IN THE COURT OF APPEAL
OF THE REPUBLIC OF VANUATU
(Civil Appellate Jurisdiction)

Civil Appeal
Case No. 27/24 COA/CIVA

BETWEEN: **KEMUEL HARRY, TELE HARRY RAMBAY, LAMI RAMBAY, JOHN KEITH, EPHRAIM IMBON, MICHAEL OTAK, ROBEA BILL, SHEMUEL NUMALMELMEL and JOHN AMPEL**
Appellants

AND: **LINDA OLUL**
First Respondent

AND: **JOSIAH NATO TAMAT, DANIEL NATO TAMAT, MASIA NATO TAMAT and RODA WILLIAM TAMAT**
Second Respondents

Coram:	***Hon Chief Justice Vincent Lunabek*** ***Hon Justice Ronald Young*** ***Hon Justice Richard White*** ***Hon Justice Viran M Trief*** ***Hon Justice Edwin P Goldsbrough*** ***Hon Justice William K Hastings***
Counsel:	***El Nalyal for the Appellant*** ***T Loughman for the First Respondent*** ***TJ Botleng for the Second Respondent***
Date of hearing:	***5 February 2024***
Date of Decision:	***16 February 2024***

JUDGMENT OF THE COURT

Introduction

1. This case concerns the customary ownership of the Tervant land and the Family Tamat and whether the appellants are part of the Family Tamat and therefore have a customary interest in that land. It is common ground that Family Tamat are the customary owners of the Tervant land. The issue before the Supreme Court was whether the appellants were part of Family Tamat through Kemuel Harry and thereby custom owners of the Tervant land.

2. Two judicial reviews were filed in the Supreme Court (*22/180 SC/JUDR and 23/2284 SC/JUDR*). One was by the respondents challenging a decision by the National Coordinator of Land, to issue a Certificate of Recorded Interest (Green Certificate) in favour of the appellants with respect to the Tervant land. Before that case was resolved, the National Coordinator had given notice of her intention to cancel that Green Certificate in favour of the appellants and issue a Green Certificate in

favour of the respondents. That decision triggered the second judicial review proceeding filed by the appellants challenging the reversal by the National Coordinator. The two proceedings were consolidated and heard in the Supreme Court.

3. The judge in the Supreme Court concluded that the cancellation was properly undertaken and that the Green Certificate was properly issued to the respondents. He acknowledged that the appellants had not been served with the National Coordinator's proposal to cancel the Green Certificate as they should have. However he said that the notification would not have changed the position.

4. In 2004, the Malekula Island Court (*Land Case 10/1993*) ruled that Family Tamat was the custom owner of the Tervant land. In 2021, the Island Court had declared Josiah Nato Tamat (a respondent) was the bloodline of Tamat, not Kemuel Harry (an appellant). This was unsuccessfully appealed to the Magistrates Court and then to the Supreme Court. As a result, the judge in the Supreme Court in these proceedings concluded that the National Coordinator was correct to cancel the Green Certificate in favour of the appellant. Kemuel Harry had no lawful interest in the Tervant land, not being part of the blood line of the Tamat family.

Appellant's Case

5. The appellants' case is that the judge in the Supreme Court failed to consider or inadequately considered that the custom ownership of the Tervant land had been determined in the appellant's favour in the Island Court judgement given on 27 October 2004, and confirmed subsequently on appeal by the Supreme Court in November 2018. The submissions was that the Island Court decision confirmed that Kemuel Harry was the bloodline of Tamat and therefore had custom ownership rights with respect to the Tervant land.

6. The appellants' case is that the decision of the Malekula Island Court in 2021, which concluded Kemuel Harry was not bloodline of Family Tamat, was in breach of the principles identified by the Court of Appeal in *Numake v Sam Naiu Iopil* [2019] VUCA 60, where this Court said at paragraph 29:

> *"It is important to make the point that an application based on "bloodline" cannot be used to indirectly invalidate or contradict a lawful decision about custom ownership".*

7. The appellants submit therefore the decision of the Malekula Island Court of 2021 as to bloodline could not be used to contradict the finding of the Malekula Island Court of 2004 that Kemuel Harry was a customary owner of the Tervant land. The conclusion about bloodline in the Malekula case could not override the 2004 decision, confirming him as a customary owner.

8. The appellants say that the judge's conclusion, that it did not matter that they were not served with the proposal by the National Coordinator to cancel their Green Certificate, is wrong. They submit that this court in *Kwirinavanua v Toumata Tetrau Family* [2018] VUCA 15 held that a National Coordinator must give notice to persons named in the green certificate and invite their response prior to any cancellation. Here, no such notice had been given. The appellants say therefore, they are entitled to have the cancellation set aside, proper notice given to them and the opportunity to make submissions to the National Coordinator, as to the appropriateness of the proposed cancellation.

9. The appellants say that the judge was wrong to state that the appellants relied on the Green Certificate as a basis of their custom ownership. The appellants relied upon the judgement of the Island Court of 2004, which they submit declared the appellant Kemuel Harry was a customary owner. The Green Certificate did not establish custom ownership. Custom ownership was decided by the Malekula Island Court in 2004.

10. Grounds six and seven emphasise that the decision of the Island Court in 2004 recorded that Kemuel Harry, representative of Family Tamat, was a rightful custom owner of the Tervant land as mapped. In the appellant's submission, the Supreme Court had departed from that finding, when holding that Kemuel Harry was not a rightful custom owner of the land.

11. The Court acknowledges the helpful summary provided by the second respondents, of the chronology of events relating to the Tervant land. It is now 30 years since the first Island Court case was filed with respect to the land.

12. In the Malekula Island case decided in 2004, Family Tamat was represented by Kemuel Harry. The Court determined that, against other challengers, Family Tamat was the custom owner of the land.

13. This decision was appealed to the Supreme Court by the unsuccessful families in the Island Court. The appeals were dismissed. At the Supreme Court hearing, Josiah Tamat was accepted as the family Tamat representative.

14. Subsequently, the Tervant land sketch map was stamped appropriately by the Island Court clerk, reflecting the litigation that had been concluded. A meeting was held by family Tamat pursuant to section 6H of the Land Reform (Amendment) Act 2013, to choose the representatives of family Tamat. Josiah Nato Tamat and others of the second respondents were chosen.

15. After this litigation the National Coordinator issued the second respondents, a Green Certificate recording their interest in the Tervant land.

16. Shortly afterwards, Josiah Nato Tamat launched a bloodline case pursuant to section 10 of the Island Court Act. He named the appellants including Kemuel Harry as the defendants.

17. In March 2021, the Island Court declared Joseph Nato Tamat was bloodline Tamat and that Kemuel Harry was not. They prohibited the appellants from using "Tamat" as part of their name. Kemuel Harry appealed that decision to the Magistrates Court. The appeal was dismissed. There was a further appeal to the Supreme Court, which was also dismissed and subsequently in May 2022, the Court of Appeal dismissed an attempt to further appeal on the basis that the appeal could not succeed.

18. In the meantime, in December 2021, the Acting National Coordinator (the first respondent) issued a new Green Certificate over the Tervant land to Kemuel Harry and others and cancelled the second respondents;' Green Certificate previously issued.

19. The second respondents lodged a judicial review claim in the Supreme Court challenging this

decision. They sought cancellation of the appellants' Green Certificate and reinstatement of theirs. Shortly afterwards, before the case came on for hearing, on 15 February 2022, the acting National Coordinator told Kemuel Harry and the other appellants that she would cancel their Green Certificate. On 4 March she did so and reinstated Josiah Tamat's Green Certificate.

20. The proceedings in judicial review 23/2284 arose subsequent to that decision by the Acting National Coordinator. The appellants challenged the decision to remove the Green Certificate in their favour and to confirm that the second respondents were entitled to the appropriate Green Certificate with regard to the Tervant land. The Judge in the Supreme Court heard both judicial review applications together given they involved essentially the same issues.

Discussion

21. To return to the grounds of challenge to the judge's decision.

22. The appellants claimed that the Malekula Island Court in its 2004 judgment confirmed both that the Tervant land was Tamat customary land, and that Kemuel Harry was bloodline Tamat and therefore had custom ownership rights with respect to the land.

23. We reject that submission. We consider it is clear from the decision of the Island Court that it did not declare that Kemuel Harry was bloodline Tamat and therefore personally had custom ownership rights with respect to the Tervant land.

24. Kemuel Harry was noted as a representative of family Tamat in the claim before the Court. In reaching its decision the Island Court noted at the commencement of its consideration Family Tamat's case as follows

> *"Kemuel Harry claiming on behalf of Family Tamat pleaded that Tervant is the native land of Tamat and Harry....."*

25. But subsequently at the conclusion of the judgement, the Court declared that:

> *"Kemuel Harry representative of family Tamat as the rightful custom owners of the Land of Tervant as mapped accordingly"*

26. At the commencement of the judgment as noted (see above at [23]) the Court recorded that Kemuel Harry was seeking an order that the Tervant land was the native land of Tamat and Harry. The Court did not make such an order. Its order limited the identification of the custom owner as Family Tamat only (see above at [24]).

27. Counsel for the appellants submitted that the Island Court at the start of its judgment dealing with the Family Tamat claim concluded that Kemuel Harry was the bloodline of Tamat. We reject that claim. A plain reading of the judgment makes it clear that the Court was simply recording what Kemuel Harry had said about his bloodline claim. As is evident in the decision of the Court it made no finding as to bloodline.

28. The decision of the Island Court was clear that they were not making any findings specifically in relation to Kemuel Harry's interest in the land but only a conclusion about the interests of family

Tamat in the land. We therefore reject the first ground of appeal.

29. As to the second ground of appeal. Josiah Tamat brought the question of bloodlines before the Malekula Island Court in 2020. That Court concluded that Kemuel Harry was not part of the bloodline of Tamat, but Josiah Nato Tamat was. That conclusion was challenged in the Magistrates Court and in the Supreme Court, and indeed an effort made to challenge it again in the Court of Appeal, all unsuccessfully.

30. The complaint by the appellants is that the decision of the Malekula Island Court breached the principle enunciated by the Court of Appeal in *Numake* that a conclusion as to bloodline could not be used as a backdoor or indirect method of undermining a decision relating to custom ownership.

31. This submission relies upon the proposition, which we have already rejected, that Kemuel Harry had been declared a customary owner of the Tervant land by the Island Court in 2004. The Malekula Island Court was free to decide on bloodline of the Tamat family. And so, no breach of the principle in *Numake* has occurred.

32. We therefore reject this ground of appeal.

33. The third ground of challenge relates to the service or advice by the National Coordinator, to the appellants, that the National Coordinator was considering cancelling their certificate of recorded interest in the Tervant land.

34. The appellants claim that they were never given any notice prior to the cancellation. The judge in the Supreme Court appeared to accept that there had been no adequate service. That conclusion was not challenged in this court. It seems common ground that the Acting National Coordinator did draft a notice of 15 February 2022, giving advice of an intention to cancel the certificate. The notice identified the reasons for the proposed cancellation. The evidence was that the notice was given to a person who claimed to be the agent of the appellants. The appellants say that they did not receive that notice and by 4 March 2022, their interest had been cancelled.

35. There is no question that the National Coordinator had the power to cancel the certificate if they discovered that for any reason, the certificate was wrongly issued (see *Kwirinavanua v Tariwer* [2016] VUCA 54). The judge concluded that in fact, notice of the proposed cancellation would have made no difference to the outcome because there was nothing that the appellants could have said which in fact would have, or might have, convinced the National Coordinator that she was wrong in cancelling the Green Certificate.

36. While it will be important for the National Coordinator to ensure that the proposed cancellation is served on those who have a Green Certificate, to give them a fair opportunity of responding, effectively the judge's conclusion was that the opportunity to respond had been given to them at the court hearing. And again today, this Court is in that position. Ample opportunity has been given to the appellants, to identify any reason why the decision of the National Coordinator was wrong. For the reasons given we are satisfied the National Coordinator was correct. We are satisfied that there is nothing that the appellants have identified in the hearing in the Supreme Court or before us, which should may convinced the National Coordinator to reverse her decision. This ground of appeal, therefore, fails.

37. Ground four of the appeal is primarily a complaint about the decisions of the Island, Magistrates and Supreme Courts relating to the bloodline case. That is not a matter which was before the Supreme Court nor before this Court and cannot therefore be the subject of challenge in this case.

38. As to ground five, the submission is that the Court below was wrong to state that the appellants "*relied on their Green Certificate as the basis of custom ownership in their favour*". The appellants say that they relied upon the decision of the Island Court of October 2004, which declared that they were the custom owners. The appellants stressed that a Green Certificate cannot establish or determine custom ownership, it only sets out the names of the representatives of the custom owners.

39. A Green Certificate in favour of a particular person or group is not itself a final determination of who the custom owners are. As the appellants correctly identify, a decision of the relevant Court declaring custom ownership is required.

40. This ground of appeal is of no assistance to the appellants. As we have said, the Island Court in 2004 did not say that Mr Kemuel Harry was the custom owner of the Tervant land. What it said was that the Family Tamat were the custom owners of the land, and that Mr Harry and others were their representatives. We therefore reject this ground of appeal.

41. As to grounds six and seven, these grounds essentially repeat earlier submissions. The grounds relate to the claim that because Mr Kemuel Harry was a representative of the family Tamat at the time of the conclusion of the Island Court decision 2004, somehow that makes Mr Kemuel Harry a custom owner. That is not the correct position for the reasons we have previously given.

42. The grounds of appeal eight to ten are effectively the same grounds of appeal the Court has really dealt with.

43. It will be evident, therefore, that we agree with the Supreme Court decision and the appeal is dismissed.

44. There will be costs in favour of the second respondent who took the major burden of the submissions, both in this Court and prior to the appeal, of VT200,000 and in favour of the first respondent VT100,000.

DATED at Port Vila, this 16th day of February, 2024

BY THE COURT

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Hon. Chief Justice Vincent Lunabek

REPUBLIC OF VANUATU COURT OF APPEAL COUR D'APPEL REPUBLIQUE DE VANUATU