

REPUBLIC OF VANUATU

MAGISTRATE'S COURT

SITTING AS LAND COURT
WITH 3 ASSESSORS
AT ANELGAUHAT

26th, 27th May,
1st, 2nd, 3rd June, 1994

BETWEEN: BARRY HANGIA

Original Claimant

AND: SILAS NAUKAE

First Claimant

AND: FRANCOIS WANEYEG

Second Claimant

AND: ROBERT NARANHEG

Third Claimant

Coram: S. LENALIA - Senior Magistrate
Assessors: Moses Napa
Charlie Tukama
Iatika Kamut

- Land Case - Mystery Island - Customary Ownership.
- Chapter 12 - The Constitution of Vanuatu - Articles 73, 74, 75, 74, 78(2).
- Inheritance and Ownership of Customary land in Anelghat Village - Aneityum.

The Constitution of Vanuatu Chapter 12, Article 73 is put in the following terms

" All land in the Republic of Vanuatu belongs to the indigenous custom owners and their descendants"

Article 74 provides that and I quote

" The rules of custom shall form the basis of ownership and use of land in the Republic of Vanuatu"

Article 78(2) is also phrased in the following terminology,

" The Government shall arrange for appropriate customary institutions or procedures to resolve disputes concerning the ownership of custom land"

The Island Courts (powers of Magistrates) Order No. 1 of 1990 which prescribes the powers, functions and duties of Magistrates in respect of matters before an Island Court concerning disputes as to ownership of land. To deal with any land matters in Vanuatu a Magistrate must first be nominated by the Chief Justice, in accordance with Section 1 (2) of the above Order. It is from this provision that I was nominated by the Chief Justice to deal with the Mystery Island Land claim.

HISTORY OF LAND CLAIMANTS AND THEIR WITNESSES

ORIGINAL CLAIMANT - BARRY NANGIA

The Original Claimant in this claim is Mr Barry Nangia caused a message to be published in accordance Order 6 Rule 8 and 9 of the Island Courts Act Cap 167 as amended to date claiming ownership of the famous Mystery Island some three to four kilometres of the coast of the Anelgauhah Village and on which is located an airstrip serving the total population on the Island of Aneityum.

Following the above, the three other Claimant Messrs. Silas Naukai, Francois Waneyeg, and Robert Naraneheg lodged their claims with the TAFEA Island Court Clerk in Tanna. I propose to cavass the evidence of each claimant as set out in the titulation of this case.

Mr Barry Nangia gave lengthy evidence which the Court sat for two and a half days to hear his evidence alone apart from his sole witness Mr Richard Willie. Mr Nangia's evidence is that because his father was and is still is greate fisherman, his father handed down those fishing rights to him. Mr Nangia tells a story about a mother and two sons. Mr Nangia gives the names of the boys as, NINYEG and NAVINIACAS. He does not give the mother's name. That once upon a time the mother decided to go fishing by herself. She told her sons to wait while she went fishing. That the mother got a local fishing net (NAULE) weaved from tree roots fibre and proceeded to the reefs now surrounding the Mystery Island. Mr Nangia says, Mystery Island was once two separate little islands and in the process of time, they grew to be one island. This view is at least confirmed by the other three claimants.

That the mother then fished on the reef. She dropped her net on a little bay called in their language "annecsenmanyau". That she could not draw the net ashore because it was full of fish. That as the result, the net was torn and the fishes ate the body of the mother. The boys waited for the return of their mother in vain.

That the boys slept that night, they had a dream their mother told them she was dead and she gave them instructions to make a net (NAULE) out of "Nawae" (a local tree which fibre is used for fish nets construction) bark fibre. That this dream was repeated a number of times. That on completion of the net, the boys proceeded to the reef and cast their net and luckily they caught all the devil fishes except the mullet and the "nap" lobster in Bislama "Naura".

That the boys took the fish ashore on the mainland and started to cook them. By this time it was getting dark and as darkness fell a devil by the name of "NECDUMA" smelled the fish and started to approach the boys from the mainland and he started to chase them. The boys were frightened of the devil and they started to swim to the reef where Mystery Island is now and to where their mother had been killed.

The boys stood on the reef until day break. That the devil come trying to catch them however as it was downing the three of them stood there forming two pillars of stones forming Mystery Island. According to Mr Nangia, the boys names were NINYEA the first born and NAVINIACAS the second.

Mr Nangia so as the other three claimants do not however clarify in their evidence nor even their witnesses evidence what relationship does each of their story mean or has to the ownership of Mystery Island. Upon canvassing the evidence of Mr Nangia and upon examination of his family trees, the names of the two boys told in his story do not appear. Messrs Naukai and Naraneheg told the Court similar stories, but once more they did not relate their stories to the ownership of Mystery Island.

Mr Nangia goes further and says in evidence that his father was a great fisherman for the Chiefs in his days. He says that his father is still alive today. Mr Nangia does not however clarify whether his father is still a great fisherman today for the present Chief Henry Naulita. He did not even call his father to give evidence if he was still alive. Mr Nangia says that he interited his fishing rights from his father and that such rights were handed down from Netodi to Nadava who adopted NAKRIPON SAM to Yogom then to Allan Deidei (pronounced Teitei).

One can see from Mr Nangia's evidence that he gives overwhelming evidence about his inheritance of fishing rights from his father. He also says that his father had certain fishing skills and magic spells for attraction of fish and turtles. No other claimant disputes that, Mr Nang a father was a great fisherman except that, the other claimants say their fore fathers were also fishermen.

It is established by the evidence of the other three claimants that there were certain people chosen by the Chiefs to be his fishermen. The Chiefs also chose other people to perform other onerous tasks say for instance, some of his people would be engaged to farm and plant taro, some to plant yams, some to plant kava and some to raise pigs. These were all for the Chiefs and even some to catch fish and turtles.

According to the evidence before me, quite apart from the Chiefly responsibilities people appointed by the Chiefs had their own families and tribes to care for. They had to make sure there was enough taro, yam, kava and pigs for his tribe and families otherwise those engaged in Chiefly responsibilities would starve their families and tribes. Mr Naukal uses the word "private fisherman". The court asked him what did he mean by saying "private fisherman". he explains that, apart from those Chiefly responsibilities, each person made sure that, there was sufficient fish, taro, yams etc for his family and the tribe as a whole so, that those persons engaged in fishing for the Chiefs were in much the same position as those who performed other Chiefly responsibilities. The fisherman had to also ensure there was sufficient yams, taro, kumala or even kava for his family and tribe.

The family trees tendered to the Court by Mr Nangia were both accepted (M.F.I. "1 & 2" are according to Mr Nangia and his only witness Richard Willie represent the inheritance of Mr Nangia's tribe fishing rights dating back some ten(10) generations (see M.F.I. "2". According to Mr Nangia's evidence the family trees represents their fishing rights that have been handed down from the top most persons in his family trees to the current generation.

Interestingly, Mr Nangia does not relate the family trees with his claim to the Mystery Island. He does not even tell the Court if his great great, great grand fathers customarily owned Mystery Island. All Mr Nangia says is that because his father was a great fisherman for the Chiefs possessing certain fishing skills he should own the Mystery Island. Mr Nangia must not only prove that, his descendants, owned the island but he must also set a basis for his case by laying a foundation on ownership of land on Analgauhat Village before claiming the Mystery Island.

Mr Naukae asked Mr Nangia in cross-examination, where is NETODI's land. Mr Nangia says that, this claim is about Mystery Island and not the mainland on Anelgauhat and so he did not wish to tell the Court anything about ownership of land in the mainland. To the Court it was Mr Nangia's duty to prove that he owns the island by proving that he also owns land on the mainland thereby setting a basis for his claim. Mr Nangia did not give to the Court any proof of any of his descendants or even his father farming or having a house on the Mystery Island. Mr Nangia could name every little bay reef, point or even name each stone on the reef surrounding the Mystery Island as he did when cross-examined by Mr Naukae does not in anyway automatically mean Mr Nangia is the custom owner of the Mystery Island.

I now come to Mr Nangia's second witness Mr Richard Willie. This witness says in evidence that, he is not from Anelgauhat Village and the Court asked him at the end of his evidence where he comes from. He says that he is from North Aneityum - on Port Patrick. The Court heard Richard Willie's evidence with suspicion due to the fact that he is from North Aneityum how on earth would he know the story about ownership of Mystery Island. This witness was quite frank in the introduction of his evidence that he does not have anything to do with the Mystery Island Claim. Naturally if that was the case, why on earth give evidence.

This witness also sought to tender two recorded cassette tapes which Richard Willie says that one of the two is now a deceased and the other is too old to walk to the Court. The Court refused to accept the cassettes on the following grounds.

First that, Mr Barry Nangia should have been the one to apply for the Court to accept the recorded evidence because Mr Nangia is the Original Claimant. Secondly, even if Mr Nangia had sought to tender them to the Court, it was dangerous on the basis that, what they were asking the Court to do is to accept the contents of the cassettes as evidence of persons who were not physically in Court. Anyone could have spoken in those tapes as it would be hard for the Court to prove this for fear of fabrication.

Amazingly, Mr Nangia only called one witness. There were three other witnesses to be called but they all decided not to give evidence on behalf of Mr Nangia and quite orderly they wrote to the TAFEA Island Court Clerk at Tanna indicating or giving notice of their intention to withdraw. These witnesses were Albert Nasaureke, Rita and Allan Deidei. The Court noted that Mr Nangia's father Allan Deidei was in Court and the court cannot understand why he could not be called as a witness for Mr Nangia.

FIRST CLAIMANT

Mr Silas Naukae is the First Claimant on the Mystery Island Land case. He gave evidence on oath so were with his two witnesses Messrs. Nagamu Ludwig and Mesak Lalop. Mr Naukae's evidence was also lengthy. At the commencement of his evidence Mr Naukae tells two stories similar to the Original Claimant but with slight variations. I do not wish to restate Mr Naukae's stories here since it is in his evidence and anybody wishing to read stories consult his evidence for comparison and contrast purposes.

At the end of Mr Naukae's two stories he drew an analogy of his two stories by saying that Anelgauhat Village is composed of a number of tribes, but that even though each tribe may have a different traditional custom story about the formation of the Mystery Island, all the people of the Anelgauhat Village traditionally had access to the Mystery Island.

Mr Naukae presented three family trees. They are marked "C to C2". He traces his family genealogy some ten generations back. He gave a comprehensive run down of his great, great, great grand parents inheritance right down to his father Nemeyen. From the family trees presented, they also indicate inheritance of the Chieftainship system from Chief Yaridawa right down to the current Chief, Chief Naulita. This means that because Chief Henry Naulita does not have any children. Mr Silas Naukae will be most probably the next Chief of Anelgauhat Village.

The next thing the first claimant analyses in evidence is his tribes customary land rights. Mr Naukae says that from Chief Nohoat right down to him (Mr Naukae) there has been a chain of inheritance of customary land which has not been broken. That customarily, he is automatically entitled to ownership of Mystery Island.

The method by which Mr Naukae presented his evidence was most impressive. He first establishes that he is a man Anelgauhat, by presentation of his genealogy diagrammes on which one of them (see M.F.I. "C") traces ten generation back. Secondly, he establishes by his evidence ownership of certain parcels of land in and around the Anelgauhut Village. He says that the land on the Anelgauhat waterfront belongs to his grand parents. He says that according to custom stories, he is a real owner of the Anelgauhat Village. He says that from the days of heathenism to his great great great - grand fathers Ladela, Katya, Abel, Tasi, Bareng then to his father (Naukae's), ownership of land was handed down generation to generation right down to him - (Mr Naukae).

Mr Naukae says that by 1845, the Church come to Anelgauhat Village on Aneityum. That it was Chief Nohohat who looked after the first missionary Mr John Geddie and his men. He says that his great great grand fathers sold parcels of land along the Anelgauhat waterfront to John Geddie, various other expertriates and to a logging company.

In the course of his evidence, Mr Naukae was asked by Assessor Moses Napa how many tribes were and are in the Anelgauhat Village. Mr Naukae says that many meetings had been convened to determine how many tribes were and are in Anelgauhat. That these meetings have come up with a possible conclusion that there were and even today four. That these tribes are NARI, NOHOAT, YAUFATI and NETODI. That there are names of persons who represented each tribe. Still in answer to another question from the Court Mr Naukae was asked who was the first man to settle on Mystery Island. He answers by saying that there was non identified - but that however all the people of Anelgauhat Village had access to fish only and that all settled on the mainland.

Mr Naukae qualifies this line of arguement by quoting from pages 100 and 367 of two books. The first one "They came for *Sandwood*" by (cc) Dorothy Shineberg - a Research Fellow in Pacific History Institute of Advanced Studies at the Australian National University - Melbourne published in 1967 and the second book "NINETEEN YEARS IN POLYNESIA" by Rev. George Turner published in 1861 (Consult Exhibit "G"). At page 100 of the first book Mr Naukae highlighted in green a sentence that reads and I quote,

"The Aneityumese considered it a haunted place and therefore willingly sold it to Paddon for an axe, a rug and a string of beads".

Then from the second book at page 367, Mr Naukae read by quoting and which I now quote,

"He says they have bought the island from the natives. Our teachers confirm this and add that they paid for it an axe, a rug and a string of beads, it is more than a mile in circumference without a coconut and hardly a blade of grass. It was considered by natives a haunted spot and hence they never planted anything on it".

Mr Naukae goes on to say that previously Mystery Island were two separate little islands with two different names. The first one being NICEL and the second NAVINIACAS. That both islands have by process of time formed into one island now called Mystery Island.

Towards the end of his evidence, Mr Naukae argue that because his great, great, grandfathers were the Chiefs of Anelgauhat Village, he is automatically to be the next Chief and thus, he shall be responsible for looking after Mystery Island. He further says that he is now a custom owner of Mystery Island because his bubus (grand father) were Chiefs in Anelgauhat.

Mr Naukae says that in heathen times, the people fished for their Chiefs. If they caught no fish, the fishermen would be put to death. Mr Naukae was cross-examined by the original claimant, if the statement that if fishermen caught no fish they were put to death true and if it was true had any persons actually been put to death. Mr Naukae replied by saying that, this was a saying and he does not even know if any actual persons were put to death just because they did not catch any fish for their Chief. However, all the fishermen for the Chief were reminded every now and then that if they came ashore empty handed when fishing for the Chief, they would be put to death.

Mr Naukae says that his great, great grand father old Bareng had a custom stone for catching big fish. That old Bareng used this stone to kill a whale for a Whaling Company in about 1844-45. That the name of the stone is "NESGANEMTAN - NEROP ANELGAUHAT". The Bislama interpretation of the above phrase is "Bareng's eyes in Anelgauhat".

Mr Naukae even traces where the custom stone for fishing is. He says that his bubu, Bareng got married to a woman named Ema. That they had two sons, both died then Bareng too died. Ema then got married to another man from Itec Village. The new man's name was NESUA. That from that marriage Ema and Nesua gave birth to a girl by the name of TAKAU. Takau then married a man called Kanida. Born to them were two kids. A boy called Takije and a girl Sake. That Takau told this story to her son Takije.

Mr Naukae reads portions of his statement - MFI "B" - refer to pages 17 downwards and he says that it was not necessary for the Court to take note of what he was reading. (The simple reason being the statement above is already with the Court.

In cross-examination Mr Nangia asked Mr Naukae what was Mr Naukae's fundamental right. Mr Naukae answered by saying that he is a fisherman and that he is looking forward to be the next high Chief of Anelgauhat. Mr Naukae says in answer to another question that if he wins Mystery Island, he wants the Mystery Island to be placed under the responsibility of the current Chief Henry Naulita and himself (Mr Naukae). Mr Naukae says that he does not wish to be a Chief when Chief Henry Naulita is still alive. It may be inferred from Mr Naukae's total evidence that if one day Chief Henry Naulita decides to step down, Mr Naukae will be the next Chief of Anelgauhat.

The second claimant Mr Francois Wanieg also asked Mr Naukae in cross-examination what principals governed dispossession of land in the Anelgauhat area. Mr Naukae answered by saying, and I think he answered this question right, that all the land in and around Anelgauhat Village belonged to certain tribes and that there was no and even today such thing as the Chief being the owner of all lands. That the Chief owned his own land and the rest of all families also had lands of their own.

Claimant Robert Naranebeg also cross-examined Mr Naukae, how many Chiefs were in Anelgauhat Village. Mr Naukae answered that there were two Chiefs in the whole Island of Aneityum. But that in the Anelgauhat Village there was only one paramount Chief. This would mean to the Court that in the whole of Aneityum, there were two paramount Chiefs one of whom was from Anelgauhat Village. Mr Naukae's claim to having one Chief in Anelgauhat Village is substantiated by the genealogy diagrammes tendered by him and Mr Barry Nagia (refer to H.F.I. B. Nangia 1 by Mr Nangia and "(1" by Mr Naukae).

Mr Naukae was also asked by Mr Naraneheg where is the custom stone for catching fish now. Mr Naukae replied that the stone is currently in the possession of the family of Mr Naraneheg. He was further asked if Mr Naukae exactly knew how many parcels of land did Mr Naukae's grand father had in and around Anelgauhat Village. Mr Naukae once more replied that, besides the plots of land he had introduced in his evidence, there are some land belonging to other people and those who have been adopted into the families of Anelgauhat and that what he had presented in evidence was his bloodline (genealogy) tenurial system .

At the end of the cross-examination the Court asked Mr Naukae, what relationship does he have with the original, the third and the fourth claimant. Mr Naukae answered by saying that Messrs Nangia and Naraneheg have different family structures. This he did not clarify if they had two distinct structures or they both come from one structure. he further says that, they are not in anyway related to him and Mr Francois Wanieg and that with Mr Wanieg, Mr Naukae shares the same structure with him.

The other two witnesses for Mr Naukae gave short evidence. Mr Nagamu Ludwig confirms in evidence in Chief that, Mr Naukae is a real and straight bloodline or of lineal decendent of the paramount Chieftain system in Anelgauhat Village. Mr Nagomu says that from the time he was a small boy he heard stories from his bubu (grand father) that the two small Islands (Mystery Island) belonged to the Chiefs. That they were never owned by any particular tribe or group. That two islands were under the authority of the Chiefs of Anelgauhat.

In cross-examination, Mr Nagomu was asked by Mr Nangia how many Chiefs owned the two little islands. Mr Nagomu says in answer that, Mystery Island was under authority of only one Chief one after the other in order of their serving terms as paramount Chiefs of Anelgauhat Village. He was further asked why for the Chiefs only. Mr Nangamu said, because it was under their care and in ther basket (property of the Chief) Mr Nangamu further adds that, Mystery Island was only used for fishing and that nobody lived there.

Mr Robert Naraneheg cross-examined Mr Nangamu and asked if the Mystery Island was considered to be the property of the chiefs at various points of time, what was the case with ordinary people of Anelgauhat. Mr Nangamu answers by saying that, it was under the authority of the Chief to send his fishermen to fish for him and his people. That the Chief was an overall boss of the people. That he was an overseer - that the Chief did not own the land.

On closure of his cross-examination Mr Naraneheg made a comment that it was true, that there was one Chief in Anelgauhat and that all the people had a right to go fishing on the two little islands.

The next witness for Mr Naukae was Mr Mesak Lalep who says that he does not see any relevance or importance of Mr Nangia claiming the Mystery Island alone. He says that all Mr Nangia wishes to do is take Mystery Island away from the Anelgauhat Community for greed and financial lusts. He says that all the evidence of Mr Nangia on how to catch fish, the stone for catching fish and turtles do not even relate themselves to the ownership of Mystery Island. That Mystery Island was under authority of each succeeding Chiefs and not any individual class or tribes. He further says that Mr Naukae is the proper person to claim since Mr Naukae is a direct decendent of the Chieftain system in Anelgauhat. Witness Lalep also confirms Mr Naukae's evidence that claimant Francois Wamieg is a close relative of Mr Naukae.

Mr Naukae then closed his evidence by making a closing address. In his short address, Mr Naukae says that all the claimants including him are from Anelgauhat Village and if he wins the Mystery Island Land Claim he wishes the Court to place the ownership of Mystery Island under authority of the current paramount Chief of Anelgauhat Village Chief Henry Naulita and himself. He further adds that it will not mean that, Chief Naulita and himself owning the Mystery Island but they will look after it for the whole community of Anelgauhat.

FRANCOIS WANIEG

The second claimant of this case is Mr Francois Wanieg. he simply says, that, he also comes from Anelgauhat Village and that customarily he owns land in and around Anelgauhat Village and that Mystery Island is his. Mr Wanieg says that for a person to claim Mystery Island he must prove and set his basis up by proof ownership of land on the main land.

The Court was so impressed with the evidence of Mr Wanieg too. Like Mr Naukae, Mr Wanieg opposes the concept of individual ownership of Mystery Island. Infact, the last claimant Mr Robert Naraneheg shares the same opinion.

Mr Wanieg says that over thirty-two years now Mystery Island has been in dispute. That many old generations have been dying away but the dispute on Mystery Island has never been solved. He says that that he would be really surprised if Mystery Island is being awarded to a particular group or "tribe. He says that the value of his claim values more than money which seem to breed problem after (problem.

Mr Wanieg presented a family structure a very simple one. (M.F.I. "B"), then explains the relationship of persons named in the structure. Mr Wanieg presented a short but comprehensive structure making it easy to understand. Mr Wanieg says in evidence he has fourteen reasons why he says he also claims the Mystery Island. The first two reasons being that his grand father Nagareg was a real man Anelgauhat. That Naganeg's great, great grand fathers were also men Anelgauhat.

That Nangreng's son, Namtiwan inherited land and fishing rights from his father. That from Namtiwan, his sons Kalambai and Numapon inherited land and fishing rights from their father Namtiwan. That on the sale of land to outsiders, his great, great grand fathers sold land to a saw milling company on the waterfront of Anelgauhat. To prove this Mr Wanieg tendered a copy of agreement for sale of land - see M.F.I. "D".

That born to Kalambai was Namoted who was Wanieg's second father. He says that his father also owned certain parts of the Mystery Island reefs where his father used to go for fishing. He says that his father Namoted was also a greate fisherman for Chief Tasi. Mr Wanieg says that his birth right was handed down from man to man and not to women.

In Exhibit "F" Mr Wanieg describes in detail portions of land which he claims for his tribe and his own. He says in that statement that all those parcels of land were "and are his bubus right from time immemorial until today. That these plots of land still belongs to him and his tribe. He also gives names of certain portions of land that are still the subject of dispute and which have not been decided. Following this Mr Wamieg tenders another document - M.F.I. H" - a record of a meeting convened on 13.2.90 by some of their Chiefs. Although it is not clear from exhibit "H" what was the decision, Mr Wamieg says in evidence that, the meeting decided infavour of him and he gives various reasons why he says he is a custom owner of all those portions of land he had identified in his evidence.

Mr Naukae asked Mr Wanieg in cross-examination who was his real father. Mr Wamieg says in answer that his father ^{was} Willie Kopitana, (SL) but that he was only adopted by Namoted. He was further asked if Kopitana was from their bloodline or not and Mr Wamieg says that Kopitana was from outside their genealogy. These two questions were raised in regard to acquitision of land and ownership rights in case of an adopted son. According to the Aneitymese custom, an adopted son does not have the full status of sonship compared to the natural sons of the adopters. It is implied from the above two questions that, because Mr Wanieg was only adopted, he is not entitle to claim. It seems Mr Naukae contradicts himself here since he first says that Mr Wanieg should claim with him but then he raises questions that debase Mr Wanieg's status to ownership rights to land.

Vanuatu does not have an adoption law that would guide the Courts on its consideration on the effects of either legal or customary adoption. To get an adoption order in this country one must go to the Supreme Court. The Constitution simply provides for reception or adoption of British and French laws in force or applied in Vanuatu immediately before the Day of Independence is to continue to be applied in Vanuatu provided that they have not been revoked or they are not inconsistent with the Independent status of Vanuatu and its customs. Chapter 15 Article 95(2).

For purposes of enlightenment on the question of adoption, I shall now refer to a UK legislation, the Adoption Act of 1958. (see this one in Halsbury's Statutes of England - Third Edition 17 page 635).

There are two other British legislations on adoption. The Adoption Act of 1960 that related to revocation of adoption orders in cases of legitimation that affected Section 26 of the 1958 Act and the Adoption Act of 1968 which provided for extension of the powers of the UK Courts and to give effect and determination of adoption orders made overseas. By section 2 subsection (2) of the 1968 Adoption Act many sections of this Act now were modified version from the 1958 Act. So that the main components of the 1958 Act do still apply which provisions do apply to effects of adoption orders and which are applicable in Vanuatu by virtue of Article 95(2) of the Vanuatu Constitution. But section 13 of the 1958 Act provides for Rights and duties of parents and capacity to marry and the effects of adoption. Section 13 is in the following terms.

"Upon an adoption order being made, all rights, duties, obligations and liabilities of the parents or guardians of the infant in relation to the future custody, maintenance and education of the infant including all rights to appoint a guardian and (in England) to consent or give notice of dissent to marry, shall be extinguished and all such rights, duties, obligations and liabilities shall vest in and be exercisable by and enforceable against the adopter as if the infant were a child born to the adopter in lawful wedlock; and in respect of the matters aforesaid (and in Scotland in respect of the liability of a child to maintain his parents) the infant shall stand to the adopter exclusively in the position of a child born to the adopter in lawful wedlock".

And subsection (2) says:

"In any cases where two spouses are the adopters, the spouses shall in respect of the matters aforesaid, and for the purpose of the jurisdiction of any Court to make orders as to the custody and maintenance of and right of access to Children stand to each other and to the infant in the same relation as they would have stood if they had been the lawful father and mother of the infant and the infant shall stand to them in the same relation as to a lawful father and mother".

The Joint Regulations, Volumes I, II & III cannot give me any assistance. That being so the legal adoption in Vanuatu would be guided by the above legislation. To me what the above quotations seem to say is that, an adopted child becomes the child of the adopters, and the adopters become the parents of the child, as if the child had been born to the adopters in lawful wedlock and that the adopted child ceases to be a child of any person who was a parent (whether natural or adoptive) of the child before the making of the adoption order and that any such person ceases to be a parent of the child.

What is the case with customary adoption in Aneityum. Chapter 15 Article 95(3) of the Vanuatu Constitution provides that customary law must continue to have effect as part of the law of the Republic of Vanuatu. What if a custom is say for instance repugnant to the general principles of humanity or for arguement shake is inconsistent with the Constitution itself. Must such customs or practices be continued to have effect as part of the law in Vanuatu? I do not agree for the following reasons. First weighing the two concepts of adoption in Vanuatu, the legal and customary. The later concept in provides that a child adopted - particularly a son, does not have the full status of a son in terms of ownership of land and the U.K. concept stated in section 13 of the 1958 British Adoption Act, customary adoption seems to discriminate against those who have been adopted. The legal concept seems to say one thing while the customary concept say something else. It is my opinion that Article 95(3) of the Constitution is not applicable in respect of customs which are inconsistent with the Constitution or statute or which are repugnant to the general principles of humanity.

Article 7 of the Vanuatu Constitution. Article 7 is put in the following terms

"Every person had the following fundamental duties to himself and his decedents and to others.

(a) to respect and to act in the spirit of the Constitution

(b) to recognise that he can fully develop his abilities and advance his true interests only by active participation in the development of the national community.

(c)

(d)

(e) to work according to his talents in socially useful employment and if necessary, to create for himself legitimate opportunities for such employment;

(f) to respect the rights and freedoms of others and to cooperate fully with others in the interests of interdependence and solidarity;

(g) to contribute, as required by law, according to his means, to the revenues required for the advancement of the Republic of Vanuatu and the attainment of the national objectives;

(h) in the case of a parent, to support assist and educate all his children, legitimate and in particular to give them a true understanding of their fundamental rights and duties and of the national objectives and of the culture and customs of the people of Vanuatu;

(i) In the case of a child, to respect his parents. "

It is my opinion therefore that, the customary adoption concept in Aneityum is not in the Spirit of Vanuatu Constitution, because it conflicts with the above provisos of the Vanuatu Constitution. It has been proved in evidence in the Court that Mr Waineg was customarily adopted. So that Francois Waineg has the full right to ownership of land from his adoptive father.

At the conclusion of his case Mr Waineg introduced to Court two statements belonging to his two witnesses who were not present in Court, were read to Court by the TAFEA Island Court Clerk and were accepted and marked M.F.I. J&K.

One thing mentioned by the two witnesses statements is that according to the Aneityumese custom, ownership of land starts from land to the reef. This concept is consistent with Mr Naukae's evidence. The legal definitions of land provided in the Land Leases Act Cap 163 and the Land Reform Act Cap 123 have slight variations. The definition that suits the purpose of this discussion is provided in the Land Reform Act Cap 123. Land is defined as follows:

"Land" includes improvements thereon or affixed thereto and land under water including land extending to the sea of any offshore reef but no further" and I quote.

Mr Wanieg two witnesses statement and the evidence of Mr Naukae and his witness seem to agree with the legal definition of land in Vanuatu and therefore I accept their evidence that ownership of land in Aneityum commences from land and includes reefs and offshore reefs.

The last two witnesses that were called by Mr Wanieg gave very short evidence each and I do not wish to explore their evidence in detail except to say that each witness said Mr Wanieg is also a custom owner of certain plots of land in Anelgauhat and that Mr Wanieg is a real man Anelgauhat. In his closing address, Mr Wanieg says that, the evidence that he has called is proof that he is also a "man Anelgauhat". He says that it is not only Mr Nagia and other claimants who have ownership right to Mystery Island. He says therefore that Mystery Island does not belong to any particular group or tribe but it belongs to all the people of Anelgauhat Village.

THIRD CLAIMANT MR ROBERT NARANEHEG

The third claimant Robert Naraneheg also introduces himself as a man Anelgauhat. He also tells similar story as told by Messrs Nangia and Naukae on the formation of the Mystery Island. I do not wish to restate what Mr Naraneheg has stated for the simple reason that, his story carries the same idea on the formation of the Mystery Island. What is essential about Mr Naraneheg's evidence is he says that NAVINVACAS and NINYEC (Mystery Island) belong to the people of Anelgauhat.

Mr Naraneheg gives an history of inheritance right down to his time. He says that, in his knowledge, he knows that Mystery Island belongs to all the people and not to any particular person. That his great great grand fathers from Lumai to Kanida were also fishermen for Chiefs Yaridowa, Nohoat and Ladela at different time. Mr Naraneheg being the last claimant in this claim seems to have the same opinion of ownership of the Mystery Island as that of claimants Silas Naukae and Francois Wanieg. Their concern is there is no possibility of individual ownership of Mystery Island but that the island should be kept for the good of all the people in Anelgauhat Village.

The stories told by the original claimant, Claimant 1 & 3 are suggestive of the fact that within Anelgauhat Village, there were and even today they have various tribes having their own story about the formation of Mystery Island. This is why it may be correct to infer that it was not possible for anyone person alone to own land in the Anelgauhat area. This Court is dealing with the Mystery Island and not the land on which Anelgauhat Village stands, however, the Court sees a purpose for this. They did it to prove that they are all men Anelgauhat and not just from somewhere. The Court also noted that Mr Naraneheg does not identify his name on the family trees he presented as well one will note from his evidence that he does not refer in his evidence to himself as "I" but instead, he says, "We" The reasons why he gave his evidence this way is as he later said in cross-examination by Mr Barry Nangia that he does not claim for himself but for all the people in Anelgauhat.

The next witness is Mr IVITAU SOPE who says that he is from Anelgauhat Village and that his grand father Takije had told him that Takije was the one who fished for the Chief. That Takije had also told him that Yaufati was married to Pialau. Born to Yaufati and Pialau was girl by name Ema, that Ema married a man called NESUA. Born to Ema and Nesua was the only daughter Takau. Takau then married Kanida and born to them was Takije, Noveipeg and Sope. Witness Sope's story is nothing less than evidence of possessory right to the Mystery Island. (SL)

The last witness called by Mr Naraneheg gives almost the same evidence as that of Mr IVITAU SOPE and so I do not wish to say any more about it.

Mr Naraneheg summed up his evidence by making a closing statement and says that he has presented to the Court, two family genealogy diagrammes. It is interesting to see how Mr Naraneheg presented his case. If one observes his family trees exhibits "D" and "E" you cannot find Mr Naraneheg's name. Infact he says in Exhibit "E" just below the top right hand corner in read in that, that exhibit "E" is Silas Naukae's family tree structure. Then when you explore Exhibit "D" which bares some of Naraneheg's family members as

mentioned in his evidence, Mr Naraneheg's name cannot even be traced. So that to trace Mr Naraneheg's position on the family tree (Exhibit "D"), one must go back to his evidence to try to put him in the picture.

Mr Naraneheg commences the second part of his evidence (see M.F.I. I.B.) by saying that, it is because of the stories, he had told in his evidence, (story about formation of Mystery Island) they know that Mystery Island is theirs. Mr Naraneheg uses the term "us" rather than "me". He later clarified this in cross-examination why he did not wish to use the terms "I and me", when asked by Mr Nangia if he (Mr Naraneheg) could identify which particular portion of Mystery Island was or he is now claiming. In answer to Mr Nangia question. Mr Naraneheg says something to this effect:

"I wish to clarify again that when you claim, you claim alone for the Island, I do not claim for any particular part. I claim the whole Island. I do not claim it for myself as you have done. I claim for the Anelgauhat people on the whole, I do not claim for myself".

Then Mr Naraneheg commences on exhibit "B": with Lumae, an old man who lived at Analue Village and that Lumae was then responsible for the Nakamal at Analue Village. That Lumae was a bigman too for Chief Yaridawa. That after Lumae - his son Nowaipeg inherited his father's land and fishing rights. That Nowaipeg also managed the sacred basket for Chief Yaridawa. that Nowaipeg was in possession of the sacred basket until arrival of the church in Anelgauhat in 1848. He says that from Lumae to Nowaipeg, then to Takiije then to Kanida (pronounced Kanisa), they were all his great pupus (grand fathers). He says that to place his name on the family tree would be hard. he says that this does not mean however that he is not from Anelgauhat Village. That due to this, he is also the owner of Mystery Island. This is the end of all the evidence called in the Mystery Island land claim.

Having thoroughly canvassed all the evidence before this Court, I wish to briefly discuss what I think is the case with ownership of Mystery Island is. Under the English concept of co-ownership it is possible for two or more persons having simultaneous enjoyment of land. In a co-ownership situation, four unities must be present. they are unities of possession, interest, title and time. Unity of possession is common to all forms of co-ownership. Each co-owner is as much entitled to possession of any part of the land as the others. A co-owner cannot point to any specific part of the land and claim as his own, if he did there would be separate ownership and not co-ownership. (S)

In the unity of interest, each joint tenant is the same in extent, nature and duration, for in theory of law they hold but one estate. The unity of interest, has important consequences. Each joint tenant has the whole of the property, such things as rents and profits are to be equally divided between them. There can be no joint tenancy between those with interests of a different nature. There cannot be no joint tenancy between those whose interest are similar but of duration. Any legal act for instance in conveyancing or a lease regarding the land must require participation of all joint tenants - Leek and Moorlands D.S. -V- Clark [1952] 2 QB 788.

Then in the unity of title, each joint tenant must claim his title to the land under the same act or document. This requirement is satisfied if all the tenants acquired their rights by the same conveyance or if they simultaneously took possession of land and acquired title to it by adverse possession.

"The Law of Real Property, Sir Robert Megarry and H.W.R. Wade" pages 419-421.

Unity of time requires that each tenant must vest at the same time. There are two exceptions to the necessity for unity of time in conveyance to uses and gifts. I do not see these appropriate in my discussion in the Mystery Island Land Claim.

The Vanuatu Constitution provides that, "all the land in the Republic of Vanuatu belongs to the indigenous custom owners and their decedents". In the case before me all parties have proved they are all men Anelgauhut. They have also proved their decedents were also men Anelgauhut and thus I find that none of those who have claimed individually own Mystery Island. I find however that, each claimant and those tribes whom they represent and all the customary owners of Anelgauhut Village are co-owners of Mystery Island. This being the case, I make the following findings.

FINDINGS

1. I do find according to the evidence before this Court that, the original Claimant, the first, second and third claimants all from Anelgauhut Village.
2. There is no such thing as individual ownership of the Mystery Island as claimed by the original claimant Barry Nangia.
3. That according to the Aneityum custom, ownership of land commences from land to the reef.
4. That although Francois Wamieg was adopted by his adoptive father Namoted (his real father being Willie Kopitana) and in accordance with the Constitutional provision I have referred to in the body of my judgement has right to ownership of property is much the same as a natural child.
5. That according to evidence of Mr Naukae, nobody owned the Mystery Island and that even before arrival of the first missionaries in 1848, nobody was sole owner of Mystery Island.
6. That, in accordance with the weight of all the evidence, all claimants and those whom they represent and all the custom owners of Anelgauhut Village have jointly owned the Mystery since its formation.

7. That at various points of their Chiefly reign, the Paramount Chiefs of Anelgauhat Village administered the Mystery Island for his people but he was not a custom owner alone.

8. That this being the case I make the following Declarations.

(a) that all the claimants and those whom they represent and all the custom owners of Anelgauhat Village are co-owners of Mystery Island.

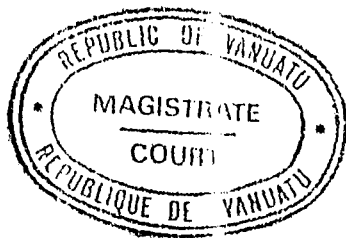
(b) that Mystery Island be placed in the hands of the Chief of Anelgauhat Village (currently Chief Henry Naulita) who shall arrange with other Chiefs of Anelgauhat Village to establish a committee to administer and run the Mystery Island Project.

(c) that the preceding sub-paragraph (b) of paragraph 8 is only applicable where there is no committed already established for purposes of administering and running the Mystery Island Project. (SL)

9. That all the co-owners shall meet the cost of publication of all service messages incurred and all other costs to the value of VT70,000 (S)

10. Parties have 30 Days to Appeal.

Dated this 7th day of October, 1994.



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S. LENALIA
Senior Magistrate