

BETWEEN: ROGER JAPHET
Appellant

AND: ELMO JOSEPH
Respondent

Coram: *Hon. Chief Justice Vincent Lunabek*
Hon Justice John von Doussa
Hon Justice John Mansfield
Hon Justice Oliver Saksak
Hon Justice Daniel Fatiaki
Hon Justice Mary Sey
Hon Justice David Chetwynd
Hon Justice Paul Geoghegan

Counsel: *Mr. George Boar for the Appellant*
Mr. Jack Kilu for the Respondent

Date of Hearing: 11th November 2016 at 9.00 am

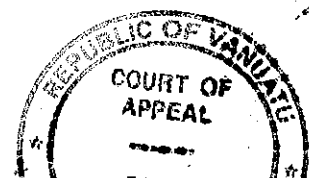
Date of Judgment: 18th November 2016 at 4.00 pm

JUDGMENT

1. This is an appeal against the whole judgment of the primary judge in the Supreme Court given on 2 September 2016 in Civil Case No.55 of 2014 when the Court dismissed the case.

Background facts

2. Mr. Japeth alleged in his Supreme Court claim that the Efate Island Court (EIC) in Land Case No. 3 of 1985 had declared him joint custom owner of Epule land and Epule Quarry. He asserted that he and Mr. Joseph have one family tree connecting them to chief Manukat, the custom owner of Epule land and Epule Quarry sites.
3. Mr. Japheth sought orders that Mr. Joseph accounts for moneys received from the operation of the quarry and that he releases the sum of VT 5,649,796 to him. He asserted that in 2013, the Government had released to Mr. Joseph the



sum of VT 11, 299, 596 for the said Epule Quarry and that Mr. Joseph had refused to distribute the money equally between the custom owners and had instead kept all the money to himself.

4. Mr. Joseph denied the claim and he said that he is the declared sole custom landowner of Wanakopa Land and not the joint custom landowner with the Claimant as alleged. Further, he contended that on 17 June 2011, the EIC in Land Case No. 3 of 1985 dealt with the dispute over custom ownership of Epule and Tangoropo land and made the following declaration in favour of the Defendant:-

“Chief Manukat & Family – He is custom owner of Wanakopa land.”

5. At that stage, the Trial Judge was of the view that, despite the assertions of the Claimant, the EIC had made no declaration that he is joint custom owner with the Defendant of Epule land.
6. Counsel was asked by the primary judge to address the Court on the following preliminary issue:-

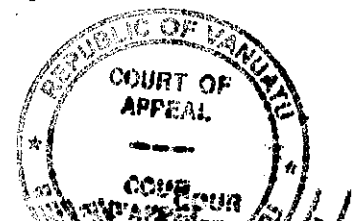
Whether the Supreme Court has jurisdiction to clarify a decision of the EIC as to custom ownership of land i.e. Epule Quarry land.

7. In his submissions, Mr. Boar relied on sections 28, 31 and 48 of the Judicial Services and Courts Act [CAP270] to say that the Supreme Court has jurisdiction to clarify a decision of the Island Court as to declaration of custom ownership of land.
8. After considering counsel’s submissions, the Trial Judge dismissed the case on the basis that the Supreme Court does not have jurisdiction to clarify the judgment of the Efate Island Court in Land Case No. 3 of 1985 (EIC).

Appeal Grounds

9. The Appellant now exercises his right of appeal to this Court and he appeals on two grounds as follows:

A. *The learned Trial Judge erred in law and or fact by not placing weight on the Claimant’s evidence which establish that the Respondent has accepted as a matter of written records and custom ceremonies that the Appellant is a direct descendant of the*



Respondent's family tree and that all the Claimant's brothers and sisters including their children have taken on the surname "Japheth" who is a direct descendant of the Respondent.

B. The learned Trial Judge did not give any and/or proper weight to the Claimant's evidence contained in the sworn statement of Charley Mala filed and dated 17 July 2015 which shows that the Respondent's claim and family tree, in Land Case No. 3 of 1985 indicated that the Respondent accepted the Appellant being part of his family tree and that it was on that basis that the Respondent (in a representative capacity) was declared custom landowner of Wanapoka land where Epule Quarry is located.

10. The trial Judge's relevant findings are contained in the following passages in his judgment at paragraphs 11 and 12:

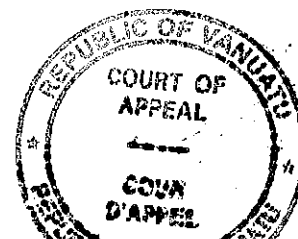
*"11. The question of clarification of a Court's judgment can only be made by the Court which made the decision. This is what the Court of Appeal said in **Kalwatsin v Willie** [2009] VUCA 47 at paragraph 17 of its judgment that:-*

"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 (30th April 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."

(Emphasis added)

12. Applying what the court said in **Kalwatsin**, the clarification of the EIC judgment is a matter solely for the EIC. It is up to the claimant to apply

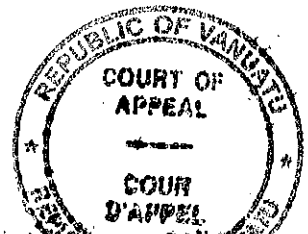


to the EIC to clarify its decision whether he is a member of the defendant's family and therefore also a custom owner as declared."

DISCUSSION

11. Appeal grounds 1 and 2 are really one ground, that the primary judge did not give any or proper weight to the Claimant's evidence that the EIC had made a declaration in Land Case No. 3 of 1985, that he is joint custom owner with the Respondent of Epule land.
12. In arguing his appeal Mr. Boar referred the Court to annexure **RJ7** at page 170 of the Appeal Book. This document (which is attached to the further sworn statement of Roger Japheth dated 21 September 2014) purports to be a letter from Family Elmo Joseph dated 13 January 2014. It states that "*Family Joseph of which Elmo Joseph is a family member confirms that Family Japheth and Family Joseph are part of each other's family.*" Mr. Boar was asked whether this document had been placed before the Island Court and his response was "No". In any event, we give no consideration to the contents of annexure **RJ7**.
13. The Trial Judge was of the view that, despite the assertions of the Claimant, the EIC had made no such declaration that he is joint custom owner with the Defendant of Epule land. His Lordship said:

"What the EIC said is chief Manukat and family are custom owners of Wanakopa land. Epule and Wanakopa lands are identified on the map annexed to the EIC judgment as two separate areas. It was quite obvious that some clarification of the EIC Judgment was required as the claimant's assertions are contrary to the declarations made".
14. We consider that aspect of this case falls fairly and squarely within the Island Court's jurisdiction. This is a customary matter since the Appellant is claiming that in custom he has to be recognized as a member of the Respondent's family. He strongly contends that he is a direct descendant of the Respondent's family tree connecting them to chief Manukat, the custom owner of Epule land and Epule Quarry sites.
15. It appeared to the primary Judge that the Claimant's assertions were contrary to the EIC declaration in Land Case No. 3 of 1985 and that some clarification by the EIC was required in the circumstances. We agree with the primary judge that the clarification of the EIC judgment is a matter solely for the EIC. A judge of the Supreme Court cannot clarify a judgment of the Island Court. The

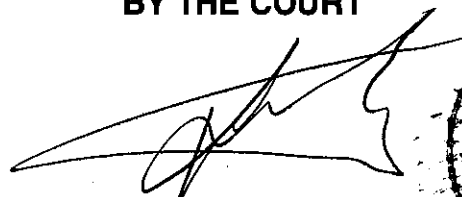


clarification of any judgment is a matter for the Court that delivered the judgment to undertake. See this Court's judgment in *Kalwatsin v Willie* [2009] VUCA 47 at paragraph 17 in which we reached a similar conclusion that "accordingly any clarification of the Malekula Island Court's decision was a matter solely for the Malekula Island Court and an application should have been made to the Malekula Island Court to clarify its decision."

16. It is timely to mention that Parliament has by virtue of section 10 of the Island Courts Act [CAP 167] vested jurisdiction in the Island Court to apply customary law. In doing so, the Island Court determines disputes as to custom ownership of land. An aggrieved party then has a right of appeal to the Supreme Court pursuant to section 22 of the Island Courts Act as far as disputes over custom ownership of Land are concerned, and any decision given by the Supreme Court is final.
17. Mr. Japheth needs to go back to the Efate Island Court to show that he is connected with the successful parties, in terms of custom, before he can institute proceedings in the Supreme Court for the Respondent to render an account and make a refund of moneys received from the operation of the Quarry.
18. In the result therefore, we see no merit in any of the grounds of appeal filed by the Appellant. For these reasons the appeal is dismissed. The Appellant must pay the Respondent's costs of the appeal at the standard rate.

DATED at Port Vila this 18th day of November, 2016

BY THE COURT



Hon. Vincent Lunabek
Chief Justice

