

IN THE AMBAE ISLAND COURT
OF THE REPUBLIC OF VANUATU
(Land Jurisdiction)

Land Case No.2 of 1993

BETWEEN: WILLIE VIRA HALIA & FAMILY
Original Claimant

AND: THOMAS VIRATANGATANGA & FAMILY
Counter Claimant 1

Coram: Magistrate Edwin A Macreveth
Island Court Justice Willie Garae
Island Court Justice Edwin Garae
Island Court Justice Stanley Doro

Clerk: Wilson Andrew

Date of hearing: 26th - 27th of June, 2012

Date of Decision: 28th June, 2012

J U D G M E N T

The land in dispute is situated at the western part of the Island of Ambae. It is situated within Saraboevutu community are and located between Willie Takaro's property on the west and Ruben's property on the east. To avoid any future confusion, the court has decided to make changes of name to the disputed terrain initially registered as Saraboevutu land substituted this time as Vira Halia land. The issue for determination concerns land ownership.

Its boundary is generally described to commence on the north at a bread fruit tree running west to a *natangura* palm tree, and follows down to a mango tree standing by the road side on the west. From there, it runs south crossing a creek to a fallen *buka* tree, pass another breadfruit tree and onto a banyan tree on the south just before another creek. Its border on the southern side is bounded by the creek running east meeting the foot path which leads to Saraboevutu village. From there, it turns northwards marked by a *nagalat* tree pass another *buka* tree and joins up at the same breadfruit tree on the north.

For specification purposes regarding its boundary limits, refer to the declared map attached herein.

Before dwelling on the subject matter and to guarantee better understanding of the reasoning of this judgment; a brief discussion of the relevant laws and custom processes and usages of the contested area are summarised below.

THE LAW & CUSTOM

The Law

The applicable laws or provisions of relevancy to land matters are summarised below.

Article 95(3) of the 1980 Constitution stipulates that customary law shall continue to have effect as part of the law of the Republic of Vanuatu. Article 73 states that all land in the Republic of Vanuatu belongs to the indigenous custom owners and their descendants. Article 74 provides that the rule of custom shall form the basis of ownership and use of land in Vanuatu. Article 75 adds on that only indigenous citizens of the Republic of Vanuatu who have acquired their land in accordance with a recognised system of land tenure shall have perpetual ownership of their land.

The function of the tribunal is to resolve proceedings according to law. Where there is no rule of law applicable to a matter before it, the court shall determine the matter according to substantial justice and whenever possible in conformity with custom.

Section 10 of the Island Court Act, Cap 167 provides that customary matters and beliefs prevailing in a territorial jurisdiction of an Island Court are applicable in the court; so far as they are not in conflict with the written law and are not contrary to justice, morality and good order.

The findings on rules of custom forming the basis for land ownership

There is sufficient information gathered from the hearing regarding customary principles of land ownership and use as presented in the forthcoming paragraphs.

The rules of custom forming the basis of land ownership practiced in the area are founded on the patrilineal system. Meaning rights to claim ownership of land is acquired from the father's line. Ownership of customary land is communal or collectively owned based on common descent, residence within a nasara and participation in common activities. All members of the clan shared undivided interests on the land. Land in custom cannot be transferred to another tribe or family. The land is eternally own by the clan and its descendants.

It is common knowledge that the first person and his family who lived, occupied and built a nasara at the particular territory become the original owners or ancestors of the land. It makes no difference if

they left again for some other reasons, they would still be recognised as the custom owners. Tribal members who form the land owning are all related by blood relationship for having descended from original ancestor.

Land is also acquired through other traditional processes. For example, a family who takes charge in meeting funeral expenses of a person would as a matter of reciprocity be given land for use for certain period of time only if consensus is reached by both parties.

Land is culturally inherited patrilineally from the chief or original ancestor to the eldest son upon death. The son, who would normally bear the responsibility for providing equal distribution of the deceased father's land to other siblings, tribal members and other relations. This is a male predominated system which is twinned with the land tenure system handed down from generations to generation.

The only exceptional condition to the general principle of land ownership is that in circumstances where there are no more surviving male heirs to the land then, ownership will pass on to the matrilineal bloodline. This is typically seen where a woman's children having bloodline to the extinct patrilineal line are given land ownership rights.

Visitation of the land boundaries

The court after courtroom hearing paid a visit to the land to inspect its boundaries and test the gathered information with direct evidence at the site. It is noted that most part of the land has significantly been developed with subsistence farming of cocoa crops, coconut palms, other local crops and backgrounds. The land claimed is estimated to a size of a soccer field. It has been for decades solely been used for gardening purposes and currently occupied by counter claimant 1 and his family. Given the basic understanding of the traditional processes and the law, the relevant facts submitted before the tribunal are summarised as follows.

Original Claimant

John Moli Halia representing family Halia in his statement told the court that he is claiming ownership of the land by way of the *patrilineal* lineage of his forefathers Vira Halia. He and his family are the surviving sons of Hannah Halia daughter of Vira Halia whose father is Vira Ngwele. Hannah is married to John Rovo of Nanako village. Vira Halia has another brother by the name of Vira Longa who has no surviving issue. These brothers have separate pieces of land under their own control.

He said that Vira Halia had always advised his family not to accept any customary goods offered by other families upon his death. The reason for such is to avoid any future dispute over the land. Vira Halia has expressed in his last testament that upon his death all properties and the land will remain in their hands.

However, upon his death, a man by the name of Jonas Bilake brought over slaughtered cattle towards Vira Halia's funeral ceremony amidst resistance from his family refusing such offer. That funeral contribution (cattle) was borrowed from another person Robert Viratangatanga. It happened that Jonas Bilake could not settle the payment of such cattle, Robert then decided to take over the land in dispute.

He further explained that his family had been patient until Robert's death where his family in return provided another cattle towards Robert's funeral expenses. He point out that in custom after having performed such rite in return they should again be designated as the customary owners of the land of their grand fathers.

In his defence statement, he argued that he does not accept a village court decision by reason that his mother Hannah Halia was not present. By way of conclusion, he submitted that he firmly believes that in custom the land cannot be given away to another family. A chief having created a *nasara* and controlled his own boundary is always regarded as the customary owner of the land. Vira Longa has no right to transfer Vira Halia's land to Thomas Viratangatanga.

He called 2 witnesses to testify on his behalf. Ruth Aron aged 73, in her statement said that she had attended Vira Halia's funeral service. She was about 8 years old and she had only seen James Tariburu constructing the corpse's coffin. She had not seen Vira Robert because he was away working for Mr Lerroux. After the funeral, food was shared out to all families whom have contributed food and other local items towards the funeral.

Witness Vira Didihi held that he believes the land belongs to his family given the promises and testamentary will of his grandfather Vira Halia as stated in the statement of claim. He had maintained his statement throughout cross examination by the defendant.

Counter claimant 1

Hensley Vira is appearing on behalf of family Viratangatanga. He led evidence that the land originally belongs to Vira Halia and his brother Vira Longa whose chiefly name is Moli Hara. However, ownership has been given or transferred to late Robert Viratangatanga upon the owner's death through an agreement and reached promises.

He went on to provide that his family had carried out certain activities qualifying them the right to take ownership of the subject land. He argues that Hannah Halia had failed to take care of her father Vira Halia when he

was sick. It was his family whom had taken care of Vira Halia. Secondly, Hannah Halia and his surviving children have no right in custom to claim land from the father's line. No ceremony was performed to acquire the rights of land use from the *patrilineal line* of the father.

He went on to list a number of rations in form of food stuff and other items provided during the funeral ceremony of Vira Halia's death. The outlined items comprised of 1 bag flour, 1 bale sugar, 1 bull (cattle), 1 bag rice, a traditional woven mat (*hakwea*) and New Zealand timbers utilised to construct the deceased's coffin.

In addition, after Vira Halia's death his brother Moli Hara had continued to strengthen social relationship with his family. Vira Longa had borrowed a tusked pig (valued as Ala) from his father Robert Vira towards a pig killing ceremony (*Hungwehungwe*). Later followed by an amount of VT 20,000 and a pig's tusk from his father. During these transactions he had appointed his father to take charge of all his funeral expenses and other mourning rituals. He had made promises that the land at Saraboevutu would be given to Robert Viratangatanga in return for such service and good relationship they had far enjoyed.

Again upon Moli Hara's death, he donated 1 tusked pig (*Boevota*) and some local food. Only after his death he decided to take possession of the land in question. An amount of VT 20,000 was also offered to Hannah Halia whom on the other hand re confirmed to his father that she has nothing to say more over the land given all performed rituals and promises made by her fathers. The village court had also recognised his right and declared his family as the rightful owner of the land.

He called 3 witnesses to testify in support of his claim. Peter Bue provided that he heard from his father stating that Moli Hara had asked Robert Vira and his relatives to take charge of Vira Halia's funeral expenses because Hannah had failed to take good care of her father when he was sick. James Tari claimed that his father Samuel Banga had also told him that James Tariburu had constructed Vira Halia's coffin. While, Hubert Karu in his address to the court said that Hannah had received an amount of 100 pounds as proceeds from cocoa production harvested on the land. Upon receiving the sum, Hannah had indicated to them that she no longer wishes to dispute the land given the promises made by the parents.

ANALYSIS OF EVIDENCE & FINDINGS

By law, the primary disputant in principle bears the burden of proof on grounds of probabilities to substantiate his claim with clear and relevant

evidence. But also he who asserts a fact must as well prove it by way of evidence.

The function of this tribunal is to resolve proceedings according to law. Where there is no rule of law applicable to a matter before us, the court shall determine the matter according to substantial justice and whenever possible in conformity with custom. But also bearing in mind that so far as they are not in conflict with the written law and are not contrary to justice, morality and good order.

Having made these clarifications, we now present the findings below in the usual order of presentation.

Original Claimant

Firstly, there is no dispute that the land in dispute actually belongs to his fore fathers namely Vira Halia and Vira Longa being the original owners. Our verification of the entire evidence gathered before the court does confirm his standing to being the true surviving descendants of Vira Halia. This must be a conclusive evidence.

Having said so, the only remaining issue for determination relates to the defendant's argument. It is noted that the plaintiff is arguing that the land cannot be given away by virtue of the rules of custom entrenching that land belonging to a particular tribe cannot be given away to another tribe. While the opponent is claiming that the performed funeral rites over Vira Halia's death and his brother had given them the mandate to claim ownership of the land.

Needless to give it some thought however, for purposes of clarity, the court referred to the useful test used for resolving conflicts between traditional evidence in *Adjeibi Kojo v Bosnie (1957) 1 W LR 1223 at pp 1226-1227*. It provides that the best way is to test the traditional history is by reference to the facts in recent years as established by evidence and by seeing which of the two competing histories is more probable and consistent.

Having made that deliberation and verified the subject matter we have come to the conclusion that counter claimant 1's arguments cannot stand.

Firstly, taking charge of Vira Halia's or Vira Longa's funeral expenses (*Tamate Ngwalu Varea*) alone cannot guarantee CCl the right to claim ownership by reason that such custom process cannot defeat the basic rule

of custom saying that land in custom is not transferrable to another tribe or family.

On the other hand, we note that the disputed gifts towards to the funeral ceremony had been undertaken forcefully on improper motives and pressure. Again that customary process cannot be regarded as genuine and it cannot by far amount to a legal binding agreement.

A further issue raised by the defendant was based on the practice that a woman cannot inherit or claim land ownership after getting married to another tribe in another village. That argument cannot be sustained. In our case, the facts indicate that she is the only surviving bloodline of Vira Halia and his brother. Therefore, since there are no other surviving descendants of this *patrilineal* line her descendants would automatically inherit the land of their proper great grand fathers being the indigenous owners of the land.

Counter claimant 1

Turning to the defendant's case; the basis of his claim is completely founded upon promises or agreements alleged to have been made by the forefathers of the original claimant to Robert Vira and his relatives.

First and foremost, it is quite obvious that this party is claiming land which is not originally owned by his forefather or ancestor. He has made confirmation to that fact in his statement in court. The tribunal's consideration and determination of this traditional claim relied upon cannot prevail by reason of the following points of taught.

The starting point is to go back to the relevant laws of this country as enshrined under the constitution of 1980 and other legislations. Article 73 stipulates that all land in the Republic of Vanuatu belongs to the indigenous custom owners and their descendants. It simply means that land must always be seen to belong to the original and indigenous custom owners and their descendants. In our case, it is the original claimant and his descendants who are the rightful and classified owners but not Counter claimant 1 and his family.

Although, Article 95 (3) of the Constitution stipulates that customary law be applied as part of the law of the Republic of Vanuatu that mandate cannot conclusively operate on its own effect in isolation of other guiding provisions. The court is guided as well by section 10 of the Island Court Act which states that customary matters and beliefs prevailing in a territorial jurisdiction of an Island Court are applicable in the court; so

far as they are not in conflict with the written law and are not contrary to justice, morality and good order. Literally, it is implying that the rule of custom or customary processes should not be accepted or applied if it comes to light that it is discriminatory, depriving or denying rights, unfair etc on grounds of gender, sex or other social integration as seen in this case.

For instance, it is evident that the original claimant and his family being the rightful owners of the land had been evicted and denied rights from their forefather's land and property for a number of decades soon after Moli Hara's death. The defendants had been using and enjoying the fruits of their land to date without any rights of access to the original claimant.

Equally, it is reminded that all land in the Republic of Vanuatu belongs to the indigenous custom owners and their descendants. Referring back to our case situation and in application of the law, Hannah's sons are the surviving children of this patrilineal line of Vira Halia the original owner of the land. The descendants have by right in law and custom to claim the land of their forefathers.

Further, the alleged pronounced verbal promises and agreements made in conformity to customary processes cannot override the objectives of rule of law as stipulated and safeguarded under the Constitution in particular Articles 73,74 &75. In our case, it cannot be justified that Hannah Halia or her siblings have lost their rights to claim land ownership. The law protects such right and they cannot be deprived off its enjoyment or benefits.

In conclusion, while balancing the arguments as advanced by the respective parties, this tribunal could only find the original claimant's evidence consistent and more constructive and thereby outweighing the opponent's case. That is to say that the plaintiff's case has been established and proven more than probable concluding that they are the true and rightful owners of Vira Halia's land.

DECLARATION

In light of the totality of the gathered findings and in application of the law and custom practiced in the subject area, the court hereby this day pronounces as follows;

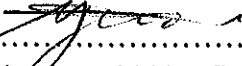
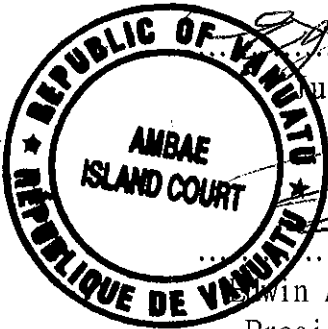

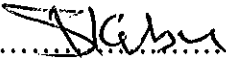
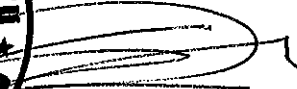
1. That Willie Vira Halia representing his family and descendants are declared as custom owners of Vira Halia's land.

2. That Thomas Viratangatanga and his family's claim for ownership is entirely dismissed.
3. The declared boundaries shall commence on the north at a bread fruit tree running west to a natangura palm tree, and follows down to a mango tree standing by the road side on the west. From there, it runs south crossing a creek to a fallen buka tree, pass another breadfruit tree and onto a banian tree on the south just before another creek. Its border on the southern side is bounded by the creek running east meeting the foot path which leads to Saraboevutu village. From there it turns northwards marked by a nagalat tree, pass another buka tree and joins up at the same breadfruit tree on the north.
4. Counter claimant 1 and any other persons currently in use of the land must cause appropriate arrangements with the declared owners to accommodate their continuous use of the land.
5. Parties are to pay their own costs necessitated by this proceeding.
6. Any party aggrieved by the decision of this court has the right to appeal within 30 days period from today.

Attached to this decision is a copy of the declared land boundaries.(see, shaded land area).

Dated at Ambore, west Ambae this 28th day of June, 2012

BY THE COURT

 Justice Willie Garae		 Justice Edwin Garae
 Justice Stanley Doro	 Edwin A Macreveth Presiding Magistrate	