IN THE SUPREME COURT
OF THE REPUBLIC OF VANUATU **Civil Appeal Case No. 128 /2009**
(Civil Jurisdiction)

BETWEEN: **CHIEF SIMEON POILAPA IV and TASIL MALASTAPU**
Appellants

AND: **KALOKAI MASAAI**
Respondent

Hearing: ***27 April 2011***
Before: ***Hon. Justice Robert Spear***
Appearances: ***Mr J Kilu for the Appellants***
Mr S T Joel for the Respondent

JUDGMENT

Delivered 6 June 2011

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1. This case involves an appeal from the decision of the Magistrates' Court that relates to the paramount chiefly title of Mele Village. It is a case that has been outstanding for too long and this has led to uncertainty and disagreement as to the leadership and governance of the people of Mele Village.

2. This decision is on a preliminary point taken by the Respondent. It is whether this Court has jurisdiction to entertain this appeal. Formally, this point is raised by an application by the Respondent to strike out the appeal.

3. The history of this case is of interest but it is not entirely essential to the consideration that this preliminary issue requires. Be that as it may, because of the significant interest in this case it is convenient to set out the essential findings of the Courts below before turning to the preliminary issue required to be determined.

Island Court Decision

4. The Efate Island Court held in its decision of 16 May 2008:-

a. *The proper customary practise to acquire a chiefly status is by inheritance through the blood line system from generation to another.*

b. *The method of selecting a chief by way of secret ballot is not a customary practice in Mele village and Efate.*

c. *The election procedures followed and made on 4 November 2006 in relation to the ordination of Chief Kalokai Masaai as the Paramount Chief of Mele village is null and void and has no effect in law and custom.*

d. *The ordination process followed and made on 8 October 2005 in relation to the ordination of Chief Kalontano Poilapa III is in accordance with the customary practices of Mele village and Efate but only considered as a lesser Chief in his nakamal.*

e. *That Chief Kalontano Poilapa III is the Chief in Langa's tribe and has no authority to rule as the Paramount Chief Mele village, Efate to that effect.*

f. *The ordination of the Paramount Chiefly Title rest on the hands of the small chiefs of each nakamal represented today in Mele village, Efate, including Chief Kalontano Poilapa III.*

5. The following orders were then made by the Efate Island Court:-

a. *That only the lesser chiefs represented by each nakamal that exist in Mele village today have the ultimate authority and power according to the principles of custom rules to appoint and ordain the paramount chief of Mele village.*

b. *That the village council members existed prior to the disputes are directed to call a meeting and to set procedures according to custom for the appointment and ordination of the paramount chief of Mele village.*

c. *That the village council members existed prior to the dispute are hereby directed to make necessary arrangements for an appointment and ordination of the paramount chief within four (4) months as from the date of this Judgment.*

d. *That both parties are hereby directed to keep peace, harmony and court order in this community at all times……*

Magistrates' Court Decision

6. The decision of the Efate Island Court was appealed to the Magistrates' Court. That appeal was addressed in a decision delivered on 29 September 2009. The appeal was dismissed. Again, it will be of interest to those who are following this case to have a clear understanding of the decision of the Magistrates' Court and so the relevant parts of that succinct decision are now set out below.

"We will deal with these grounds of appeal as they are set out above.

Ground 1

It is submitted by counsel for the Appellants that it is not true that the Paramount Chiefly Title was bestowed on Chief Kalsuatu Poilapa I by Titongoatabu. That Title was bestowed on Chief Kalsuatu Poilapa I by the Mele counsel chiefs. He was the first Paramount Chief of Mele village. It is the view of this Court that that statement is made in light the whole judgment. The Court below held that a paramount chiefly title is a custom property only to be succeeded by descendants of the holder. Kalsautu Poilapa I and Titongoatabu were from different tribes and the succession of that chiefly title could not be passed on between them because there was no lineal lineage between them. The Court below further on its judgment pronounced that the appointment of Kalsautu Poilapa I as chief was in line with the proper procedures in custom but as a lesser chief of his tribe.

That would be a correct finding because Kalsuatu Poilapa I could not inherit something that his tribe did not possessed or owned and that is the paramount chiefly title. Ground 1 fails.

Ground 2
It is submitted that Titongoatabu was not originally from Mele therefore he could not been a chief of Mele village and that the Court below was wrong in holding that chief Titongoatabu was a Paramount Chief of Mele.

We are unable to see how that proposition is made. In response counsel for the Respondent submits that it would be impossibility for the Appellant to claim that he is Paramount Chief since the paramount title did not originate from his tribe. We hold the view. Ground 2 fails.

Ground 3
Ground 3 must also fail for the reasons set out in the discussion to ground 2 of this appeal.

Ground 4
It is submitted that only a paramount chief can ordain small chiefs.

We find that is not the case.

In response thereof counsel for the Respondent submits that the Appellant cannot claim to be paramount chief because in the lower Court he admitted being a lesser chief of his tribe. Lesser chiefs are nominated by members of their tribe. The Court below, it is submitted, has set up the proper customary procedural mechanism for an appointment of a paramount chief. Ground 4 fails.

Ground 5
It is submitted that Kalsautu Poilapa I came from a chiefly blood lineage. There is no evidence that he descended from a family with a chiefly lineage. There is evidence that prior to Kalsuatu Poilapa I there were 2 chiefs in Mele village. They were Chief Ngos and Chief Malasikokto. There was no evidence in the Court below that Kalsautu Poilapa I was related to anyone of them in one way or another. The submission that Kalsautu Poilapa was a descendant of a chiefly relation is unfounded. Ground 5 also fails.

> *We are of the view that to set things right the Efate Island Court has set down the proper customary procedure for the appointment of a paramount chief. That judgment cannot be disturbed. The orders set out in that judgment should now be enforced.*
>
> *This appeal is dismissed and the Respondent must be entitled to his costs to be assessed failing agreement."*

7. The Magistrates' Court was correctly constituted with a Magistrate sitting with two assessors.

8. It is accepted by the parties that what is sought to be challenged in this court are the findings as to *custom* by the Efate Island Court and as upheld by the Magistrate's Court. This is of critical importance in this case. Accordingly, it is necessary first to understand exactly what is meant by *custom.* It is indeed defined by the Interpretation Act [Cap. 132] as follows:

> *"**Custom**: - means the customs and traditional practices of the indigenous peoples of Vanuatu*

9. Mr Joel, for the Respondent, argued that this Court has no jurisdiction to entertain this appeal. Alternatively, that it should not entertain an appeal from a Magistrates' Court dealing with a decision on matters of custom and relating to a chiefly title. Essentially, Mr Joel's submission is that there is no statutory basis for this appeal coming before this Court. Furthermore, the Court should not also entertain this appeal within its supervisory jurisdiction of inferior tribunals. This argument relies particularly on the appeal regime established by section 22 of the Island Court's Act [Cap. 167].

10. Mr Kilu submitted that section 30 of the Judicial Services and Court's Act [CAP [270] provides a right of appeal. Furthermore, section 65 of that Act imbues this Court with such inherent and incidental powers as may be reasonably required in order to apply custom. Mr Kilu refers to an earlier decision of this Court *Tenene v Namak [2003] VUSC; Civil Case 203 of 2002 (25 June 2003 Coventry J)* as an illustration of this Court exercising appellate jurisdiction on custom issues in respect of another chiefly title case.

Consideration

11. Island Courts were established in 1983 to exercise limited criminal and civil jurisdiction but also to apply customary law. An Island Court is constituted by three Justices *"knowledgeable in custom for each Island Court at least one of whom shall be a custom chief residing within the territorial jurisdiction of the Court"*- s. 3 (1) Island Courts Act. Island Court Justices are appointed by the President.

12. Section 10 of that Act specifically directs an Island Court to apply customary law:

*"**10. Application of customary law***

Subject to the provisions of this Act an Island Court shall administer the customary law prevailing within the territorial jurisdiction of the court so far as the same is not in conflict with any written law and is not contrary to justice, morality and good order."

13. There is an appeal structure provided by sections 22 and 23 of the Island Court's Act:

*"**22. Appeals***

(1) Any person aggrieved by an order or decision of an island court may within 30 days from the date of such order or decision appeal from it to the Magistrates' Court.

(2) The court hearing an appeal against a decision of an island court shall appoint two or more assessors knowledgeable in custom to sit with the court.

(3) The court hearing the appeal shall consider the records (if any) relevant to the decision and receive such evidence (if any) and make such inquiries (if any) as it thinks fit.

(4) An appeal made to the Supreme Court under subsection (1) (a) shall be final and no appeal shall lie therefrom to the Court of Appeal.

(5) Notwithstanding the 30 day period specified in subsection (1) the Supreme Court or the Magistrates' Court, as the case may be, may on application by an appellant grant an extension of such period provided the application therefore is made within 60 days from the date of the order or decision appealed against.

23. Power of court on appeal

The court in the exercise of appellate jurisdiction in any cause or matter under section 22 of this Act may –

(a) make any such order or pass any such sentence as the island court could have made or passed in such cause or matter;

(b) order that any such cause or matter be reheard before the same court or before any other island court."

14. Section 22 (1) was amended in 2001 to direct all appeals from Island Courts to the Magistrates' Court. Previously, section 22 (1) directed appeals from

decisions of Island Courts relating to the ownership of land to the Supreme Court and appeals on all other matters to the Magistrates' Court. The 2001 amendment was a consequence of a completely new system being established to resolve customary land dispute cases. The Customary Land Tribunal Act [CAP 271] gave originating and appellate jurisdiction for all customary land cases to the land tribunals established under that Act.

15. The 2001 amendment of section 22 clearly overlooked the need to repeal section 22 (4) which is now of no effect. Certainly, section 22 (4) cannot be read as conferring any right of appeal to the Supreme Court from an Island Court decision and counsel did not attempt to suggest that it did.

16. The Respondent's argument is that the legislature has carefully defined an appellate structure for decisions from Island Courts. It has conventionally provided for a party, dissatisfied with an Island Court decision, a right of general appeal to the Magistrates' Court. Furthermore, it provides that the Magistrates Court sitting on appeal from a decision of an Island Court is required to include two or more assessors knowledgeable in custom.

17. This case comes before this court, however, by way of appeal from the Magistrates' Court and thus a consideration of s. 30 of the Judicial Services and Courts Act is required:

> ***30. Appeals from Magistrates' Court***
> *(1) Subject to the provisions of any other Act, the Supreme Court has jurisdiction to hear and determine appeals from judgements of the Magistrates' Court on all or any of the following:*
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> *(a) a question of law;*
>
> *(b) a question of fact;*
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> *(c) a question of mixed law and fact.*
>
> *(2) The Supreme Court in hearing an appeal:*
>
> *(a) is to proceed on the face of the record of the Magistrates' Court; and*
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> *(b) may exercise such powers as may be prescribed by or under this Act or any other law; and*
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> *(c) has the powers and jurisdiction of the Magistrates' Court; and*
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> *(d) may review the procedures and the findings (whether of fact or law) of the Magistrates' Court; and*
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> *(e) may substitute its own judgement for the judgement of the Magistrates' Court; and*
>
> *(f) may receive evidence.*
>
> *(3) (Repealed)*

(4) The Supreme Court is the final court of appeal for the determination of questions of fact. However, an appeal lies to the Court of Appeal from the Supreme Court on a question of law if the Court of Appeal grants leave.

18. It is important to appreciate that the Supreme Court is given specific and clearly defined jurisdiction to hear and determine appeals from decisions of the Magistrates' Court only on questions of law, questions of fact, or questions of mixed law and fact. Section 30 (4) provides that the Supreme Court is the final court of appeal for the determination of questions of fact however an appeal lies to the Court of Appeal on questions of law with leave. This completes an entirely conventional appeal structure applying to decisions of Island Courts.

19. The issue is then whether *custom* can be considered: (1) a question of law; (2) a question fact; or (3) a question of mixed law and fact – such that it comes within the enabling confines of s. 30 (1). I do not consider that *custom*, in this context, fits into any of those categories and, furthermore, this was the deliberate intention of the legislature. Nor do I consider that the carefully defined appellate structure set up s.22 of the Island Courts' Act, as extended by the Judicial Services and Court's Act, ever contemplated that *custom* would be subject to two levels of appeal. The principle reason for that conclusion lies in the plain wording and the intent of the legislation.

20. While Magistrates and Judges are of course to be considered learned in the law and to have expertise in assessing factual issues, custom is something quite different and it is treated quite differently. That is recognised by Island Courts being constituted by three justices knowledgeable in custom and the first appeal court being required to include at least two assessors knowledgeable in custom- s. 22 (2) Island Court's Act [Cap. 167]. That recognises that matters of custom are outside the expected and required expertise and the knowledge of a Magistrate sitting alone or a Judge of this Court.

21. This is not to say, however, that a decision of the Magistrates' Court sitting on appeal from a decision of the Island Court cannot be appealed to the Supreme Court. Indeed, s. 30 of the Judicial Services and Courts Act specifically provides for such a right of appeal but only on questions of law or a mixture of both. An obvious example that identifies the difference is, as in this case, the issue of who is eligible to assume a particular chiefly title. A finding that a particular chiefly title is to be passed on to the eldest son of the chief is a question of custom. Who that eldest son might be is be a question of fact.

22. It needs to be recognised that by the time matters of custom have been addressed by the Magistrates' Court on appeal from an Island Court, at least five people, widely recognised as being knowledgeable in custom, have sat in judgment on the custom issues.

23. Arguably, s. 65 (3) of the Judicial Services and Courts' Act may permit this Court to appoint assessors to sit with it when required. It is unnecessary for me to determine this point in this case as it would clearly not be in accordance with the appeal structure established by Parliament for cases such as this. If this court was to consider appeals in such cases on questions of custom, and appoint assessors to sit with the judge, that would simply mean that the two more people knowledgeable in custom would have the opportunity to give their opinion. Who is to say that they would be more knowledgeable on matters of custom than the Island Court Justices or the assessors with the Magistrate?

24. Mr Kilu referred to an earlier decision of this Court *Tenene v Namak (supra)* which related to the paramount chiefly title for Erakor village. However, that case was not a determination in a strict sense of what was or was not custom. The distinction was recognised by Coventry J when he noted the earlier attention that he had given to the case.

> *a. "... The Island Court is the proper Court of first instance in the formal system for matters of custom. By consent ... six questions were put before the Island Court. ...*
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> *b. On 7 August, 2002 the Island Court gave its answers to the six questions. There was an unsuccessful appeal to the Magistrate's Court (see the Judgment of 7 January 2003). The matter came again before the Supreme Court (CC 203/02), this appeal on appeal from the Magistrate's Court. On 26 May a ruling was given ... No assessors sat. The Court did not make findings of custom. It looked to see that in the Island Court proper procedures were followed and the conclusions reached were properly based on the evidence and were not unreasonable. This Court found no grounds to disturb the Island Court's postfious findings upon the six questions.*
>
> *c. However, the Island Court went a stage further then answering the questions and found that Kalmetabil Namak was the correct chief of Erakor."*

25. The case then came back before Coventry J because of a resistance to follow the decisions made in the Island Court as to how the chiefly title award should be determined as a matter of custom. Matters had become even more complicated as a result of an attempt by the National Council of Chiefs to assist with resolution. Coventry J considered that he could resolve matters with orders that he stated he felt able to make under section 23 (1) (a) of the Island Court Act. I am reluctantly unable to accept that Coventry J had jurisdiction to do so under that section.

> ***23. Power of court on appeal***
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> *The court in the exercise of appellate jurisdiction in any cause or matter under section 22 of this Act may –*

(a) make any such order or pass any such sentence as the island court could have made or passed in such cause or matter;

(b) order that any such cause or matter be reheard before the same court or before any other island court.

26. The Supreme Court was not the court exercising the appellate jurisdiction under the Island Courts Act. That was clearly the Magistrates' Court. Be that as it may, it had become by that time an exceptional case and one which required intervention by this court to resolve the differences. This is permitted particularly by the interplay of Articles 47 (1) and 49 (1) of the Constitution and section 65 of the Judicial Services and Courts' Act

47. The Judiciary

(1) The administration of justice is vested in the judiciary, who are subject only to the Constitution and the law. The function of the judiciary is to resolve proceedings according to law. ***If there is no rule of law applicable to a matter before it, a court shall determine the matter according to substantial justice and whenever possible in conformity with custom.*** *(emphasis mine)*

(2) – (6) ...

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49. The Supreme Court, the Chief Justice and other judges

(1) The Supreme Court has unlimited jurisdiction to hear and determine any civil or criminal proceedings, and such other jurisdiction and powers as may be conferred on it by the Constitution or by law.

(2) – (4) ...

65. Inherent powers of Supreme Court and Court of Appeal, and custom

(1) The Supreme Court and the Court of Appeal have such inherent powers as are necessary to carry out their functions. The powers are subject to:

(a) the Constitution; and

(b) any other written law; and

(a) the limitations of each Court's jurisdiction.

(2) For the purpose of facilitating the application of custom, a provision of any Act or law may provide that it may be construed by the Court of Appeal, the Supreme Court or the Magistrates' Court with such alterations and adaptations as may be necessary.

(3) The Supreme Court and the Court of Appeal have the inherent and incidental powers as may be reasonably required in order to apply custom.

(4) ....

27. The orders made by Coventry J were in line with the report received from the President of the National Council of Chiefs on the custom issues and it apparently brought the dispute to an end. Coventry J did not himself attempt to determine what the custom was. He simply gave appropriate recognition to the report of the National Council of Chiefs. It was an exceptional response to an exceptional situation.

28. ***Tenene v Namak*** does not assist the Appellant in its opposition to the application to strike out the appeal. It cannot be taken as authority for Mr Kilu's argument that this court has jurisdiction to entertain this appeal bearing in mind that this appeal is brought entirely on questions of custom. If, indeed, ***Tenene v Namak*** was to that effect, I would not follow it.

29. It is fundamental to the interests of justice that justiciable issues are able to be considered as having been finalised at some appreciable point and that is generally when all available legal appeal rights are exhausted. In relation to matters of custom determined by an Island Court, I find that this finality is reached by either the expiration of the applicable appeal period or by the determination of any appeal properly brought in the Magistrates' Court.

30. In this case, the Appellants have sought to maintain their challenge to the custom aspects of the judgment of the Efate Island Court notwithstanding that the judgment in that respect has been upheld on appeal by the Magistrate's Court correctly constituted by a Magistrate and two assessors knowledgeable in custom. The custom issues have now been ruled on by five people knowledgeable in custom (the three Island Court Justices and the two assessors in the Magistrate's Court) which clearly represents a wealth of knowledge and experience. There are no further rights of appeal from the Magistrates' Court on the custom issues. It is right that this matter is understood to have been concluded as to the custom issues by the Magistrate's Court decision.

Conclusion

31. Accordingly, I rule that this Court has no jurisdiction to entertain this appeal which challenges determinations as to custom and not questions of either fact or law or mixed fact and law.

32. This leaves the people of Mele village with a settled and final process for determining the next paramount chief of Mele. For convenience, I restate the orders of the Island Court with some slight alterations to assist with the progressing of the appointment process:

    a. The Island Court has determined that only the lesser chiefs represented by each nakamal that exist in Mele village today have the ultimate authority and power according to the principles of custom rules to appoint and ordain the paramount chief of Mele village;

b. The Mele Village Council is now directed to call a meeting by 30 June 2011 to settle procedures according to custom (explained in paragraph 32 (a) above) for the appointment and ordination of the paramount chief of Mele village;

c. The Mele Village Council is directed to make the necessary arrangements in order for the appointment and ordination of the paramount chief to take place before 31 October 2011.

33. Those orders are now to be followed without further hesitation. If necessary, I will entertain an application for further directions if there is obstruction to this appointment and ordination process.

34. I leave it for the Respondent to bring this decision to the attention of the Mele Village Council.

35. The appeal is accordingly struck out subject only to leave reserved for further directions as explained in paragraph 33. Costs are to be argued if they cannot be agreed.

BY THE COURT