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

Land Appeal
Case No. 95/3 SC/LNDA

BETWEEN: Family Kalulu
Appellant

AND: Family Sope
First Respondent

AND: Family Toro
Second Respondent

AND: Family Kaltabang
Third Respondent

AND: Family Toutak Naru Kapeau Kalsakau
Fourth Respondent

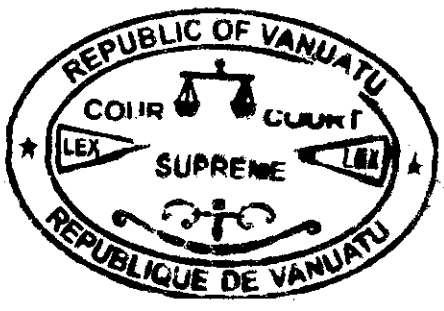
Coram: ***Justice Aru***
Counsel: ***Mr. S. Hakwa for the Appellant***
Mr. J. Malcolm for the First and Third Respondents
Second Respondent (no-appearance)
Fourth Respondent (no-appearance)

DECISION

Background

1. This is a land appeal matter concerning a dispute over custom ownership of land around the area commonly referred to today as paradise cove at Pango South Efate. The Island Court gave its decision on **5 September 1995** declaring Family Toutak, Family Toro, Family Sope and Family Kaltabang as co-owners of the land at *'Watarua'* and *'Emeltau'*. It also declared these same families as perpetual custom owners of both lands with rights to grow crops, make gardens, build houses and live on the land.

2. Family Kalulu of Pango appealed the decision and filed their notice and grounds of appeal on **3 October 1995** seeking to set aside the judgment. The grounds in brief are that the Court:



- Was wrong in allowing Family Kaltabang's claim as it was not based on customary entitlement to land but on an alleged debt of non-payment of Kaltabang's salaries after years of teaching at Pango and was given the land.
- Misdirected itself in holding that there is no individual ownership of land;
- Misdirected itself in holding that land rights are held by the chief and their Council;
- Misdirected itself in holding that land is owned communally;
- Misdirected itself in holding that there was no evidence that someone actually had ownership of the land in dispute;
- Misdirected itself in holding that the land in dispute was divided by the chiefs and elders of Pango;
- Misdirected itself in holding that the respondents are the perpetual custom owners of Watarua and Emeltau;
- Was wrong in law declaring that the respondents are the perpetual custom owners of Watarua and Emeltau;
- Was wrong in in law in not giving due weight or any weight of the appellant's evidence adduced in Court;

3. Whilst the appeal was yet to be heard, in 2007, the Island Court File was destroyed when the Supreme Court building was destroyed by fire.

4. On 8 August 2011 the appellant filed an application seeking leave to introduce new evidence. Also filed in support was a sworn statement deposed by Sope Kalsrap dated 9 August 2011.

5. On 28 September 2011 the appellant filed their submissions in support of the application.

6. On 12 September 2013 the first and third respondents filed a sworn statement by **Barak Tame Sope,** dated 11 September 2013, a sworn statement by **Kalfori Kaltabang,** dated 11 September 2013 and a sworn statement by **Albert Sablan** date 12 September 2013.

7. No application was filed by the respondents seeking leave to file these sworn statements as new evidence.

8. On 18 September 2013 the first and third respondents filed a sworn statement by Tapangkai Sope.

9. On 27 September 2013 the first and third respondents filed their written submissions dated 26 September 2013 in response to the appellant's submissions.

10. On 9 June 2014 the appellant filed a further sworn statement of Sope Kalulu Kalsrap, a sworn statement of Alice Leialo and sworn statement Stephen Toro.

11. On 9 June 2014 Fatiaki J convened a conference to hear submissions in relation to the appellant's application and issued the Orders dated 9 June 2014. The Order identified two issues

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(agreed issues) for the parties to address in their submissions namely: "*what is the true nature of an appeal under s22 of the Island Courts Act*" and secondly, "*what is the power to admit fresh evidence or additional evidence under a s22 appeal*".

12. On 28 July 2014 the same orders were reissued.

13. On 17 June 2015 Fatiaki J issued his Ruling on the appellant's application allowing both the appellant and the respondents to adduce additional evidence on condition that the deponents are made available for cross examination at the hearing of the appeal.

14. The Ruling has not been appealed by the respondents and remains a final decision determining the agreed issues.

15. On 30 May 2024 the first and third respondents filed a sworn statement by Barak Sope.

16. In response, on 17 June 2024 the appellant filed a Notice of Objection against the sworn statement of Barak Sope. Those objections are yet to be heard.

17. On 15 March 2024 after taking over management of the File, I directed that the sworn statements allowed by Fatiaki J be re-served as they had already been filed previously and that the "*deponents be available for cross examination at the hearing of the appeal*" when the appeal is listed for hearing.

First and third respondents notice of objection

18. The first and third respondents object to the sworn statements filed in "2024" and filed their notice of objections on 11 November 2024. No sworn statements were filed by the appellants in 2024. In line with the directions I issued, they provided copies of the sworn statements which were filed in 2011 and 2014. The only statements filed in 2024 were filed by the first and third respondents namely: sworn statement by Christian Kaltabang filed on 30 May 2024 and sworn statement of Barak Sope also filed on 30 May 2024.

19. In support of the objections, Mr Malcolm made oral submissions based on grounds supporting the notice of objections. He submitted that it is trite law in Vanuatu that in an appeal, evidence that was available at the trial can be used in the Appeal and otherwise any new evidence is only admissible on application in an appeal where it was unavailable at the trial. It was submitted that none of the evidence provided by the applicants in furtherance of the appeal is anything that is new or able to be used in an appeal.

20. It was submitted that the first and third respondents accept that the same position applies to their sworn statements and no further or new evidence should be adduced and/or available for cross examination. That there has already been an 8-week trial with all evidence recorded in for the for the Court. It was submitted that as with all appeals, in the event the findings show a mistake of fact or law on its face, and in terms of evidence before the Island Court, then those matters can

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be raised in an appeal. It was submitted that it is not appropriate to re hear the entire 8 weeks of trial and it is not appropriate to introduce new evidence which was not available at the trial and/or disputed by evidence at the trial.

21. It was further submitted that the parties have filed their written submissions and they should rely on those submissions and deal with the matter without the need for a renewed 8-week trial. It was submitted that examination cross examination of new witnesses would be time wasting, very one sided in that to avoid it all the witnesses would have to re give their evidence and be cross examined. It was submitted that it would make the entire Island Court trial a nonsense.

22. It was also submitted that it is trite law that all custom land cases are based on hearsay. That there is no known Ni Vanuatu written language until recent decades. That custom land cases go back hundreds of years. That there is no written law and custom law changes from place to place and the evidence is always by word of mouth which is easy to manipulate.

23. It was submitted that without direct admissible evidence and documentation, custom trials take weeks because of the number of witnesses and all documents such as family trees are modern computer-generated documents also based on hearsay evidence as to what may have occurred hundreds of years ago. It was submitted that the only way justice could be done is to hear the many witnesses to get a matrix of the evidence and the like true history. That in this matter it took 8 weeks over an 8-month period.

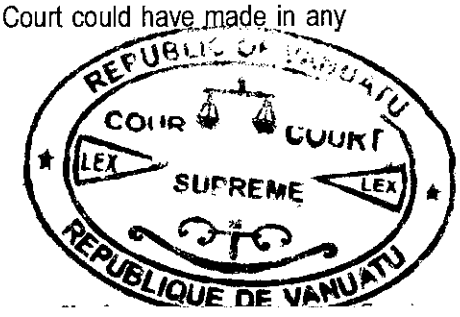
24. It was submitted that to appeal that as with all appeals, the appellant need to show a miscarriage of justice to show:

    a) An assessor that failed to disclose an interest in the reality, or a relationship with any of the parties;
    b) Bribery
    c) An obvious wrongful decision on the evidence to hand or an outright actually provable lie on the evidence.

25. It was submitted that to do that the appellant has the decision and reasoning and whatever documentation is part of the existing case. That new evidence is allowable only if it was unavailable at trial.

26. In support of their submissions the respondents refer to what this Court said in two cases namely **Malas Family v Songoriki family** Land Appeal Case No 1/85 and **Selwyn v Ross** Land Appeal Case No 18/85.

27. These cases do not support the respondents' contention that a rehearing be made only on the papers. In both cases this Court re heard the matter with all the witnesses giving evidence and being cross examined before a decision was given. Section 22 (3) of the Act allows this Court to receive such evidence (if any) and make orders as an Island Court could have made in any matter. (s23(a).



28. The appellant in response submits that the first and third respondents have waived their rights to raise any objections against the further sworn statement of Sope Kalulu Kalsrap dated 9 June 2014, sworn statement of Alice Leialo dated 9 June 2014 and sworn statement of Stephen Toro dated 9 June 2014 by reason of the fact that it has taken them more than 10 years to do so.

29. It was submitted that the appellants had obtained leave from this Court and rely on the Ruling by Justice Fatiaki to file Further sworn statement Sope Kalulu Kalsrap dated 9 June 2014, sworn statement of Alice Leialo dated 9 June 2014 and sworn statement of Stephen Toro dated 9 June 2014. The appellant submits that until such time as the Ruling is set aside by the Court of Appeal, it is a final judgment made by the Supreme Court on all those issues which were raised by the appellant, first respondent and third respondent as set out in the Ruling itself and every party to this appeal is bound by it.

30. It was submitted that the first and third respondents are not entitled in law and are therefore estopped from attempting to raise by way of the notice of objections the same issues which had been previously raised and determined by this Court in its Ruling ; in particular the issue of allowing new evidence in this appeal case has been raised, litigated, and determined by this Court in its Ruling and therefore the first and third respondents are estopped from raising it again

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31. It was finally submitted that the principle of res judicata applies and the Court is functus officio. That allowing the notice of objections to proceed in its current form is an abuse of process and the objections should be dismissed.

Discussion

32. Justice Fatiaki when referring to the submissions made by the appellant to introduce new evidence said:

"It is clear that the submission is based on a construction of section 22 (3) that imposes a mandatory duty on the Court under the three (3) limbs of the section by extending the word shall to each limb."

33. Section 22 (3) provides:

"(3) The court hearing the appeal shall consider the records (if any) relevant to the decision and receive such evidence (if any) and make such inquiries (if any) as it thinks fit."

34. He went further at paragraphs 13 to 16 and said:

"13. I accept that the Court retains a discretion as to the receiving of further evidence and the making of enquiries. The discretion is not unfettered however, in so far as received or inquiry made must be "relevant to the (Island Court's) decision" and be confined within the recognised parameters of an appeal by way of rehearing.

14. Having said this I note that despite their apparent opposition, the three (3) successful respondents before the Efate Island Court, perhaps in recognition of the absence of the original

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record of the Efate Island Court proceedings, also seek to adduce three (3) additional sworn statements namely:

(1) From Barak Sope who was the spokesman for the Family Sope, Family Kaltabang and Family Toro before the Efate Island Court; and
(2) From Kafong Kaltabang and Albert Sablan who were both witnesses before the Efate Island Court.

15. I accept the circumstances of the present appeal are unique and special in that, other than the decision, the original Efate Island Court File and record of proceedings in Land Case No 1 of 1994 have been destroyed and are unavailable for consideration by this Court in this appeal. I also accept that there is a real possibility that any additional evidence received in the appeal is likely to include evidence that was not placed before the Efate Island Court and could be criticized as all "filling gaps" in the evidence, but that is the clear intention and inevitable result and effect of the second limb of subsection (3).

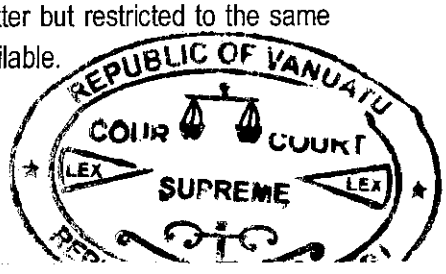
16. Furthermore given the provisions of s22 (4) which declares the decision of the Supreme Court (on appeal) "....final and no appeal shall lie therefrom to the Court of Appeal" coupled with the need to reconstruct as much of the record of proceedings before the Efate Island Court as fully as possible, I allow the application(s) to adduce additional evidence by the appellant and the respondents on condition that the deponents be made available for cross examination at the hearing of the appeal."

35. I agree with the appellant that as the ruling has not been appealed since it was issued and almost 10 years have now lapsed the ruling finally determined the two issues raised. The first and third respondents' objections cannot be sustained as both parties were allowed to file their sworn statements as new evidence in view of the circumstances and this Court is now functus officio.

36. Section 10 of the Island Courts Act gives an Island Court jurisdiction to administer the customary law prevailing within the territorial jurisdiction of that Court.

37. Section 22 (3) provides that the Court hearing an appeal (from the island court) shall consider the records (if any) relevant to the decision and receive such evidence (if any) and may make such inquiries (if any) as it thinks fit. This Court is given discretionary powers under s.23 and can make an order as the Island Court could have made in any matter or can order that any such cause or matter be reheard before the same Court or before any other island Court.

38. The appeal seriously challenges the findings made by the Efate Island Court in awarding custom ownership to the respondents. The appellant wants the appeal heard in line with Fatiaki J's ruling or for the matter to be remitted to the Island Court for a re-hearing in view of the circumstances. This is opposed by the respondents. However, as no records are available and given the respondents strong objections to a rehearing with all the witnesses and objections to any cross examination of witnesses, I am of the view that justice in this can only be best achieved by returning the matter to the Efate Island Court to rehear the matter but restricted to the same parties given that the initial record of their proceedings are unavailable.



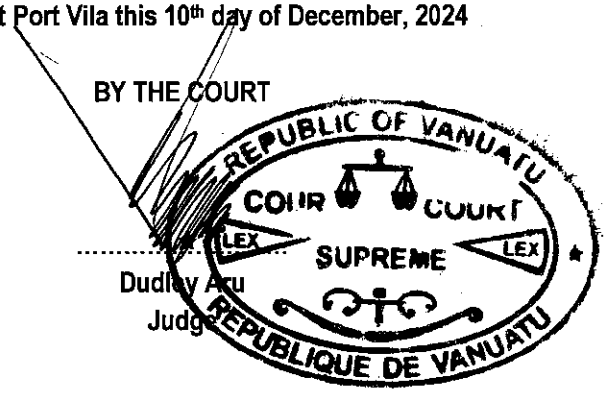
Result

39. The orders are: -

a). The matter is remitted to the Island Court.
b). The Efate Island Court shall be reconstituted to rehear the matter but with the same parties.
c). No orders as to costs

DATED at Port Vila this 10th day of December, 2024

BY THE COURT



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Dudley Aru
Judge