

**IN THE MAGISTRATE COURT OF
THE REPUBLIC OF VANUATU**
(Appeal Jurisdiction)

Civil Appeal Case No. 3199 of 2018

BETWEEN: NIAR BATICK

Appellant

AND: ELSIEM HARRY
First Respondent

AND:
FRED MARKON
Second Respondent

Coram: *Laloyer. A*
Acting Chief Magistrate

Assessors: *Justice Patison Peter*
Justice Edwin Edwin

Counsel for Appellant: *George Batick as representative of the Appellant*

Counsel for First Respondent: *James Tari*

Counsel for Second Respondent: *Jimmy Vohor*

Hearing Date: *27 September 2021*

Judgment Date: *30 September 2021*

JUDGMENT

This is an appeal from the Island Court judgment dated 31st January 2018. The judgment declared that:

1. Chief Harry Marsangafur as paramount chief of Batamar nasara located at the sea coast and the Batamar nasara located in the bush.
2. Chief Harry Marsangafur to choose one of the parties to become his assistant chief within the Batamar nasara.



The Appellant decided to proceed with his appeal in the absence of his counsel, though the Court told him that he can seek adjournment.

Appellant's case

The Appellant as a lay person could not properly make his application based on the law to adduce new evidence in the appeal. However, the Appellant submits that in the area of Batamar nasara a chiefly title can only be given to a person when a namaki is performed. A person who holds the last rank of namaki is a paramount chief. A child of a paramount chief cannot be given the paramount rank automatically upon birth. The child must perform the first to the last namaki and then he would take the title of a paramount. In each nasara, there is a paramount chief. Marsangafur is not a paramount name in Batamar nasara. This means Marsangafur belong to another nasara. The highest rank in Batamar nasara is Markon.

In custom, a namaki requires a person to kill a pig within a nasara. Once this is done, a chiefly name is given to that person. There are more than one namaki to perform before that person becomes a paramount chief. This is how the chiefly ranks are done.

The Appellant submits that he and Markson Fred applied to the local court to decide on the Markon title. During that time, Harry Elsiem joins as a party to dispute his rank. The reason for him to seek a declaration from the local court is because he believes the title belong to him. Markson Fred took the title when he kicked his father's coffin.

So, it is crucial for the trial court to visit the stones where namaki had been done. Each stone has its history and this evidence would definitively cause a change to the Island Court decision. The appeal must refer the matter back to the Island Court to determine the claim for Markon and to visit the site.

First Respondent

The First Respondent replied that the Appellant and Markson Fred do not challenge the Marsangafur title in the Island Court and in this appeal. The appeal should uphold this declaration but remove the part of the judgment that declared this title to be a paramount title.

All person before a Court must be given the opportunity to be heard and for the trial court to deal with the claims of all parties. Counsel concedes that Island Court had not properly addressed the claim for Markon title. A different constituted Island Court should only address these issues:-

- a) Deal with the claim for Markon;



- b) Visit the Batamar nasara and see the stones including allowing the parties to tell their story over the stones.
- c) Decide which title is the highest in Batamar nasara.

The visitation of site would assist the Court to see the position of the stones. In custom, a position of stones used in namaki show the ranks of the two titles.

Second Respondent

Counsel for Second Respondent concede to the submission of the First Respondent and concedes that the matter be referred back to a different constituted Island Court.

Discussion

Article 5 (2) (a) - (h) of the Constitution made provision that when a Court deals with criminal charges it must be fair. The appeal is of the view that this also apply in civil claim. Island Court has the responsibility to deal will all claim filed by parties. All claims and defence must be addressed properly. The ruling of the Island Court putting more weight on the issue of Marsangafur and lesser on the claim of Markon is not fair. The procedure of considering the evidence seems to not proper.

Order 18, Section 9 of the Island Courts Act [Cap 167] provides that the Island Court shall visit the land when dealing with land matters. No provision in law for Island Court to visit the land when dealing with chiefly title. The appeal is satisfied that the Island Court had properly used its discretion to refuse to visit the site. This approach would be appropriate if all parties claim the same chiefly title and rank within a common nasara. However, this is not the case. In this matter, there are two different titles in one nasara and each title claim to be the highest one. It becomes a question of rank and title.

In custom, a paramount chiefly title is not an automatic right upon birth. The first born son of a paramount chief who had not performed the last namaki cannot be a paramount chief. In custom, stones are laid in a nasara. The stones show the ranks of chiefs from the highest to the lowest title. The position of these stones is important and definitively would assist the Island Court in determine the ranks of the titles of Marsangafur and Markon.

Findings

1. The Court finds that the Island Court had not properly dealt with the chiefly title of Markon.



2. The title of Marsangafur is not challenged by the other parties to this appeal. As a result, the Court finds that Harry Elsiem is entitled only to the title of Marsangafur but not of paramount right until a different constituted Island Court visit the site also consider the evidence of both parties and rank the titles according to custom.
3. Paramount title is not an automatic right. Paramount title is given to the first born son of a paramount chief when he had performed the last namaki. This means that the stones are crucial to see in this case. The Island Court had declared Harry Elsiem to be a paramount chief without taking these steps.

ORDER


1. The Island Court judgment dated 31 January 2018 is hereby revoked.
2. Harry Elsiem is not the paramount chief of Batamar nasara.
3. Harry Elsiem holds the chiefly title Marsangafur.
4. A different constituted Island Court shall deal with the five issues :-
 - a. Hear and determine the claims of parties over Markon title.
 - b. Visit Batamar nasara to see the physical evidence of each party and their ranks.
 - c. Declare which title use for paramount chief in Batamar nasara.
 - d. Marsangafur or Markon is the highest rank in Batamar nasara.
 - e. Who is the paramount chief in Batamar nasara?
5. Each party bears their own costs.

DATED at Lakatoro on this 30th day of September 2021

BY THE COURT


.....
**Acting Chief Magistrate
Laloyer. A**


.....
Justice Patison Peter


.....
Justice Edwin Edwin

