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IN THE MAGISTRATE'S COURT FOR
THE REPUBLIC OF VANUATU

Civil Appeal Case No. 01 of 2009

BETWEEN: ANDREW KALONTAS

Appellant

AND: CHIEF PHILIMON PAKOALAEAE

Respondent

Coram: Stephen D FELIX, Chief Magistrate

Assessors: Chief Sam MARPAKOA, Lausake village Emao Island North Efate
Mr. Kaltavara Arvie, Emao Island North Efate

JUDGMENT

HAVING HEARD both counsels Mr Edward NALIAL for the Appellant and Mr Chris RARUMAE from ACE Advocates for the Respondent,

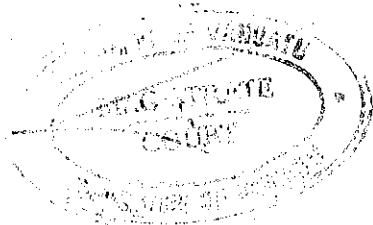
AND HAVING ALSO READ AND CONSIDERED the documents filed herein,

THIS COURT MAKES the following findings concerning each of the six main grounds relied upon by the Appellant as shown in pages 27 to 30 of the Appellant's appeal book:

Ground 1

The appellant submitted that he was not given a fair opportunity by the Efate Island Court to present his case. He submitted that he was in fact stopped by the court clerk from presenting his case. They say that the principle of natural justice of *the right of a fair hearing* was not respected by the Court below.

However there was no record of the minutes of the Efate Island Court's proceeding provided to confirm or support that allegation.



This Court has consulted the Efate Island Court case file but has also not found any record or minutes of proceeding to support the appellant's claim.

However to assist and guide the court below in future proceedings, this Court only wishes to make comments that Island Courts are not bound to follow technical rules of evidence and the right to a fair hearing is a fundamental principal of natural justice that must always be respected by the courts including the Island Courts. And it is also important that proper and clear minutes of the Court proceedings are kept by the clerks from commencement to the end of the court hearings.

Ground 2

The appellant submitted that the Clerk of the court below has breached Rule 8(10)(a) of the Island Courts (Court Clerks) Rules of 2005 which states that:

(10) The clerk shall not-

(a) question the parties or witnesses;

Again there are no copies of any minutes of the court below to support that allegation. This Court is not informed about what the question was exactly and at what stage of the proceeding was the question asked.

However because of the evidence of witnesses who were present during the hearing in the court below, it is important to make the following remarks: The island court clerk's responsibility in a civil hearing as outlined in Rule 8 of the Island Courts (Court Clerks) Rules of 2005 includes the opening of the court sessions, calling of the cases, ensuring that the Bislama language is understood by everyone, reading of the statement of claim, requesting and recording the oral response of the Defendant, administering oaths if the matter proceeds to trial and writing minutes of the proceeding including decision taken by the justices. The Island Court Clerk is not an adjudicator and should never be asking question to parties or witnesses concerning any of the facts of a case at anytime during the hearing.

Ground 3

The appellant submitted that the court below was bias in its decision because one of the justices Anne Carlo is a close family member of the President of the Vanuatu Republican Party VRP and the Respondent is a strong supporter and also the President of the VRP sub-committee on Tanoliu village. There were also allegations that another justice was seen being transported by the Respondent in his taxi to his home village.

Those allegations however are disputed by the Respondent. This Court is also of the opinion that the Appellant should have raised an objection for Ms Calo to be a presiding justice in the court below.

This Court wishes to comment that to avoid future complaints of impartiality of an island court, the Clerk must, after nominating the justices for an island sitting, especially in a customary land matter or a chiefly title dispute, get the views of both parties before the justices are summoned to sit as Island Court justices.



The justices who are sitting must also be strongly advised before the commencement of a proceeding not to conduct themselves in a manner that will affect the impartiality of the island court.

Ground 4, Ground 5 and Ground 6

This Court proposes to respond to Ground 4, 5 and 6 together because they deal basically with the substantive customary practices relating to the dispute before the Court.

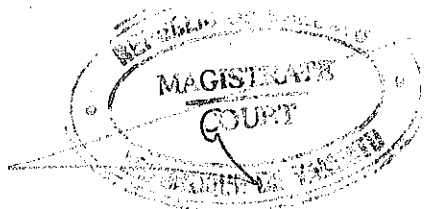
But firstly it must be noted that the court below had overlooked a very important point when registering the matter and that is the name of the parties. If the title in dispute is 'POPOVI' then the fairest way to go about it is to use the personal name of the parties as claimant and defendant and leave the chiefly title for the court to decide who has the right to use that name at the end of the hearing.

Having heard and considered submissions from both the Appellant and the Respondent and having also considered the opinion of both assessors this court finds that:

- As a customary practice of Efate, the title of a custom chief is understood to be a title given to a person to exercise control over a group of people and over a boundary of land using the customary laws and practices of the island. The exercise of such power does not give the chief the right to own all the land in the area. The land boundary of Udaone is the area, recognized by the Efate Island Court in a previous customary land matter, as the area controlled by chief POPOVI. So Chief POPOVI may be a custom owner but not the custom owner Udaone. That basically explains the difference and the relationship between a custom chief and a custom land on Efate.
- This Court further notes that the transfer of the chiefly Title POPOVI from Late Kalnagis Tivate through his Late wife Ruth to Late Chief Daniel POPOVI was never disputed during his 60 years reign by anyone including the Responent's father. The ordination of Late Chief Daniel Popovi also has never been disputed.

As a customary practice of Efate, the issue of blood line becomes irrelevant if the will and decision of the 'Tukurao' or the care-taker chief and the elders of the community were made in relation to the chiefly title of a deceased.

- There was no dispute that the three chiefly titles that were passed on to the descendants of late chief Kalnagis Tivate were as follows: Daniel received the title Popovi, Obed received the title Pakoalaelae and Kelbet received the title Tongoltong. And as a customary practice of Efate, those three brothers should continue to retain and transfer their respective chiefly titles through their respective blood descents unless a will or collective decision is made by the 'Tukurao' and/or the elders of the community to pass their titles outside their bloodlines.



Upon these findings, this Court decides to allow this appeal and makes the following declarations:

1. That the Chiefly Title 'POPOVI' is a title inherited lawfully and in accordance with the custom of Efate by late Daniel Popovi in 1938;
2. That the Chiefly Title 'POPOVI' is a title inherited lawfully and in accordance with the custom of Efate by Andrew Kalontas Popovi.
3. Each party bear their own costs

The Court further makes the following recommendations:

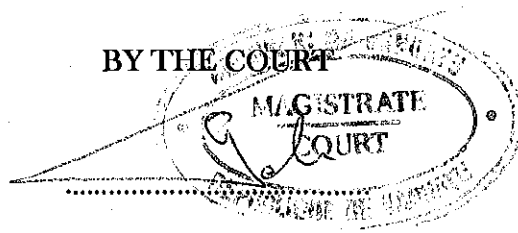
1. Because the Parties are all related as cousin brothers, it is important that Popovi, Pakoalaelae and Tongoltong respect each others' roles and work together for the good of the people living within the Udaone land boundary;
2. And even if Popovi is the paramount chief, he must always act a great servant of the people and not as a big master; and must always seek the assistance and advise of the other two chiefs Pakoalaelae and Tongoltong when exercising his chiefly authority.

With the privilege of holding a high custom chiefly title, comes great responsibility and great accountability towards the people of the land.

The parties have the right to appeal to the Supreme Court within 28 days

Dated at Port Vila this 14th Day of May, 2010

BY THE COURT



Stephen Felix

Chief Magistrate

Assisted by Chief Broad Sam Marpakoa and Chief Kaltavara Arvic of Emao, North Efate

Assessors

