

**IN THE SUPREME COURT
OF THE REPUBLIC OF VANUATU**
(Other Jurisdiction)

Land Appeal
Case No. 23/2291 SC/LNDA

BETWEEN: Family Redison Meltek
First Appellant

AND: Family Saravanu
Second Appellant

AND: Family Kai Meltenovan
Third Appellant

AND: Family Meltesaen
Fourth Appellant

AND: Family Meltevielser Ulrick
Fifth Appellant

AND: Family Melesy
First Respondent

AND: Hendry Lambamu
Second Respondent

Coram: Justice Aru

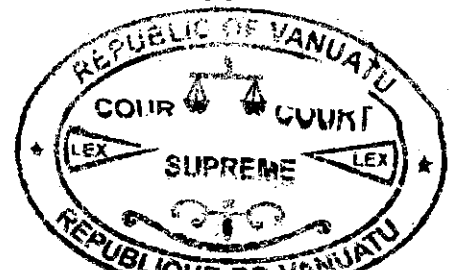
Counsel: Mr. J. Tari for the First Appellant (Family Redison Meltek) no appearance
Mr. E. Molbaleh for the Second Appellant (Family Saravanu) no appearance
Mrs. M. Nari for the Third Appellant (Family Kai Meltenovan)
Mr. D. Yawha for the Fourth Appellant (Family Metesaen)
Fifth Appellant (Meltevielser Ulrick) no appearance
First Respondent Respondent (Family Melesy) no-appearance
Second Respondent (Hendry Lambamu) no appearance

DECISION

Background

1. This matter is an appeal from a decision of the Malekula Island Court (MIC) concerning custom ownership of *Nesingwar land*. The background to the hearing before the MIC was set out by the Court at the beginning of its decision as follows:

"Hemia hem namba 2 decision blong Malekula Island Court afta we Malekula Island Court I jajem kes ia long November, 2008 mo faenem se Counter Claimant 6 (CC 6) Celine Malesy we hemi daughter blong Jerenmal nao hemi custom owner blong graon Nesingwar.



Risen blong referem back matter ikam long Island Kot from igat dispute se long Custom blong graon long North East Malekula, wan woman ino save ownem graon from hemi againsem custom.

Nesingwar custom graon istap antap long bush samples between Vao mo Atchin, long North East Malekula.

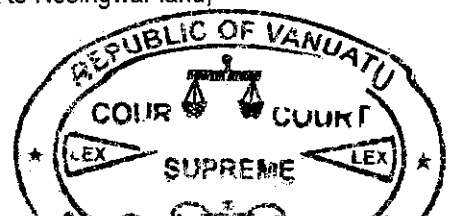
Long 2008, I bin gat 12 parties everyone, long this time, Family Rory mo Family Malror I withdrawem claim blong tufala mo wan new claimant hemi kam inside we hemi Family Rale I mekem wan total blong 11 parties."

2. On 11 August 2023 the MIC declared the second respondent and his descendants (Mr Lambamu) as the custom owners.
3. On 8 April 2024 the fourth appellant informed the Court that they intend to apply to have the matter reheard as Mr Lambamu was not a named party in the MIC proceedings. The issue raised was the MIC lacked jurisdiction to declare a non-party custom owner of the disputed land. This was identified by the parties as a preliminary issue that required determination before any progress is made in the management of the appeal. Mr Lambamu was then joined as a respondent in this appeal to afford him an opportunity to respond to the application. Directions were then issued for the filing and service of the application and for responses to be filed by the respondents. As the second respondent was unrepresented, specific directions were made for the fourth appellant to serve him with a copy of the Orders. The hearing of the application was listed for 12 June 2024.
4. The hearing did not proceed on 12 June 2024 as the orders had not been complied with by the 4th appellant. The 8 April Orders were reissued with Mrs Nari indicating to file and serve the application and a hearing date was allocated for 29 July 2024. When the matter was called for hearing Mr Yahwa confirmed that he filed and served his application as directed but had yet to file a sworn statement in support. He informed the Court that the third appellant had filed and served her application as well with a sworn statement in support. Both applications were then listed for hearing on 10 September 2024.

Applications

Fourth appellant's application

5. The fourth appellant served the second respondent with their application on 29 May 2024. A proof of service was filed noting that the second respondent was served. No responses were filed by the respondents. The order sought is a declaration that the MIC decision declaring of the second respondent as custom owner of Nesingwar land was unlawful and must be struck out.
6. The grounds for seeking the order are that: -
 - Mr Lambamu was at that time living and residing on the island of Vao in North Malekula but was not a party to the Nesingwar land claim;
 - Mr Lambamu was not blood related to any party before the MIC;
 - Mr Lambamu was part of the villagers during the boundary visit but had not filed any counter claim nor paid any fee to claim his entitlement to Nesingwar land;



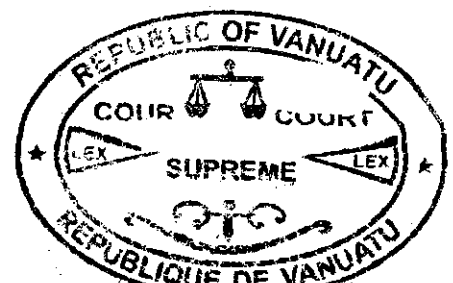
- Mr Lambamu's declaration ambushed the appellant's right to claim against him; and
- Mr Lambamu's declaration of right to the land did not follow due legal process to receive the scrutiny of the evidence and cross examination by the other parties and that justice was not done in awarding custom ownership to Mr Lambamu.

Third appellant's application

7. The third appellant's application was filed on 26 June 2024 and served on Mr Lambamu on 3 July 2024 with a sworn statement of Maxime Meltenoven. Written submissions were also on filed 21 August 2024.
8. The applicant sought an order under s23 of the Island Courts Act [CAP 167] that the 2nd respondent was not a party in the MIC proceeding therefore the judgment of 11 August 2023 was null and void in respect of the declaration of custom ownership of Nesingwar land. And that the matter be returned to the MIC for rehearing. The applicant relies on the following grounds:
 - That the judgment of the 11 August 2023 named a non party (Mr Lambamu) as custom owner of Nesingwar custom boundary. That the decision was erroneous and contrary to law and court processes. That the second respondent was not a party in the land case since 1985 to 2023;
 - That the first respondent (Family Malesy) had not presented Mr Lambamu's claim nor did they represent Mr Lambamu and his interest. The first respondent have always represented and presented their own claim since 1985.
 - That the MIC on its own initiative made findings and declarations on behalf of the second respondent without his evidence or participation in the proceeding. That this happened after the hearing ended;
 - That the first respondent (Family Malesy) did not make any statement in support of Mr. Lambamu before the MIC nor did Mr Lambamu present any evidence in support of Family Malesy as a claimant for Nesingwar land;
 - The MIC judgment dated 11 August 2023 was made in error and it is just that the matter be returned for re hearing.

Submissions

9. Mr Yahwa submitted that Mr Lambamu was aware of the claim before the MIC but did nothing to become a party in the proceedings. It was submitted that Mr Lambamu never filed a counterclaim, never paid a filing fee for any claim to the land and not being a party to the dispute was not cross examined by any of the parties in the dispute.
10. It was submitted that the MIC decision was made contrary to law and should be set aside and quashed.



11. Mrs Nari adopts the same submissions made by Mr Yahwa and relies on the sworn statement filed by Maxine Meltenoven. Mr Meltenoven states: -

"2. Mi konfem se long stat blong lan keis blong Nessingwar kastom baondri long 1985 Hendry Lambamu emi no kleim olsem pati. Famli Malesy emi no talem long kot se oli stap representem hem.

3. Mr. Lambamu emi neva mekem eni stetmen blong sapotem kleim blong Famili Malesy.

4. Emi wan sapraes we Malampa Aelan Kot jajmen deit 11 August 2023 emi gat nem blong Mr. Lambamu olsem kastom ona blong bigfala nasara o kastom ona blong Nessingwar kastom baontri Luk mak 'MM1'.

*5. Malampa Aelan Kot emi kamap wetem wan disisen we ino gat kleim from mo Mr. Lambamu emi no pat blong keis nomo stat long 1985. Emi neva soem intres long keis ia mo emi no gat histi wetem keis ia. **Storian blong Mr. Lambamu i jes kam antap afta long en blong hearing blong keis we i no stret.***

6. Mifala evri apellent i luk se disisen blong 11 August 2023 emi no folem loa mo ol proses blong kot emi mas kam aot blong keis ia i go bak blong hearing bakegen."

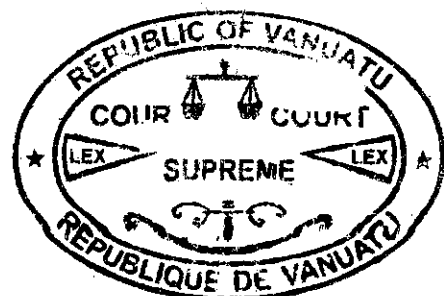
12. Mrs Nari submits that the MIC decision was made contrary to law as the Mr Lambamu was never a party since 1985 to 2023. It was submitted that family Malesy never presented Mr Lambamu's claim and neither did they say they were representing the interests of Mr Lambamu. Family Malesy presented their own claim since 1985.
13. It was further submitted that the MIC on its own initiative made findings and declarations on behalf of Mr Lambamu without hearing or receiving any evidence from him and without his participation in the proceedings. Furthermore, it was submitted that family Malesy did not present any statements for Mr Lambamu's claim before the court and Mr Lambamu did not present any evidence in support of the family Malesy as a claimant.
14. It was finally submitted that the MIC was not at liberty to make declarations in favour of persons who are not land claimants or whose claims were not presented before it. Mr Lambamu was not a party and had no standing for a declaration to be made in his favour.

Discussions

15. Both applications complemented each other and were heard together. No assessors were required as the issue raised a legal issue whether it was lawful and proper for the MIC to make a declaration in favour of Mr Lambamu when he was not a party in the dispute and none of the parties presented claims on his behalf.
16. No response was filed by both Mr Lambamu or Family Malesy.
17. Article 73, 74 and 75 of the Constitution state as follows: -

"
CHAPTER 12 – LAND

73. Land belongs to custom owners



All land in the Republic of Vanuatu belongs to the indigenous custom owners and their descendants.

74. Basis of ownership and use

The rules of custom shall form the basis of ownership and use of land in the Republic of Vanuatu.

75. Perpetual ownership

Only indigenous citizens of the Republic of Vanuatu who have acquired their land in accordance with a recognised system of land tenure shall have perpetual ownership of their land.

.....”

18. Section 10 of the Island Courts Act provides that –

“10. Application of customary law

Subject to the provisions of this Act an 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.”

19. And section 23 b) empowers the Supreme Court to order that a matter be reheard before the same court or before any other court.

“ 23. Power of court on appeal

The court in the exercise of appellate jurisdiction in any cause or matter under section 22 of this Act may –

“ ...

(b) order that any such cause or matter be reheard before the same court or before any other island court.”

20. The Island Courts (Civil Procedure) Rules 2005 sets out the procedures for filing claims before an Island Court (Rule 1). Rule 1 (3) provides-

“If the claim relates to ownership or the boundary of customary land the statement of claim shall contain a description of the boundaries and also contain a sketch map of the land.

21. And sub rule (7) provides that the clerk shall ensure that notice of the statement of claim is given and posted to members of the public in areas where the land is located. Family Kai Meltenoven is the original claimant who filed a claim claiming ownership of *Nesingwar land*.

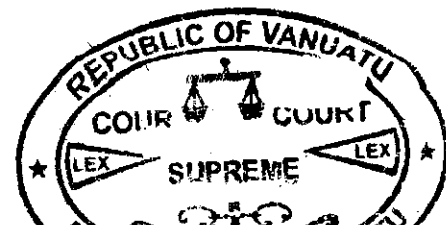
22. Rule 2 (5) and (6) provides for the filing and service of a counterclaim. Ten parties filed their counter claims against the original claimant. Family Malesy was the sixth (6) counterclaimant.

23. Rule 7 provides for the issuing of judgment by an Island Court and sub rules 3),4) and 5) provide:-

“(3) Judgment must be based upon evidence

The judgment of a court must always be based upon the evidence that has been given to the court, but should not be based upon information that has come to the knowledge of the justices from outside the courtroom.

(4) Judgment must be given in favour of party whose evidence is more convincing



The judgment of the court should be given in favour of the party whose evidence is, in the opinion of the justices, more convincing.

(5) Judgment on claim and also counter-claim or set-off, if any

In giving judgment, the court should first give judgment upon the claim of the claimant, and then give judgment on any counter-claim or set-off of the defendant."

(emphasis added)

24. It was submitted by Mrs Nari that a single paragraph at page 9 of the judgment mentioned Mr Lambamu's adoption.
25. When considering the judgment, the MIC identified the local custom to be applied and set it out at paragraph 2.4 as follows:

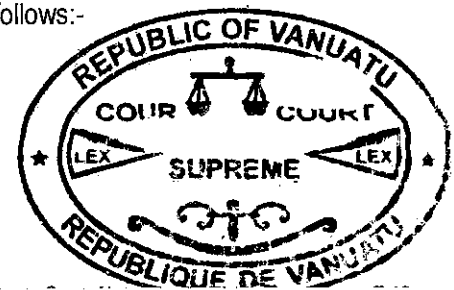
"2.4 Custom Loa blong Nesingwar – North East Malekula

Hemia list blong ol custom law we Court ia hemi establishim during long Court hearing mo hemi declarem olsem ol stret custom practice/loa blong area we disputed land hemi stap long hem:

1. Right blong ownem ground hemi follem bloodline blong man (patrilineal). Blood blong man hemi paramount over long blood blong adoption mo blood blong woman taem yumi tokbaot custom graon.
2. From reason ia, hemi wan recognised custom practice se taem wan man inogat pikinini boy, bae hemi adoptem wan nara pkinini boy blong replacem blood blong hem long next generation. Custom hemi requirem tu se boy ia hemi mas be closely related by blood or sapos no hemi mas kamaot within long sem tribe blong people we I ownem custom graon.
3. Custom adoption hemi valid nomo taem hemi folem stret custom fasin/practice blong custom adoption. Wan valid adoption hemi givim full right long adoption blong ownem graon from hemi replacem blood.
4. Taem inomo gat wan surviving blood blong man mo taem we inomo gat wan valid custom adoption I tekem place long wan custom boundary, woman hemi save ownem graon wetem ol condition mo directive blong wan custom chief long custom graon ia.
5. Wan custom graon boundary hemi belong long wan or moa tribe blong pipol, we oli live inside long wan custom boundary mo oli identify olgeta wetem wan language mo wan custom believe mo practices.
6. Man we I pem graon long landowner hemi karem right blong usim graon nomo, hemi nogat right blong ownership.
7. Right we man I pasem long narafala man from any narafala reason hemi no right blong ownem graon be hemi right blong use mo right blong lukaotem or ocupaem nomo.
8. Man we I aot long custom graon or boundary blo hem from any reason mo go live long nara custom graon mo boundary blong nara high chief, hemi save go olsem wan user long graon nomo. Man ia free blong mekem namangi blong hem lo nara ples ia, be hemi nogat right blong ownem graon we igo perform custom long hem, hemi gat right blong usim graon nomo.

(emphasis added)

26. Following the identification of local custom applicable to this case, the MIC considered each party's claim. The claim by family Malesy was considered at paragraph 3.7 of the judgment. At paragraph 4 the court made its assessment of the evidence and the applicable custom in relation to each party. It assessed Family Malesy's evidence at paragraph 4.7 as follows:-



"4.7 Evidence blong CC6 – Family Malesi: Meltevaratin blong Nesingwar, hemi gat wan boy nem blong hem Lele, Lele I tet ino gat pikinini so Meltevaratin hemi adoptem Henry Lambamou. Hemi tekem Henry igo long Nesingwar I mekem custom business olsem circumcise blong hem long Bonsok. Then hemi kilim haos long Nesingwar mo hemi tekem nem ia Testesum. Henry hemi kilim las namanki long Nesingwar mo hemi tekem nem ia Lambamou.

Kot hemi satisfy long taem blong wokabaot witness blong CC6, Rory I showem stone blong namangi blong hem long area Sarmatju we plante oli refer long hem se Nesingwar.

Kot hemi satisfy se adoption blong Henry hemi folem custom, from ol custom activities we hem I pefomem blong hemi tekem ples blo Meltevaratin wetem Serenmal blong Nesingwar.

First adoption hemi blong Henry Lambamou. CC6 Family Serenmal I givim long evidence blong hem se Meltevaratin we hemi brata blong Malrel hemi maretem Leateteru mo bonem Lele. Lele I tet, Meltevaratin I adoptem Henry. Hemi pem Henry wetem wan pig tooth I fas mo hemi performem customary ceremony blong hem taem hemi circumcise long Nesingwar, kilim haos mo hemi putum nem blong hem Tetesu, hemi kilim las namangi long Nesingwar mo tekem custom nem Lambamou.

Oulili brata blong Serenmal I givim full right igo long Henry. Long ol submission blong CC6, Claimant hemi clarify se Henry Lambamou nao I stap representem nasara Nesingwar long every custom ceremony folem custom adoption blong replacem blood blong Serenmal mo Meltevaratin. Henry hemi man figure we I representem bloodline blong high chief blong Nesingwar graon. Court hemi satisfy se even though Henry hemi no claim, hemi man behind long claim blong Family Malesy.

Kot I satisfae I folem established custom law blong Nesingwar se adoption hemi wan recognized custom adoption mo long custom blong Nesingwar man I save claimem graon tru long adoption."

27. In its concluding remarks at paragraph 5 the court said: -

"5. CONCLUDING REMARKS

Constitution hemi mama law we I karem force over long every nara law blong Vanuatu. Protection blong custom ground hemi stap long mama law ia mo hemi specifically providem long Article 73 se graon long Vanuatu hemi belong long ol Indegenious man Vanuatu wetem ol descendant blong olgeta. Article 74 I hemi pointem out se rule blong kastom nao hemi fomem basis blong onasip mo use blong land long Republic blong Vanuatu.

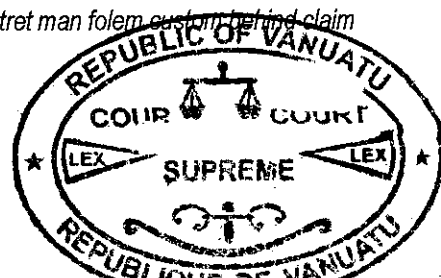
Malekula island Court hemi mas sitaon bakeken namba 2 time blong re-harem land matter ia from ol claimer I claim se fes decision hemi no folem law blong custom graon long area blong Nesingwar custom graon. Wetem hemia long mind, court ia hemi focus specifically long custom law mo applem wetem ol claim we ikam blong ekem decision ia.

Court ia I wantem mekem I klia bakeken se folem Article 73 blong Constitution, every graon long Vanuatu hemi blong ol group blong ol people (Communal ownership) we oli kamaot long wan descendant or tribe blong pipol long wan area. Plante time igat misunderstanding mo misperseption se graon hemi blong wan man nomo (individual ownership), hemia hemi no reflectem spirit mo intention blong Constitution mo custom law blong difren areas long Vanuatu."

28. The findings of the court at paragraph 6.6 and 6.7 states:

" 6.6 Court hemi faenem se adoption blong Harry Lambamou hemi stret folem custom practice blong adoptem wan pikinini ikam long wan nasara folem origin blong Meltevaratin brata blong Malrel (papa blong Serenmal). Meltevaratin hemi man Nesingwar mo folem custom hemi save mekem wan adoption blong replacem blood blong man Nesingwar.

6.7 Court hemi faenem se Henry Lambamou hemi nao I stret man folem custom behind claim blong family Malesi."



29. The declaration of custom ownership of Nesignwar is made at Paragraph 7.1 of the judgment:

"DECLARATION

7.1 Henry Lambamu wetem ol descendant blong oli tekem ownership right blong Sarmatsu nasara mo Tonas nasara we tufala l stap long boundary blong Nesignwar custom graon long behalf blong Celine Lenimal Serenmal olsem big fire blong Nesignwar."

30. As noted by the Island Court, the judgment under appeal was issued after a second hearing of the dispute. The first hearing found in favour of Celine Malesy but was appealed and referred on appeal for rehearing for reasons as the Court stated that:

".....igat dispute se long Custom blong graon long North East Malekula, wan woman ino save ownem graon from hemi againsem custom."

31. When applying articles 73 and 74 of the Constitution and s10 of the Island Courts Act, the only person in custom who could be declared custom owner aside from Celine was Mr Lambamu through his custom adoption by Meltevaratine, the high chief of Nesignwar. His custom adoption was complete. The MIC noted when visiting the land that, family Malesy's witness Rory identified to the Court the stone used by Mr Lambamu to perform the last namangi at Nesignwar. The MIC gave full consideration to family Malesy's evidence before the Court before declaring Mr Lambamu custom owner of Nesignwar.

32. This is not a civil claim strictly under the Civil Procedure Rules as the Island Court is required to apply custom. Secondly, Mr Lambamu's adoption was part of family Malesy's evidence before the Court and cannot be ignored. The Court gave judgment in accordance with the evidence it received and considered.

33. Family Malesy was served with the applications but has not filed any response either objecting to or conceding to the applications. Both applications are rejected and are hereby dismissed. The appeals will have to be listed for hearing.

Result

34. I make the following orders: -

- a) Both applications are dismissed.
- b) The matter is listed for further review at **2.00 pm on 11th October 2024**.
- c) Costs in cause.

DATED at Port Vila this 7th day of October, 2024

BY THE COURT

Dudley Arti
Judge

