

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

**Land Appeal
Case No. 17/1831 SC/LNDA**

**BETWEEN: CHIEF TARIPOAMATA FAMILY MANAPANGA MANIA & BILLY
AMIERA MARMOSOEETAPAU
FIRST APPELLANT**

**AND: FAMILY METAK VALEAWIA
SECOND APPEALLANT**

**AND: FAMILY ALBERT KALMARIE
FIRST RESPONDENT**

**AND: FAMILY GEORGE TITUS
SECOND RESPONDENT**

**AND: FAMILY KALSAF
THIRD RESPONDENT**

**AND: FAMILY JERRY NAMBAKAUMATA
FOURTH RESPONDENT**

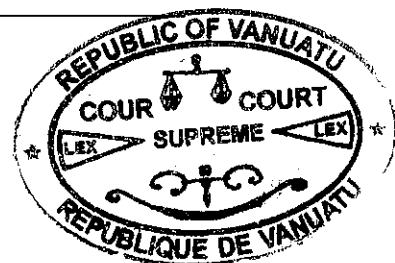
**CHIEF MANUKAT & FAMILY
FIFTH RESPONDENT**

**AND: FAMILY MAKOU-LOVA MARAKI VANUA
SIXTH RESPONDENT**

**Coram: Justice Dudley Aru
Assessors: Timothy Kalangis
Felix Thomas**

**In Attendance: D Yahwa – 1st appellant
R Tevi – 2nd Appellant
C Leo - 1st Respondent
2nd Respondent (no appearance)
3rd Respondent (appearance)
J Tari – 4th Respondent
J Kilu – 5th Respondent**

RESERVED JUDGMENT



Introduction

1. This is a land appeal against a judgment of the Efate Island Court (EIC) concerning custom ownership of EPULE and TANGOROPO lands located at North Efate.

EIC judgment

2. The Court was constituted by the late Senior Magistrate Rita Naviti and three Island Court justices, chief Jimmy Meameadola, Anne Calo and Thompson Andrew. Following the hearing, a decision was made on 18 June 2011. In its findings, the EIC said:

"In this case it is difficult to determine customary ownership of EPULE Land because there is not much said on custom, apart from some well-known stories. The court expects to hear evidence of the ORIGINAL TRIBES of the claimants, their custom totems or Nafiac, but nothing of such was said. Making it difficult to trace their origins.

Having said this and after considering all evidences adduced in this case. We are satisfied that, the parties before the court fall into 3 different categories

- Explorers
- Perpetual Land owners and
- Custom owners.

Normally in custom Head chiefs controlled and managed the main boundaries. These boundaries are marked by Rivers, Mountains and series of big stones. Within such big boundaries smaller boundaries are put in place by the Head chiefs and allocated to assistant chiefs and head of tribes. The Sketch map of the disputed land provided to this court by Albert Kalmaire includes 5 different pieces of land; within 2 main boundaries.

TANAROPO (by the cost); ROARAFARAP (in land);
ERANGO (inland);
EPULE
WANAKOPA
EPAU

This leads up to find that 6 of the claimants before this court are 6 assistant chiefs descending from 2 Head chiefs or Paramount chiefs."

3. And the following declarations were made:

"FAMILY ALBERT KALMARIE

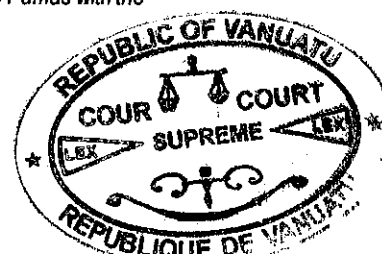
He is the Custom owner of TANOROPO and RORAFRAF lands; and CARETAKER of EPULE LAND.

FAMILY GEORGES TITUS

He is under Chief Metak VALEAWIA, he must negotiate his land with the declared custom owner of Epau.

FAMILY METAK VALEAWIA

Chief Valeawia, is custom owner of EPAU and ERANGO (see boundary attached). He must re-negotiate the Pumas with the declared custom owner of WANAKOPA.



FAMILY KALSAF

He is under chief Metak VALEAWIA, he must negotiate his land with the declared custom owner of Epau.

CHIEF TARIPOAMATA

He is descendant of KALOROSA's TRIBE, he owns a piece of land within the land allocated to LAUSAKE community. He must negotiate the rest of the land with the declared custom owners.

CHIEF JERRY NAMBAKAUMATA

His long term absence from EPULE does not allow him to return to EPULE. He must negotiate his return with the caretaker Chief Maripatok with the custom blessing of Vaturisu Counsel of Chiefs.

FAMILY LOUIS SOSOU MAUPE

His application is dismissed

CHIEF MANUKAT & FAMILY

He is custom owner of WANAKOPA LAND. (See boundary attached)

**FAMILY MANAPANGA MANUA &
BILLY AMEARA**

the application to be declared custom owner of EPULE LAND fails.

**FAMILY MAKOU-LOVA MARAKI-
VANUA**

He is PERPETUAL LAND OWNER of a piece of Land within TANOROPU under chief MARIPATOK

MARMASOETAPAU

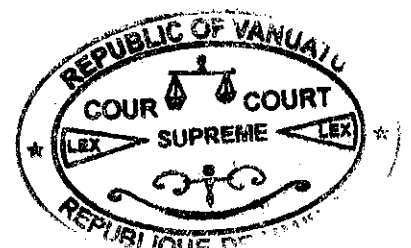
Application to declare MARMASOETAPAU custom owner of EPULE fails.

MAUTIKETIKE TRIBE

His application to declare MAUTIKETIKE custom owner of EPULE fails."

Appeal

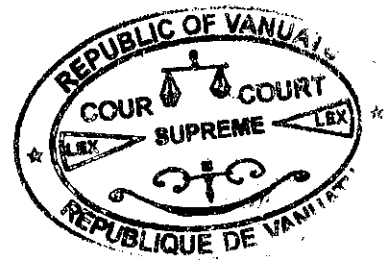
4. There are two appellants in this appeal. The first appellant consists of number of counter claimants who had the same ground of appeal and filed a single notice of appeal, namely; Chief Taripoamata, family Manapanga Manua & Billy Ameara, Marmasoeetapu and Mautiketike tribe. They were represented by Mr Yahwa .
5. Their grounds of appeal in summary are that:



- That the judgment was tainted with bias and conflict of interest both directly and indirectly by the supervising Magistrate and the justices composing the Court;
 - The Court published and decided as part of its judgment a sketch map and declared custom owners according to its boundaries and names of places marked on that map contrary to the map agreed to by all the parties during the proceedings and site inspection. That the agreed map was put in evidence before the Court by chief Taripoamata.
 - The Court made an error in the custom of Efate without consideration of the evidence before it when it declared the respondents custom owners of the different boundaries.
6. The second appellant is family Metak Valeawia. Chief Valeawia was declared custom owner of EPAU and ERANGO and that he must re negotiate the Pumas with the declared custom owner of WANAKOPA. They appeal on a number of grounds namely that the EIC:
- did not allow them to be served with copies of other claimants' claims in order for them to challenge those claims;
 - failed to consider their evidence of a Deed of Sale identifying the custom owner of the land;
 - failed to allow each claimant to walk or visit the boundaries as claimed in their respective claims. The judgment was delivered in the absence of any site visit to each area claimed.
 - erred in awarding counterclaimant 7 (chief Manukat and family) Wanakopa land boundary where there was no site visit by counter claimant 7 at Wanakopa during the hearing.
 - erred in awarding the second appellant part of Erango land which in custom belongs to the original claimant family Albert Kalmarie . The second appellant had not claimed any part of Erango land which was awarded to them.
 - erred in finding that counter claimant 5 chief Jerry Nambakaumata was originally from Epule when there was evidence that he came from Emae Island and had not lived at Epule for more than six hundred (600) years.
 - erred by relying solely on part of the Supreme Court judgment in Manie v Kilman [1988] VUSC 9, [1980 – 1994] Van LR 343 which formed the basis of the finding that chief Jerry Nambakaumata was originally from Epule.
 - erred in finding that page 6 paragraph 8 of the judgment that the second appellant was part family of counter claimant 7 (chief Manukat and family).

Discussion

7. We deal with the first appellants grounds of appeal first. The main thrust of their appeal is the issue of bias. Not that there was actual bias but the likelihood or apprehension of bias which is addressed in their written and oral submissions. No submissions were made addressing the balance of their grounds of appeal. Therefore, their only challenge to the judgment is that it is tainted with bias due to alleged close family ties of the Senior Magistrate and justice Meameadola to some of the parties.



8. The first aspect is that the spokesman for the first respondent (family Kalmaire), Ephraim Songi, is married to Delma who is the sister of justice Jimmy Meameadola. They submit that this objection was made in Court but was overruled.
9. Second that the spokesman for the second appellant (family Metak Valeawia), Titus Taripu eldest daughter was engaged to marry the Magistrate's son Leeman Naviti sometime before the hearing occurred. They submit that this objection was also raised in Court but was overruled.
10. The third aspect is that a lady called Leikarie a member of the third respondent's family (family Kalsaf) is married to Harry Naviti the eldest brother of the Magistrate's husband (now deceased). They submit that this objection was raised in Court but was overruled. It was submitted that during the hearing Harry Naviti and Leikarie attended with the third respondent's families. It was further submitted that eight (8) days after judgment was given, the Magistrate's husband, Toara Peter Naviti and Harry Naviti and members of the third respondent's family were seen organizing a kava fundraising night at the Makira community hall at Anamburu.
11. The evidence relied on by the first appellant is that of Charlie Ben Abel. He was called upon by Mautiketike tribe (first appellant) to make the statement. By his own evidence he did not make any objection because he came late to the hearing. Next is Charley Mala. He did not raise any objections himself, instead saying the objections were made by Kennedy Kalfau. Mr Kalfau says he was the spokesman for the first appellant, Marmasoeetapau. He says when the hearing begun, opportunity was given as a preliminary matter for parties to confirm any disagreement about the assessors and he raised his objections. First that the presiding Magistrate was related to the seventh respondent (chief Manukat and family). Next that the Magistrate was related to the third respondent (family Metak Valeawia) as the daughter of the third respondent's spokesman, Mr Titus Taripu was engaged by the Magistrate's son as his wife sometime before the hearing and the couple got married sometime after the judgment was delivered. The final objection was in relation to justice Meameadola sitting as his sister Delma is married to the first respondent's family (Albert Kalmaire) spokesman's Mr Ephraim Songi.
12. Section 21 (2) and (3) of the Judicial Services and Courts Act [CAP 270] as amended states:
 "

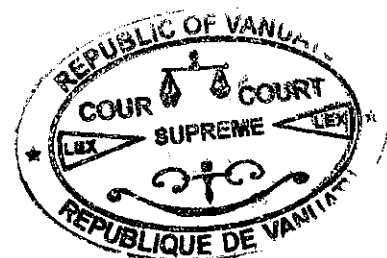
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(2) A party to any proceedings may apply to a magistrate to disqualify himself or herself from hearing the proceedings.

(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.

....."
13. In relation to justices or assessors, s26 of the Island Courts Act [CAP167] provides:

"26. Disqualification
 If a justice or an assessor has any personal interest or bias in any proceedings he shall be disqualified from hearing the same."
14. And under the Island Court Civil procedure Rules, rule 6 (3) (b) and (c) provides:



"...

(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.

..."

15. The respondents generally submit that the allegations of bias are without basis and the alleged close connections complained of could not lead to an apprehension of bias.

16. First, the only person who says he made objections is Mr Kennedy Kalfau. He says his objections were not recorded. That is not correct. The record of the proceedings which is required to be kept by s28 of the Island Courts Act and headed Record of Trial at page 14 of the first appellant's Appeal Book under the heading *Composition Blong Kot* records that:

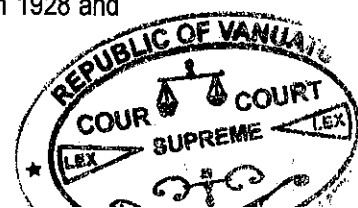
"Taem kot hemi openem trial long 20 July 2010, Senior Magistrate hemi inquire long any issues we l might affectem trifala justices blong Efate Island Court we oli sitdaon. Every parties oli acceptem trifala justices."

17. The record which is prima facie evidence of what occurred during the proceeding is that all the parties accepted the three justices to sit. There is no objection recorded against the Magistrate. Even if one was made and refused, Mr Kalfau had the opportunity to appeal the Magistrate's refusal but did nothing.

18. Second, in view of the evidence, we are not persuaded by the first appellants submissions. Not only is the evidence lacking but the family ties alleged are so remote and not directly involving parties and members of the Court. Ephraim Songi was not a named party but the spokesman for the first respondent (family Albert Kalmarie). Titus Taripu was also not a named party but the spokesman for the second, third and fourth respondents (family George Titus, family Metak Valeawia and Family Kalsaf respectively). Finally, family Naviti was not a party to the proceedings. In the context of Vanuatu, we accept that in a small community people could be related to others through inter-marriages. However in this case given the nature of the allegations, a fair minded person could not objectively assess an apprehension of bias.[see **Matarave v Talivo** [2010] VUCA 3]

19. Turning to the second appellant's grounds of appeal, there is no evidence that the Court did not allow them to be served with copies of other claimants' claims. In the Record of Trial, under the heading *Procedures*, it was clearly recorded that: *"Olketa counterclaimant oli receivim statement blong claim mo map or sketch map nomo"*. The second appellant being one of the counter claimants was therefore served.

20. The next ground concerns a Deed of Sale. The second appellant submits that the EIC failed to consider the second appellant's evidence of a Deed of Sale identifying the custom owner of the land. They submit that their descendant had sold the land to the McCoy Brothers in 1928 and



had the Court taken this into account they should have been declared custom owners of part of the land.

21. There are six (6) names of native vendors on the alleged Deed of Sale document. The submissions do not specify which of the six is their descendant or whether all are descendants of the second appellant. In **Family Makono v Orah** [2020] VUCA 16, the Court of Appeal when considering the effect of a deed of sale relied upon in that matter as proof of custom ownership of land said:

"...such documents could not be construed or admitted as proof of ownership. The appellants could only succeed if they could prove custom rights. Moreover, the instrument of sale was not a decision of a competent Court. The Epi Island Court ruled that the appellants' case must entirely fail. The second ground of appeal also fails.

We recognize that this is an important case for Family Mokono and that it relates to customary land which is of fundamental importance to all Ni-Vanuatu people. We reiterate that there is no possibility in law for the instrument of sale that the appellants have relied on to be accepted as proving customary ownership of the subject land." (emphasis added)

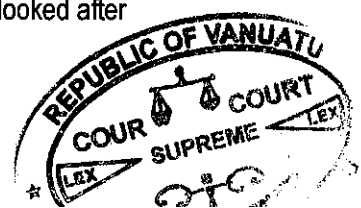
22. A deed of Sale therefore cannot determine custom ownership of land. This submission is therefore rejected.
23. The second appellant also submits that the EIC awarded Wanakopa land to chief Manukat and family without a site visit to the land. Under the Island Court Civil Procedure Rules, where a claim concerns ownership of custom land, it is mandatory that the Court visit the land to inspect its boundary before giving judgment. (rule 6 (10))
24. Family Manukat in response submitted there was no evidence from the second appellant that there was no site visit. It was submitted that the second appellant was present with representatives of other parties when the Court visited Wanakopa land.
25. The Court noted in its findings that *"During the visitation it was clear that this claimant (chief Manukat and Family) is not familiar with the visited sites in the inland area. Furthermore Manukat's nasara was said to be in the developed area at the sea coast .."* . We agree there was a site visit to Wanakopa land despite the allegations by the second appellant.
26. The second last issue raised by the second appellant is that they were declared custom owner of Erango when they did not make a claim for it. The Record of Trial records the second appellant's main witness Stephen Kalto's evidence as follows:

"witness ia hemi save olgeta boundaries blong claim blong hem . Hemi callem area long west blong Epule river se hemi Erango .Hemi save se ikat 3 survivors blong Erango istap mo wan long olgeta hemi Tukurao Takor".

27. The Court found that:

"..Thompson Valeawia was the most influential chief. He was very powerful. Once upon a time he was governing Epau and Epule. During his reign he has received Pumas from Tukurao Takor."

28. Tukurao Takor was the wife of Chief Maripatok and they resided at Erango until he died and was buried there. Tukurao Takor who was his only survivor was then taken care of and looked after



by chief Valeawia of Epau until she died. Before she died, to thank chief Valeawia for his kindness, she gave all of chief Maripatok's lands of Epule and Erango to chief Valeawia as "Pumas". As a result the second appellant was declared the custom owner of Epau and Erango. It would be absurd to be awarded land if one did not claim it.

29. The final ground of appeal concerns the Court's finding that the fifth respondent, family Jerry Nambakaumata is originally from Epule. It was submitted that the Court was wrong to rely on Manie v Kilman [1998] VUSC 9 to find that family Jerry Nambakaumata was originally from Epule

30. The Court not only referred to *Kilman* but noted that none of the parties (including the second appellant) disputed Jerry Nambakaumata's evidence. The Court found that:

"There were strong evidences to show on probability that this claimants' ancestors originated from this area. In fact this is the only claimant who shows traditional sites and cultural attachment to EPULE with traditional stories and sacred places within the land. The following evidences were not disputed:

1. Ancestors' sacred place "Kirivatu";
2. Ancestors' "Disaster stone";
3. Ancestors tradition way of building a Structure of Varea; and
4. The word Pule which was used by the claimants on their settlement on Emae and another settlement in Vila, at Anaburu area Seven Star; and
5. Their willingness to return to their land in 1946; all those evidences strongly supports their claim as the original occupiers of the land."


31. The above evidence was not disputed and not challenged therefore the second appellant cannot now challenge the Courts findings based on the undisputed evidence.

Result

32. For these reasons we are of the view that both appeals be dismissed. The respondents are entitled to costs to be agreed or taxed by the Master.

DATED AT Port Vila this 8th day of April 2022

BY THE COURT


Dudley Aru

Judge

