the **KASTOM OWNA BLONG GRAON** form dated 01 September 1987 which was signed by the respondent's predecessor along with 6 other chiefs and Land Committee members unanimously affirming that ownership of "*Paunagisu (Malasa)*" was undisputed and "*Solomon Manlaewia*" was the "*... stret kastom ona blong graon ia*".

53. Finally, there is the handwritten statement of **K. Kalrong** dated 6 September 1987 where he writes:

"MI BILIF SE CHIEF MANLAEWIA EMI KASTOM ONA BLONG KRAON BLONG MALASA MO KAKULA"

And later:

"MO OLGETA KRAON WE ISTAP LONG BAONDRI BLONG CHIEF MANLAEWIA WE EMI HIGH CHIEF BLONG PAUNAGIS TEDEI".

54. The significance of the evidence is self-evident as being admissible ancestral declarations against the respondents' interest and more particularly, their claim to customary ownership of "*Malasa*".

55. The court is not unmindful of the respondent's own admission of the statement made on 6th September 1987 and his explanation that it was: "*... in support of the claim by the late chief Solomon Manlaewia over malasa and not the First Appellant*" who is the present day legitimate successor to the chiefly title: "*Manlaewia*". Given that "*Malasa land*" has been long-associated with the "*Manlaewia*" chiefly title, we reject the respondent's

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disingenuous explanation which seeks to separate the title from the title-holder.

56. Counsel for the respondent relying on the judgment of the Court of Appeal in **Valele Family v Touru** [2002] VUCA 3 submits that the decision of the Council of Chiefs on the ownership of Malasa land "*... is not a binding decision which had legal effect so that the Efate Island Court should give weight to (it)*". That submission ignores the Court of Appeal's statement in its judgment where it said in clarifying its decision:

> "***However it does not follow from this conclusion that all evidence put forward by Mr. Touru is totally irrelevant in determining who are the true custom owners of Natinae land.*** *Our decision only establishes that the processes and decisions that have occurred in the past have not finally determined who are the custom owners.* ***Much of the evidence adduced by Mr. Touru would be admissible in the Island Court*****".**
>
> (our highlighting)

57. In our view the above evidence was highly relevant and should have been specifically considered by the EIC, not just ignored in the absence of any reasons for doing so. That failure is sufficient in our view to vitiate the EIC's determination of custom ownership in the respondent's favour. That declaration is accordingly quashed. Needless to say we answer Questions (C) and (D): "***No***".

58. Having answered the questions earlier posed principally in the first appellant's favour, we turn next to consider what order(s) we should make in disposing of this appeal which has been in existence since 2010. We are satisfied that the appropriate order is a declaration that Jif Manlaewia is the customary owner of Malasa customary land boundary as delineated in the record of ordination that occurred on 16 January 1968 and we so declare.

59. The first appellant having succeeded is awarded costs of the appeal which is summarily assessed at VT50,000 to be paid by the respondent within 21 days.

DATED at Port Vila, this 30th day of November, 2018.

BY THE COURT

D. V. FATIAKI
Judge.