

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

Land Appeal Case No. 2 of 2012

IN THE MATTER OF : TANNA ISLAND COURT

BETWEEN: FAMILY IAKUA
First Appellant

AND: FAMILY LAVAH KARETFA
Second Appellant

AND: FAMILY LESARE
Third Appellant

AND: FAMILY IRAPIA
Fourth Appellant

AND: FAMILY KIEL LOIVIA
Fifth Appellant

AND: FAMILY TAFAN
Sixth Appellant

AND: FAMILY LAVAH KEWIEVI
Seventh Appellant

AND: FAMILY NALPINI KATH
First Respondent

AND: FAMILY IOLIN
Second Respondent



AND: FAMILY IOLU
Third Respondent

AND: FAMILY KAUH
Fourth Respondent

AND: FAMILY IARIS
Fifth Respondent

Coram: Justice Aru

Assessors: Mrs. Lina Tamanu Sam
Mrs. Anneth Lopri

Counsel: Mr. F. Laumae-First Appellant (Family Iakua)
Mr C. Rau -Second Appellant-Family (Lavah Kareffa)
Mr. W. J. Kapalu -Third Appellant (Family Lesare)
Mr. R. Kapapa - Fourth Appellant (Family Irapia)
Mr. J. Tari-Fifth Appellant (Family Kiel Ionivia)
Mr. Mr. E. Nalyal- Sixth Appellant (Family Tafan)
Mr. D. Yawha - Seventh Appellant (Family Lavah Kewievi)

Mr. C. Leo-First & Second Respondents (Family Nalpini Kath) & (Family Iolin)
Mr W. Daniel -Third Respondent (Family Iolu)
Mr. L. Napuati - Fourth Respondent (Family Kauh)
Mr. Kiel Loughman for the Fifth Respondent (Family Iavis)

RULING

Introduction

1. These are the reasons for the court's ruling of 5 June 2017 dismissing the Second Appellant's Application. During the management of this appeal, a number of preliminary issues were identified by the parties which were raised in the grounds of appeal. On 24 October 2013 direction orders were issued giving 14 days for the Second Appellants Family Lavah Kareffa to file and serve an Application with their sworn statements for the determination of these issues namely whether Senior Magistrate Steve Bani had



jurisdiction to issue the judgment in Land Appeal Case No 1 of 2000 and secondly, in relation to the issue of bias, whether the Court was properly constituted to give judgement in the case. The Respondents were then allowed 21 days to file and serve their response and sworn statements in support by 6 December 2013. The Application was listed for 3 and 4 March 2014. Due to so many delays that hearing never took place until 31 May 2017. Most of the delays were due to adjournments of the hearing, unavailability of counsels and indecision as to nomination of assessors to assist this Court.

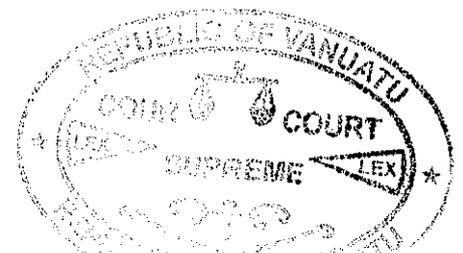
2. Even then, Counsel for the Second Appellant Family Karetfa before the hearing filed an application on 30 May 2017 a day before the hearing seeking an extension of time to file further sworn statements and written submissions which was refused. The First Appellant also filed a sworn statement of Jimmy laus on 31 May 2017 which was also ruled out as it was filed at the very last minute after so much time was allowed to the parties.

Background

3. At the conclusion of the hearing in Land Case No 1 of 2000, judgment was issued on 25 April 2012 by the Island Court consisting of Senior Magistrate Steve Bani sitting with 3 justices of the island Court, namely, Samson Ieru Bruno Kema and Micheline Noar. The following five families were declared by the island Court as custom owners of Namruerne land:-

- Family Nalpini Kath
- Family lolu
- Family Kau
- Family Iolin; and
- Family lavis

4. These families were declared as custom owners with perpetual customary ownership rights over the land in equal shares. The losing parties now Appellants then appealed. The land in dispute covers the area commonly known today as "black man town" at Lenakel, Tanna.



Law

5. The relevant pieces of legislation considered for the purpose of this hearing are the Island Courts Act [CAP 167] (the IC Act) and the Judicial Services and Courts Act [CAP 270] (the JSC Act).

Discussions

Jurisdiction – Constitution of the Court

6. Section 3 of the IC Act provides:-

"(1) The President of the Republic acting in accordance with the advice of the Judicial Service Commission shall appoint not less than three justices knowledgeable in custom for each island court at least one of whom shall be a custom chief residing within the territorial jurisdiction of the court.

(2) A person may be appointed a justice for more than 1 island court.

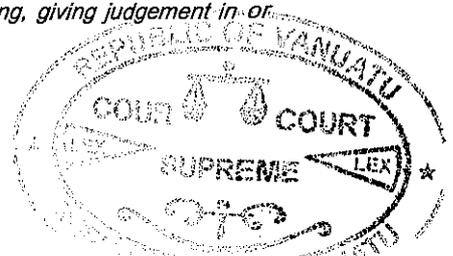
(3) A justice shall be paid such allowances as the Chief Justice may determine.

(4) An island court is properly constituted when three justices nominated by the clerk are sitting."

7. It was submitted by the appellants that none of the justices who sat are from west Tanna and the clerk did not give an opportunity to the parties to vet the names of the proposed justices. The submission is without basis as there is no evidence to support it. In relation to the Magistrate sitting with the Island Court justices, it was submitted by the appellants that Magistrate Bani lacked jurisdiction to give judgment in the case as he had left the judiciary by then and therefore had no jurisdiction to continue the case and give judgment.
8. There is no evidence of that but even if that were the case, s 24 of the JSC Act allows a Magistrate who has left the judiciary to complete cases partly heard before their termination or resignation. It states:-

"24. Magistrate may sit after appointment terminated and other paid work

(1) A magistrate whose appointment has terminated (otherwise than by reason of his or her removal from office) may sit as a magistrate for the purpose of hearing, giving judgement in or



otherwise finishing any proceedings which were commenced before the termination of his or her appointment.

....."

9. That submission is also rejected.

Bias

10. The rule against conflicts or bias on the part of justices of the Island Court is stated in section 26 of the JSC Act as follows:-

"If a justice or an assessor has any personal interest or bias in any proceedings he shall be disqualified from hearing the same."

11. Furthermore, rule 6 (3) of the Island Court (Civil Procedure Rules) 2005 restates the requirement in the following terms:-

"(3) Interest of justice

(a) Declaration of interest by justice

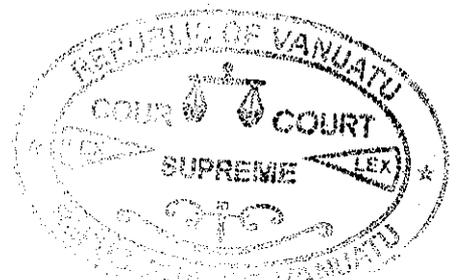
If, at any stage of the proceedings, a justice realises that he or she is related to any of the parties or has any interest in the subject matter of the claim, that justice must inform the other justices who must then inform the parties and ask the parties whether they wish the justice to withdraw from the hearing. If one or more of the parties objects to the justice hearing the case, that justice must withdraw, and the hearing adjourned to a new date and time. If the parties have no objection to the justice hearing the case, the case may proceed.

(b) Objection by party

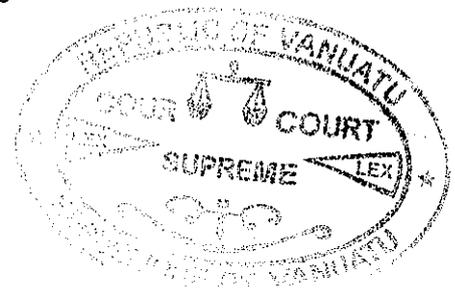
If a party considers that a justice is related to any of the parties or has an interest in the subject matter of the claim, that party may object to the court about the participation of that justice. If the other justices consider that the objection is well founded, the clerk shall adjourn the hearing to be heard by a different panel of justices.

If the justices consider that the objection is not well founded, the court shall continue with the hearing.

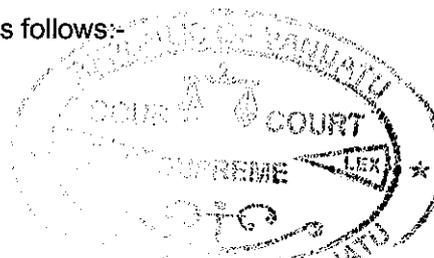
(c) Recording of declaration or objection relating to the interest of a justice The clerk must record any declaration of interest made by a justice, or objection made by a party to the interest of a justice, and the result of that declaration or objection."



12. The only witness called by the Appellants alleging bias against one of the justice's sitting with Magistrate Bani is Mr Tom Kaltoi [Exhibit "A22"]. His evidence is that justice Samson Ieru had a conflict of interest as he was married to the sister of the original claimant's wife's mother Jonah Robert from Family Nalpini Kath and should not have been sitting on the case as one of the three justices. Under cross examination he said he did not know all the family of Johna Robert. Furthermore he confirmed that he was not inside the Court room and he did not raise any objections during the Island Court hearing but was only later told that his spokesman did. No evidence was filed by his spokesman. The absence of this evidence means that before this Court there is no evidence that an objection was made in the island Court to Samson Ieru sitting as an assessor.
13. With regards to a Magistrate, s21 of the JSC Act makes provision for a Magistrate to disqualify himself from a proceeding on the grounds of bias or a party may apply to a Magistrate to disqualify himself on the grounds of actual bias or an apprehension of bias. It states:-
- "(1) If:*
- (a) a magistrate has a personal interest in any proceedings; or*
- (b) there is actual bias or an apprehension of bias by the magistrate in the proceedings;*
- he or she must disqualify himself or herself from hearing the proceedings and direct that the proceedings be heard by another magistrate.*
- (2) A party to any proceedings may apply to a magistrate to disqualify himself or herself from hearing the proceedings.*
- (3) If a magistrate rejects an application for disqualification, the applicant may appeal to the Supreme Court against the rejection. If an appeal is made, the magistrate must adjourn the proceedings until the appeal has been heard and determined.*
- (4) A magistrate who rejects an application for disqualification must give written reasons for the rejection to the applicant."*
14. There is no evidence before this Court that a party during the island Court proceedings applied to Magistrate Bani to disqualify himself from hearing the case.



15. The only other evidence called by the appellants on the issue of alleged apprehension of bias on the part of Magistrate Bani relates to events in Vila not Tanna. The appellants relied on the evidence John Iouiou [Exhibit "A21"] and Royson Willie [Exhibit "A23"].
16. John Iouiou's evidence is that he saw Magistrate Bani meeting George Nipiko who is the spokesman for family Lavis at the Loughman Kava Bar at Freswota. That George Nipiko bought their kava with VT 1000 then contacted Magistrate Bani who later drove to the kava bar in a government vehicle got the kava in a plastic container and left. Under cross examination, John Iouiou could not recall the exact date and time he said he saw Magistrate Bani at the nakamal with George Nipiko. This was denied by George Nipiko under cross examination that he never met John Iouiou or Magistrate Bani at the Loughman kava bar at Freswota.
17. Royson Willie's evidence is that on 29 November 2010 at 3 to 4pm he was standing at the roundhouse nakamal at Freswota and saw Magistrate Bani with Tom Loughman who is a member of family Lavis driving past going towards Bon Marche at Freswota. He was cross examined.
18. The respondents on the other hand in response relied on two sworn statements filed by Tom Loughman [Exhibit "R51"] and George Nipiko [Exhibit "R52"]. Tom Loughman's evidence is that his family, family Loughman is not a party in the land case and that he knew Magistrate Bani from their law school days. That during the hearing of the land case, Magistrate Bani was on Tanna and he was in Vila and did not associate with him during the hearing. Under cross examination he denied being with Magistrate Bani on 29 November 2010 as alleged by Royson Willie. As for George Nipiko, his evidence is that at the end of the case he was only in Vila once or twice but never met with Magistrate Bani in private. He denies ever buying kava for Magistrate Bani as he is unemployed and stays with families in Vila and cannot afford to buy kava for VT 1,000. He was also cross examined.
19. The law relating to the issue of bias in Court proceedings has been stated by the Court of Appeal in **Matarave v Talivo** [2010] VUCA 3 as follows:-



"The test we apply is whether a fair minded lay observer might reasonably apprehend that the judge might not bring an impartial mind to the resolution of the questions which the Court was required to decide. In the case of the assessors the test is the same.

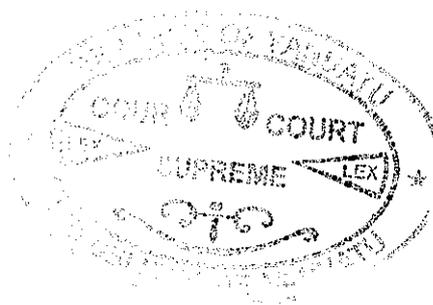
....

Where a suspicion or apprehension of apparent bias is said to arise from particular circumstances, the test is an objective one. The test requires the Court's assessment of the perception which the circumstances would give rise to in the mind of a fair minded lay observer informed of the facts. The test is to be applied at the time when the circumstances arose. The test is not one to be applied after the judgment is delivered and with knowledge of the outcome of the case.

....

However, matters of fact and degree inevitably arise. Casual meetings may lead to discussion, and the subject matter of the discussion might be important. As the cases emphasize, all the circumstances must be considered. In the present case, the mere attendance of the judge in his role as leader of the church at the opening ceremony and his participation in formal celebrations would not be sufficient to give rise to a reasonable apprehension of bias. Further, the mere fact that the judge comes from the same island as one of the parties would not give rise to a reasonable apprehension of bias. However the matter did not end there. The contact continued over some two days in which the judge and his wife resided in the home of one of the parties. Of even greater significance is the giving and receiving of a significant gift at the conclusion of the ceremony. Those factors must go into the balance..."

20. We find that the appellant's evidence as to bias on the part of Magistrate Bani is unreliable. Secondly the alleged events are said to occur in Vila not Tanna where the hearing was held and finally and more importantly, there is no evidence that a party applied to Magistrate Bani to disqualify himself from hearing the case.
21. Because the evidence is unreliable, we are of the view that no fair minded lay observer in terms of the test in *Matarave* might reasonably apprehend that the Magistrate might not be impartial.
22. The final argument made by the appellants relates to delay in delivery of the judgement by the Court. No evidence was produced by the Appellants to show that there are errors in the Judgment because of the delay. In the absence of such evidence, that argument is also rejected.



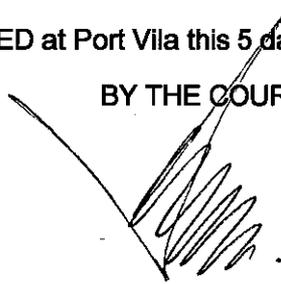
Conclusion

23. When considering the submissions and the totality of the evidence called, the final orders are:-

1. The Second Appellant's application is dismissed. The Magistrate had authority to issue the judgment on 25 April 2012 and the Island Court was properly constituted.
2. The Respondents are entitled to costs to be agreed or taxed by the Master.
3. A further conference to manage the hearing of the appeal proper is listed for 2.00 pm on 23 June 2017.

DATED at Port Vila this 5 day of May 2017

BY THE COURT



.....
D. ARU
Judge.

