

BETWEEN: KALRONG KALWATSIN
Appellant

AND: ESAU WILLIE
Respondent

Coram: Chief Justice Vincent Lunabek
Justice John Mansfield
Justice Mark O'Regan
Justice Daniel Fatiaki

Counsel: Mr Saling Stephens for the Appellant
Mr Stephen Joel Tari for the Respondents

Date of hearing: Thursday 22nd October 2009 and Wednesday 28th October 2009
Date of Judgment: 30th October 2009

JUDGMENT

1. On the 26th of November 1993 the Malekula Island Court delivered its judgment in Land Case No.02/93 between Esau Willie and Chief Bersie Timothy (the Claimants). Both parties had claimed customary ownership rights over the same land ('the disputed land'). Esau Willie claimed as the son of Willie Prey, the adopted son of Thomas the original owner of the disputed land, and Chief Bersie Timothy as a direct descendant of Thomas.
2. In its judgment the Malekula Island Court noted that Thomas had surviving issues including 2 daughters Lekolan and April. The Island Court determined that both of the Claimants in the case had "*equal raets*" to the disputed land and the Court urged them to attempt to reach a compromise as to how the land might be divided between them and, failing which, the Court would decide the matter. What the form, nature and extent of those "*raets*" were over the disputed land is not discussed or delineated in the judgment. More importantly, for present purposes, the judgment did not

address or determine what rights over the disputed land (if any) existed in favour of Lekolan and April or were denied them as a result of the Island Court decision.

3. Be that as it may, sometime after the Island Court's judgment, differences arose between Esau Willie and Lekolan and April over their occupation of the disputed land culminating in the issuance in December 2001 of an Originating Summons in the Supreme Court. The parties to the Summons were Kalrong Kalwatsin the son of April who was not a party to the Island Court case, (as Plaintiff) and Esau Willie (Defendant). This is the original action from which the present appeal arises. A short Judgment was eventually delivered by Saksak J on 12th November 2004 dismissing the Originating Summons and declining any relief.
4. In its judgment the Supreme Court dealt with two main issues raised by the Appellants' Originating Summons in the following extracts:

"1. Whether Defendant acted in a representative capacity in the Island Court?

The Claimant did not call any evidence from the Island Clerk or a Chief who presided as a justice of the Court to confirm his allegation. In this sworn statement Exhibit P1 the Claimant annexes as "B" a copy of the judgment of the Island Court dated 26th November 1993. It is headed LAND CASE No. 02/93.

It states clearly it is 'BETWEEN: ESAU WILLIE (Plaintiff) AND: CHIEF BETSI TIMOTHY (Defendant)'. In his oral evidence the complainant confirmed this. I am therefore not satisfied that the Defendant acted in a representative capacity.

Therefore the declaration sought by the Claimant is declined."

5. We interpose here to note that in a renewed application for leave to appeal out of time filed in this Court the Appellant produced a sworn statement of Chief Males Freddie who was a member of the original Malekula Island

Court in Land Case No.02/93 who deposed that Esau Willie was the “spokesman” on behalf of the two women Lekolan and April who were the true surviving descendants of Thomas the original owner of the disputed land.

6. The second issue which the Supreme Court dealt with in its Judgment on the Originating Summons was:

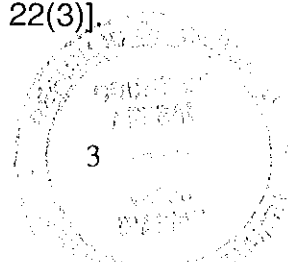
“2. Whether the land in question is owned by Thomas and his life blood descendants?

This Court does not have original jurisdiction to determine issues as to ownership of land. It only has appellate jurisdiction. And the Claimants’ case is not in appeal. Therefore the Court declines to make the declaration sought by the Claimant”.

7. For the same reason the Court declined 2 other declarations sought in the Originating Summons.

8. In this latter regard, although the learned judge was strictly correct in asserting the absence of an original jurisdiction in the Supreme Court to determine issues of ownership of customary land, his Lordship nevertheless recognised that there was an appellate jurisdiction which could be invoked by *“any person aggrieved by the order or decision of an Island Court.”*

9. It would have been apparent from the sworn statements filed in support of the Originating Summons that the applicant and his mother (April) and aunt (Lekolan) were *“persons aggrieved”* by the Malekula Island Court’s decision in Land Case No.02/93 and, as such, would be proper appellants against the Island Court decision. An appeal would have been the proper manner to bring the matter before the Supreme Court. If the Supreme Court had treated the Originating Summons as an appeal under Section 22 of the Island Court Act, the Court would have been able to receive such additional evidence and make such inquiries as it thinks fit [Section 22(3)].



In determining an appeal, the Supreme Court may make any order which the Island Court could have made in the cause or matter. [Section 23(a)].

10. Had the matter come before the Supreme Court as an appeal or been treated as such, then some finality would have been brought to bear on the proceedings and the grievances of the sisters Lekolan and April could have been addressed on its merits and the later Constitutional Application (referred to below) as well as the subsequent appeal to this Court possibly averted. Unfortunately this case has been marked by unnecessary procedural applications that have multiplied to the cost and detriment of all parties concerned without any real end in sight and moving the case further and further from the Island Court which has the original exclusive jurisdiction to determine the substantive matters in dispute.
11. For instance, instead of an appeal being lodged against the Supreme Court's decision as might be expected in the normal course of events, a Constitutional Petition, pursuant to s.218 of the Criminal Procedure Code was filed in August 2005 in the names of Mrs Lekolan Gongi and April Kalwatsin (the petitioners) and citing the Attorney General as first Respondent and the original parties in the Malekula Island Court Case No.02/93 as the second and third respondents to the petition, namely, Esau Willie and Mr Persi Timothy respectively. In December 2005 the Attorney General sought to have the petition struck out for want of proper form.
12. Another year passed before the petitioners sought in November 2006, to amend the petition in a belated attempt to comply with the Constitutional Applications Rules but, for reasons that are not entirely clear, the application to amend was not pursued and presumably remains extant. This is an unsatisfactory state of affairs.
13. In a further unusual turn, an application for leave to appeal out of time was filed in June 2009 against the Supreme Court judgment dismissing the Originating Summons which was delivered five (5) years earlier. Despite the inordinate delay in bringing the application, leave was granted in

August 2009. *"...in the parties best interest as well as the community's interest."*

14. We note that although the application was for leave to appeal out of time it was granted in the following terms namely: *"...leave to the applicant to proceed to file a constitution application in the Court of Appeal to try and resolve the matter."* The application before the Judge was for an extension of time to appeal to this Court so the reference to a constitutional application appears to have been an error. We will treat the grant of leave by the Judge as being one extending the time within which the Appellant may appeal against the judgment of the Supreme Court dismissing the Originating Summons.
15. Upon considering the appeal papers we quickly formed the view that the various actions (and there were several), that were instituted in the long history of these proceedings were largely misguided and unlikely to lead to a resolution of the underlying dispute raised in the appeal. We will deal briefly with the procedural aspects of this case before proceeding to consider how best to resolve the substantive matters raised in the appeal.
16. At the outset we draw attention to the penultimate paragraph of the appellant's synopsis of submissions which reads:

"As a conclusion we submit that the Appellant in the Court below did not invite the Court to make a declaration as to ownership of the said custom land but was merely asking the Court to make some clarification/question to the Island Court judgment dated 26th November, 1993."

17. The clarification of any judgment is a matter for the Court that delivered the judgment to undertake. Accordingly any clarification of the Malekula Island Court's decision was a matter solely for the Malekula Island Court and an application should have been made to the Malekula Island Court to clarify its decision. This much is clear from the recent judgment of this Court in *Republic of Vanuatu v. Bohn* [2008] VUCA 6 Constitutional Appeal Case

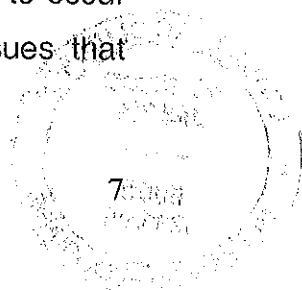
No.03 of 2005 (30thApril 2008) where it observed in the penultimate paragraph of its judgment:

"If there was any uncertainty as to what he (the trial judge) was directing or requiring then questions should have been asked. It is of course true that once a judge makes an order which is clear and unambiguous, a litigant either follows it or appeals. That does not have to mean that parties cannot seek legitimate clarification where there is a degree of uncertainty."

18. Unfortunately that did not occur. Instead, the appellant issued an Originating Summons referred to above seeking various declarations, including a declaration that the respondent (who was the original Claimant in the Island Court proceedings) had acted in a representative capacity in the Island Court proceedings and not on his own accord or solely for his own benefit.
19. We note that the Island Court Act contains provisions for a supervising magistrate of an Island Court to order any case to be retried or transferred before him for hearing even after judgment has been delivered. (Section 21). Similarly, Section 22 (1)(a) provides for an appeal to the Supreme Court in matters concerning disputes as to the ownership of land by *"any person aggrieved by an order or decision of an Island Court"*. There is no satisfactory reason disclosed in the appeal papers or by counsel at the hearing of the appeal as to why neither course was adopted or considered unsuitable in this instance, particularly, as the right of appeal against an Island Court decision is not confined to the original parties in the case but extends to *"any person aggrieved by the decision"*.
20. For completeness, we note that an appeal from an Island Court decision to the Supreme Court shall be final and no further appeal shall lie therefrom to the Court of Appeal. The Supreme Court on such an appeal may make any order that the Island Court could have made or order that any cause or matter be reheard before the same Court or before any other Island Court.



21. -Needless to say we also consider the constitutional application (and amendment) filed in the course of these proceedings misguided and misconceived because the constitutional application seeks the Supreme Court's intervention on the basis that the judgment of the Malekula Island Court in part, deprived the surviving daughters of Thomas, namely Lekolan and April, of their rights and interests in the disputed land that originally belonged to their deceased father.
22. In the first place, the judgment of the Malekula Island Court, as we read it, does no such thing and, secondly, even if the judgment has that indirect effect (which we do not accept) then such an effect is not an "*unjust deprivation*", but one effected in accordance with the law as determined by a properly constituted court vested with the original exclusive jurisdiction to determine disputes as to customary land ownership within its territorial limits. [See: the observations of the Court of Appeal in *François v. Ozols* (1998) VUCA 5 which are cited with approval in the later appeal of *Rombu v. Family Rasu* [2006] VUCA 22.]
23. Plainly not only was the Appellant's constitutional application defective in form, it was also seriously lacking in substance.
24. So much then for the procedural aspects of the case. We now turn to the substantive issues of the appeal.
25. When the appeal hearing commenced we raised our concerns with counsel as to whether there was a continuing dispute between the parties to the appeal and whether or not these could be resolved by agreement between them. We were of course mindful of the protracted nature of the proceedings thus far and were concerned to bring some resolution and finality to any remaining dispute between the family members concerned.
26. Upon both counsel's positive indication in that regard we adjourned the further hearing of the appeal to later in the Session to allow talks to occur between the parties with a view to settling the outstanding issues that remained between them.



27. When the appeal hearing resumed counsels advised the Court that despite their best efforts, no agreement could be reached between the parties concerned with this appeal. That is unfortunate.
28. Counsel also accepted that the Appellant's concerns should properly be directed to the Malekula Island Court and counsel submitted a draft of points which the Appellant desired to have referred by this Court to the Island Court for its "clarification".
29. Having considered the nature and substance of the specific questions and matters sought to be clarified we do not accede to the Appellant's specific requests which we consider extends beyond legitimate matters for clarification by the Malekula Island Court.
30. Instead, we are content to frame the questions for clarification of the Malekula Island Court which decided Land Case No.02/93 as follows:
- (1) **What was the capacity of Esau Willie in pursuing the claim before the Malekula Island Court in Land Case No.02/93? And**
 - (2) **If it was in a representative capacity, then who were the other persons that he was representing besides himself? and**
 - (3) **If those other persons included Lekolan Gongi and April Kalwatsin then what were their interests in the land the subject matter of Land Case No.02/93?**
31. It would be desirable if the Malekula Island Court also decided on the interests of all the persons who Esau Willie represented, as well as Lekolan Gongi and April Kalatsin, as there seems to be some potential for ongoing disputes on such matters. For example, we have referred above to the dispute between Esau Willie and Bersi Timothy.
32. The recent Judgment of the Hon. Chief Justice in Supreme Court Land Appeal Case No.58 of 2004: Family Kaltapang Malstapu v. Family Kaltongo Marapongi, Family Songoriki, Family Lakeleo Taua, Family Masau Vakako and Family Taravaki delivered on 14th September, 2009

provides valuable guidance to Island Courts charged with the difficult task of determining customary land disputes and competing claims to rights over customary lands where it says at pp.6, 7 & 8 of the judgment beginning:

"The customary land disputes in the Courts of Vanuatu show that absolute ownership of land is the greatest interest in land recognised by the customs of different Islands and areas of Vanuatu. However, they reveal also that custom ownership is not the only interest in land. There are other interests in land than customary ownership interest which are recognised by the customs of Vanuatu. A member of a land-owning group, family or clan or community has a custom interest to use, occupy or reside and make gardens on the land. That custom right includes taking fruits from trees on the land, water and Salt and fishing and to cut trees for houses and pass across the land. These rights are also recognised to a person who is married to a member of land-owning family or group. These rights are described as usufructuary rights or secondary rights.

Land courts established through out the country have to bear in mind that when dealing with customary land disputes after determining the customary ownership interests, they must also consider and determine the existence of the secondary rights on the land in dispute. This is important for three (3) reasons:

First, to set the extent and scope of the secondary rights within the traditional purposes and customary limits vis-à-vis the primary ownership rights. Second, to limit future internal disputes between the declared custom owners and other members of the land-owning families, groups, tribes or communities and others. Third, to develop a consistent body of customary law on the land in accordance with [Chapter 12 of the Constitution – Land: Articles 73, 74, 78(2), 79(2) and 81] and the land courts legislations and rules (when relevant).

This approach allows the land courts to have wider and better understanding of the customary law and concepts on the customary lands in Vanuatu in the performance of their duties. It will assist the land courts to

discover, apply and make declarations of the applicable relevant rules of custom concerning the form of ownership of customary land whether the form of ownership is individual or family/group or communal. If it is a group (family) or communal ownership whether the members of the group or community own joint individual interests in the land where the group or community is located. What is the basis of their relationship to ownership interest? Blood relationship which means that they all related by blood, having descended from a common ancestor or tribes relationships or titles in the land in question (or both of these).

If it appears that only some members of the group/family or community, according to custom, have rights to ownership of that land, are both male and female legitimate descendants of the original owners have equal rights or only male or female legitimate descendants of the original owners are regarded as having ownership rights.

If the relevant custom is that only male (or female) legitimate descendants of the original owners are entitled to customary ownership of land, the relevant land courts must determine whether or not other legitimate descendants have some custom rights other than customary ownership interests. The same exercise must be done for illegitimate and adopted children in relevant land cases.

If the relevant custom is that individuals have rights to customary ownership of land, according to custom, the relevant land courts must declare so in accordance with the relevant custom rule. It is important to note that some land cases before the courts reveal that customary land is attached to a chiefly title, and the holder of a chiefly title has power under custom to determine what is done with the land attached to his (or her) title. Land courts may appreciate that the power is a very different thing from beneficial ownership. The land courts may appreciate in relevant cases that a chief holding land under his unlimited customary administrative powers, may hold the land in the capacity of trustees of his people but not for his personal benefit. The chief may have rights of control rather than ownership rights.

Apart from the form of customary ownership, the land courts are also confronted with the basis of rights in custom to ownership of land.

The land courts may inquire in relevant cases as to the method of land acquisitions and transfer of customary interests in land. Discovery or original occupation of land constitutes each a basis of the rights in custom to ownership of land. Inheritance, that is, succession to the original owners is another. The land court must determine the relevant custom for succession. The land courts must consider (when relevant) whether succession is based on patrilineal system (only male children to succeed to their father's interests) or matrilineal (only female children to succeed to their mother's interest or ambilineal (children succeed to both either their mother or father's interests or bilineal (children succeed to both their father and mother).

The land courts must also consider (when relevant) whether all children descendants are treated alike or whether the relevant custom makes ranking priorities between oldest and younger children; male children and female children; legitimate and illegitimate children; natural and adopted children; adopted children within the family or adopted children outside the family.”

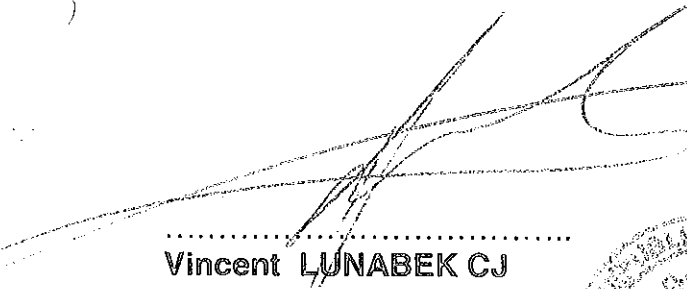
33. We respectfully urge the Malekula Island Court to bear this guidance in mind in providing its clarifications to the 3 questions earlier referred to in this judgment.
34. We cannot conclude this judgement without some reference to the Constitutional Application No.36 of 2005 issued in the course of these proceedings by Lekolan Gongi and April Kalwatsin. Hopefully their interests in the disputed land will be clarified by the Malekula Island Court's answers to the questions referred to it and in accordance with the guidance provided in Land Appeal Case No.58 of 2004 referred to above, and will result in the voluntary withdrawal of the Constitutional application without necessitating a further application in that regard.



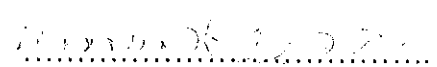
35. In light of the agreement of the parties that the proper forum to clarify their respective interest in the land is the Malekula Island Court, we will remit the matter to the Supreme Court to keep the Supreme Court proceeding extant while the matter is dealt with in the Malekula Island Court. In other respects, we dismiss the appeal against the decision in Civil Case No.54 of 2001 and uphold the Judge's rulings as to the inappropriateness of the process adopted by the Appellant. We also uphold the costs award made in the Supreme Court.
36. The Appellant and/or Lekolan and April should, in accordance with the agreement between counsel reached at the hearing before us, file an application in the Malekula Island Court seeking clarification of its decision and asking it to rule on the questions set out at [31] above. That application should be filed and served on or before 27 November 2009, and a copy should be lodged at the Supreme Court at Santo to be kept on the file for Civil Case No.54 of 2001.
37. We award cost of VT25,000 in relation to the present appeal to the Respondent.

DATED at Port-Vila this 30th day of October 2009

BY THE COURT


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Vincent LUNABEK CJ


.....
John MANSFIELD J


.....
Mark O'REGAN J


.....
Daniel FATIAKI J

