

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

Land Appeal
Case No. 18/2608 SC/CVL

BETWEEN: DIRECTOR OF LANDS
Applicant

AND: FAMILY KALTAPANG
MALASTAPU
First Respondent

AND: FAMILY KALTONGO MARAPONGI
Second Respondent

AND: FAMILY LAKELEO TAU
Third Respondent

AND: FAMILY MASAU VAKALO
Fourth Respondent

AND: FAMILY TARAVAKI
Fifth Respondent

AND: FAMILY MALASIKOTO
Sixth Respondent

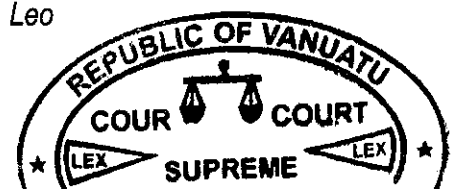
AND: FAMILY KALTOA MALAS
Seventh Respondent

Coram: Justice G.A. Andrée Wiltens

Counsel: Director of Lands: Mr. L. Huri

First Respondent, Family Kaltapang Malastapu: Mr. S. Hakwa

Second Respondent, Family Kaltongo Marapongi: Mr. C. Leo



Third Respondent, Family Lakeleo Taua: Mr. E. Nalyal
Fourth Respondent, Family Masau Vakalo: Not registered
Fifth Respondent, Family Taravaki: Mr. B. Bani
Sixth Respondent, Family Malasikoto: Mr. P. Fiuka
Seventh Respondent, Family Kaltoa Malas: Ms M. N. Ferrieux Patterson
Interested Party, Family Songoriki: Mr. E. Nalyal
Interested Party, Family Anatu: Mr. B. Livo

Date of Hearing: 28 September 2020

Date of Decision: 7 October 2020

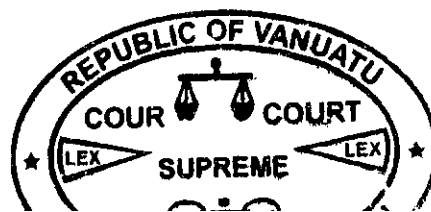
JUDGMENT

A. Introduction

1. This decision deals with 4 discrete issues raised in relation to land known as Lakenpagatau which is part of Ponatoka custom land in the Mele area of Efate.

B. Background

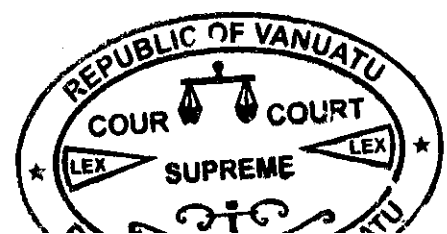
2. The Director of Lands filed an application in September 2019 seeking clarification from the Supreme Court as to the legal status of the interim restraining orders against the Director of Lands issued by the Chief Justice in Land Appeal Case No. 58 of 2004 and Justice Fatiaki in Land Appeal Case No. 2A of 2010. The Director was concerned the interim restraining orders prevented the registration of subsequent land transactions, and accordingly sought clarification as to whether that interpretation was correct.
3. Mr. Hakwa, whose client was the beneficiary of both interim restraining orders, proposed by way of resolution to withdraw both interim restraining orders and made application to the Court for such. The Minister of Lands supported that approach as it made his position clear. All other parties also supported that approach, save for Family Kaltoa Malas.



4. Family Kaltoa Malas, in September 2019, made a counter application, in relation to the same land and the same parties. What was sought was clarification of Chief Justice Cooke's decision dated 8 October 1985 in Land Appeal Case No. 1/85. The issue of concern was to identify whether Lakenpagatau land comprised some 33 hectares or 500 hectares.
5. During pre-trial conferences three other issues arose.
6. Firstly, Mr Nalyal filed an application that Ms Ferrieux Patterson was conflicted and ought to recuse herself or be prevented from acting in this case as the legal representative for Family Kaltoa Malas.
7. Secondly, there was a difference of opinion as to whether this Court had jurisdiction to hear the counter-application.
8. Thirdly, in the event the decision was made that the Court had jurisdiction, a determination was required as to what exactly Lakenpagatau land comprised.

C. Issue One

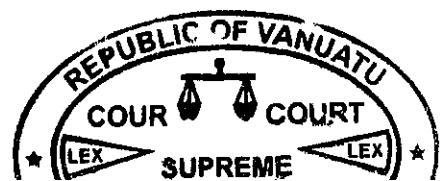
9. Mr Nalyal, supported by Mr Hakwa, but opposed by all other counsel, submitted that Ms Ferrieux Patterson should not be permitted to act in this matter due to conflict. That conflict was submitted to arise due to Ms Ferrieux Patterson's previous firm being Hudson & Co. Hudson & Co had in the 1980's and 1990's acted for Family Songoriki in relation to land issues affecting the same land as that involved in this litigation. It was submitted to therefore be inappropriate for Ms Ferrieux Patterson to now be acting for a different client in respect of the same land.
10. Mr Ferrieux Patterson responded that she had not been involved himself in the litigation 34 years ago that was undertaken by Mr Hudson. She only commenced with Hudson & Co in 2003, 17 years after July Cooke's decision was published. Further, Ms Ferrieux Patterson opened a branch of Hudson & Co as her firm in 2011, in another part of Port Vila. Mr Hudson continued to operate his practice, prior to ceasing to practice altogether when he closed his branch.



11. Ms Ferrieux Patterson commenced acting for Family Kaltoa Malas in March 2019. Her instructions have little if anything to do with the matters raised in Land Appeal No. 1/85, although she seeks clarification of the exact land referred to in that decision.
12. In my view, Ms Ferrieux Patterson cannot properly be said to be conflicted. There are issues of remoteness of of her firm from that of the former principal Mr Hudson; as well as issues of remoteness in time. Clarification of the decision is wholly different to a challenge to the 1985 decision – as a result this proceeding is discrete and sufficiently unrelated to the previous litigation.
13. Mr Nalyal's application is dismissed. Ms Ferrieux Patterson is permitted to act for the Seventh Respondent.

D. Issue Two

14. Ms Ferrieux Patterson filed her counter application due to issues she submitted had beset the community since 1985. Due to the Director of Lands reading Justice Cooke's decision as affecting 500 hectares the lessorship of numerous Ponatoka custom land areas has been changed. It was submitted that even if Mr Hakwa proposed solution to the Director's dilemma were accepted and put into practice, there would remain numerous disputes in relation to Ponatoka custom land. A first step to addressing some of the residual land disputes would be for the Court to determine what land was referred to as Lakenpagatau in Chief Justice Cooke's 1985 decision.
15. It was further submitted that such clarification would impact on at least two other extant cases, namely Island Court decisions E/C 6/93 and E/C 1/97.
16. In terms of whether the Court had jurisdiction to entertain Ms Ferrieux Patterson's counter application, only Mr Hakwa and Mr Nalyal sought to submit there was no jurisdiction.
17. Mr Huri relied on the provisions in Article 49(1) of the Constitution and section 28 of the Judicial Services and Courts Act [Cap 270] as giving this Court unlimited jurisdiction to hear civil disputes. He also pointed to this Court's supervisory powers in respect of land disputes as set out in Section 47(4) and (5) of the Custom Land Management Act No. 33 of 2013. I further noted that the Director of Lands saw merit in the Court undertaking the

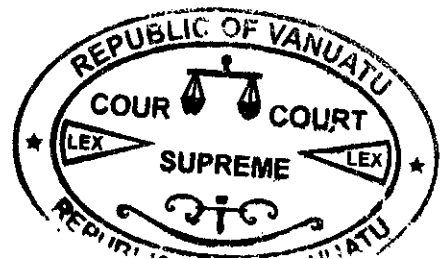


clarification sought in addition to the clarification the Director had sought - indeed he described such additional clarification as being "necessary".

18. Ms Ferrieux Patterson relied on the substantial justice requirement that the Court deal with all underlying disputes, not simply the issue raised by the Director. In effect, by accepting the counter-application as necessary, she submitted the Director had extended the original application to also include this second aspect. She submitted both clarifications came within the ambit of section 8(g) of the Land Leases Act [Cap 163]. She also referred to the Court's unlimited jurisdiction, pursuant to section 28 of the Judicial Services and Courts Act.
19. Mr Hakwa's opposition centred on the fact that Family Kaltoa Malas was not a party to the original Efate Island Land Case which decision was confirmed by Chief Justice Cooke's 1985 decision. He further submitted that this was actually an application to review Chief Justice Cooke's decision, which was impermissible as that decision is final. He submitted the Supreme Court has no jurisdiction to determine custom ownership of land.
20. Mr Nalyal supported Mr Hakwa's submissions. He equated the counter-application to an appeal of Chief Justice Cooke's decision. He considered the point had already been considered and determined.
21. This Court has unlimited jurisdiction to decide civil disputes, but not customary land ownership issues. However, what is sought is for the Court to clarify what land Chief Justice Cooke was referring to in his decision. I am satisfied that this does not equate to neither a review of the decision or an appeal from the decision. Accordingly, there is nothing in my view to prevent this Court hearing the counter-application. Further, the fact the Director of Lands supports the application and described it as "necessary" is significant.
22. I accept there is jurisdiction to hear the counter-application.

E. Issue Three

23. Ms Ferrieux Patterson sought to rely on the filed sworn statements by a number of witnesses:



- E. Bulegih,
- P. Malas (x4),
- C.S Malapa,
- A. Mansale, and
- K.T. Anatu.

24. Ms Ferrieux Patterson also relied on her submissions of 30 October 2019 and 16 September 2020.

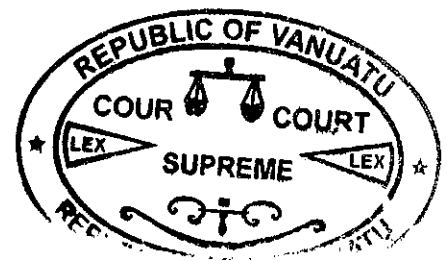
25. Ms Bulegih's statement is to the effect that the land identified as "Mission Catholique" prior to independence covered a total just over 34 hectares. Mr Malapa and Mr Mansale both relate having walked the boundaries of Lakenpagatau which only covered some 33 hectares of land; and further, that family Songoriki only commenced to pro-actively claim to be lessors of the 500 hectares that comprises Ponatoka from 2008 onwards.

26. Mr Anatu's statement describes Lakenpagatau as the Ex-Catholique Mission land later known as the South Seas Cement Factory. In his evidence, the land only occupied 33 hectares. He appended the decision of Chief Justice Cooke which itself appended a map of the land covered by Title 12/0822/010. Mr Anatu further appended a clarifying statement issued by Chief Justice Cooke dated 7 November 1990.

27. Mr Anatu finally appended the Efate Island Court decision which was appealed and resulted in Chief Justice Cooke's decision. That Island Court decision appended a copy of the same map of the land as that appended to Chief Justice Cooke's decision.

28. Ms Ferrieux Patterson pointed to the Island Court decision heading as being material. It recorded:

"Mele Land Dispute, South Sea Cement Factory,
Roman Catholic Mission Land, LAKENPAGATAU.
I kasem Hill on top. We Map isoem out."



29. Later under the heading "Judgment", the Island Court recorded similar descriptions of the land in dispute at paragraphs (3), (5A) and (5C). Ms Ferrieux Patterson accordingly submitted the Lakenpagatau land was restricted to the Cement Factory area or the ex-Catholic Mission title, both of which ran from the bottom to the hill top. She linked that description to the evidence of Mr Bulegih and that of Mr Malas and Mr Mansale who had walked the boundaries and therefore had personal knowledge.

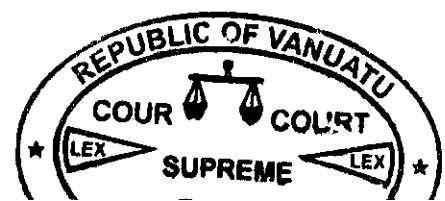
30. Next Ms Ferrieux Patterson pointed to the first paragraph of Chief Justice Cooke's decision where it is recorded:

"The Appellant appealed against the decision of the Efate Island Court who in their judgment hold that Songoriki Family were the custom owners of the land in dispute, i.e. the land at Mele on which the cement factory stands."

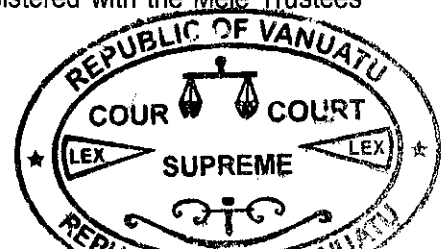
31. Ms Ferrieux Patterson does not resile from the fact that Chief Justice Cooke does refer in his decision to an area of 500 hectares of land - described as having been sold by Deed in 1884. However, she submitted that was the area called Ponatoka, of which Lakenpagatau is but a small part. She maintained that all references to the 500 hectares do not relate to Lakenpagatau land.

32. Ms Ferrieux Patterson next pointed to the perhaps surprising situation, post the 1985 decision, of Family Songoriki not taking any steps to claim any lease in respect of Ponatoka land as lessor. In 1990 Family Songoriki claimed the seashore have as being part of their customary land, but that was explicitly rejected by Justice Cooke's clarification of his decision dated 7 November 1990. The first claim relating to an area of 500 hectares was made on 28 February 2006 by Martin Sokomanu.

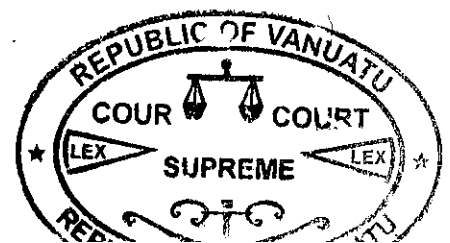
33. Land Case No. 6 of 1993 also relates to Ponatoka land. Mr Malas appended a map to his second statement showing the relevant area - which Ms Ferrieux Patterson submitted covered more than 500 hectares. That case was determined in July 2004, but appealed. The Supreme Court returned the case to the Island Court for re-hearing, which resulted in a judgment of 2 March 2010. This decision acknowledged Lakenpagatau was declared to be Family Songoriki's customary land in Land Appeal Case No. 1/85, but the decision went on to award surrounding land to other parties. Mr Malas gave evidence explaining that.



34. Ms Ferrieux Patterson submitted it to be significant that Family Songoriki did not appeal that decision, which clearly delineated the Family Songoriki custom land as being only a small part of Ponatoka land. Ms Ferrieux Patterson submitted Family Songoriki had in effect accepted that Lakenpagatau was only 33 hectares in area.
35. Ms Ferrieux Patterson sought to rely on the evidence of those who had actually walked the Lakenpagatau boundaries with Island Court officials, and the time that it took, as supporting her contention the land only comprises 33 hectares.
36. Prior to 2008 Mele Trustees Ltd was the lessor for land surrounding Lakenpagatau, on behalf of disputing custom owners. That position only changed in 2008 when Family Songoriki sought to increase its land holdings. As examples of this Ms Ferrieux Patterson referred to the following:
- On 5 December 2012 Family Songoriki admitted by consent they were not custom owners of leasehold title 12/0821/138 in Civil Case No. 11/32. This land is adjacent to the ex-Catholic Mission land and within the greater area of Ponatoka land.
 - Lease 12/0544/060 was first registered in the name of Mele Trustees Ltd in 1983. There was no change in lessorship until 2019, despite Chief Justice Cooke's decision of 1985.
 - Lease 12/0544/017 was registered in November 2006 with Mele Trustees Ltd as lessor. It was changed to Family Songoriki in 2009.
 - Lease 12/0543/022 was registered in October 2006 with Mele Trustees Ltd as lessor. It was changed in 2008.
 - Lease 12/0822/074 was registered in 1994 with Mele Trustees Ltd as lessor. It was only changed in 2011.
37. Ms Ferrieux Patterson's point was that those leases were registered after the 1985 decision, and if the decision had declared Family Songoriki as custom owners of those lands, the leases would not have been permitted to be registered with the Mele Trustees Ltd as lessor on behalf of disputing custom owners.



38. Finally, Ms Ferrieux Patterson dealt with a letter of 2 December 2013 by the then Attorney General stating Family Songoriki was custom owners of 500 hectares. Firstly, she maintained that the letter was retracted by a later Attorney General writing on 14 June 2017 that Lakenpagatau land was made up of 33ha 44a 40a, not 500 hectares. That later position was re-affirmed by SLO letters of (i) 18 February 2019 to Mr Nalyal, and (ii) 1 June 2020 to Family Songoriki.
39. Mr Livo, Mr Leo, Mr Huri and Mr Bani all adopted Ms Ferrieux Patterson's submissions. Mr Livo relied on his written submissions and a further sworn statement by Mr Anatu with appendices.
40. Mr Fiuka and Mr Hakwa adopted Mr Nalyal's submissions; and Mr Hakwa neither agreed with the submissions of Ms Ferrieux Patterson nor conceding any points. Mr Hakwa was of the view that this issue could and should be addressed when the various Ponatoka land appeal cases were heard. He was concerned that Family Kaltoa Malas had "sat on their hands" for over 20 years.
41. Mr Nalyal relied on Chief Justice Cook's decision – he submitted that it spoke for itself. When pressed, he was unable/unwilling to further articulate what he meant by that submission. He was unable to point to any part of the judgment which declared Lakenpagatau to be 500 hectares in area, or that declared Family Songoriki to be custom owners of an area of land of that magnitude.
42. In my view, Ms Ferrieux Patterson's arguments were compelling and comprehensive. There was nothing of note raised to the contrary, save technical issues.
43. The judgment of Chief Justice Cooke was dealing with certain land in dispute – it was described variously as ex-Catholic Mission land, the land where the South Sea Cement Factory hand stood, and as Lakenpagatau.
44. There is a clear distinction between Ponatoka land, which is significantly larger area than Lakenpagatau land. Family Songoriki are the declared custom owners of the smaller area – that which comprises 33/34 hectares. In my view that is what Chief Justice Cooke confirmed the Efate Island Court to have determined.



F. The Interim Restraining Orders

45. Mr Hakwa had applied to set aside the two interim restraining orders. He was supported in that by all Counsel save Ms Ferrieux Patterson. She submitted the status quo should remain pending the outcome of the various appeals currently underway.
46. It is significant that the Director of Lands supported Mr Hakwa's position in that to grant the application will make his task more ascertainable and clearer. Primarily for that reason I am prepared to grant the application.
47. The party who had applied for and principally benefited from the interim restraining orders no longer requires them to protect its interest.
48. Accordingly, the 19 December 2006 orders made by the Chief Justice in Land Appeal Case No. 58 of 2004 and the 24 August 2008 orders made by Justice Fatiaki in Land Appeal Case 2A of 2010 are hereby set aside in their entirety.
49. It is now a matter for each party in those respective cases to determine whether they require to seeking fresh restraining orders, and if so, for each to make application for the same in their names.
50. Costs are to lie where they fall.

DATED at Port Vila this 7th.day of October, 2020.

BY THE COURT

Gandhi Ull
Justice G.A. Andrée Wiltens ★

