

**IN THE SUPREME COURT OF  
THE REPUBLIC OF VANUATU**  
*(Civil Jurisdiction)*

Land Appeal Case No.08A of 2009

**BETWEEN:** FAMILY NAHAINE NISSINAMIN  
First Appellant

**AND:** FAMILY NIPIKNAM  
Second Appellant

**AND:** NAWAKAI KAPATANGATANG  
Third Appellant

**AND:** TRIBE RAKATNE  
Fourth Appellant

**AND:** TRIBE NAHIFA NISSINAMIN  
Fifth Appellant

**AND:** CHIEF TOM NUMAKE  
Sixth Appellant

**AND:** FAMILY NAHEU FAILET NAMEL  
First Respondent

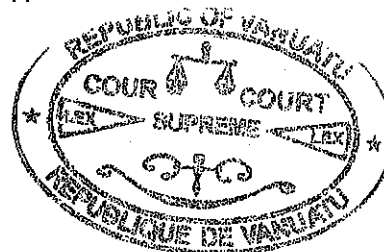
**AND:** NAKANE TRIBE and NISSINAM  
Second Respondent

**Coram:** Justice D. V. Fatiaki

**Counsel:** Mr. E. Nalyai for Family Nissinamin  
Mr. J. Ngwele for Family Nipiknam  
Mr. D. Yawha for Tribe Rakatne  
Mr. W. Kapalu for Tribe Nakane & Nissinam  
Mr. K. Loughman for Tribe Nahifa  
Mr. G. Nakou for Chief Tom Numake  
Mr. J. L. Napuati for Family Naheu Failet  
Mr. R. Warsal for the Second Respondent – no appearance

**Date of Judgment:** 6 September 2013

**JUDGMENT**



1. This is an appeal against a decision of the Tanna Island Court declaring the respondents the custom owners of "Lengkowgen" customary land situated at Whitegrass on Tanna.
2. The appeal is brought pursuant to Section 22 of the Island Courts Act and raises numerous grounds challenging the decision including, bias on the part of the justices of the Island Court and various failures on the part of the Court to comply with the requirements of the Act and Court Rules.

3. In particular, the appellants highlight the Court's non-compliance with the requirements of the **Island Courts (Civil Procedure) Rules 2005** which requires the Court and the claimants to walk and identify the boundaries of the land under dispute [see: Rule 6 (10)]. Although the Island Court judgment expressly records that it had walked the boundaries of the land the judgment fails to clearly describe the Court's finding(s) in that regard [see: Form Civil 4 (option (6))].
4. This critical omission is further aggravated by the complete absence of a sketch map annexed to the judgment, from which the parties and this Court might be able to derive the relevant boundaries of "Lengkowgen" which was accepted and identified by the Island Court in its judgment. This absence of a map is even more significant as all seven (7) claimants before the Island Court were required under the Rules to include a "sketch map of the land" in their claims [see: Rule 1 (3)].
5. Furthermore, during the course of the management of the appeal, **Chief Tom Numake** was belatedly joined as a fresh appellant on the basis that he had been previously declared the custom owner of the land being disputed in the present appeal.
6. The particular pre-independence judgment was delivered on 26 February 1973 by the **Native Court in Civil Case No. 1 of 1973** between **Tom Numake v. Nisak**. The comprehensive judgment which had a hand-drawn map attached to it declares *inter alia* that **Tom Numake** is the rightful owner of customary land entitled: "**NIOUGAN**" situated at Whitegrass, Tanna. Although spelt differently, the parties in the present appeal accept that the pronunciation and the hand-drawn boundaries coincides with the land boundaries in the present appeal.
7. Such a Native Court judgment constitutes "*res judicata*" [see: **Kalotiti v. Kaltabang** (2007) VUCA 25] and, unless it can be avoided or limited in its application, is binding on the Island Court and constitutes a complete bar to the present proceedings which seeks to answer the question: "*Who of the competing claimants is the true custom owner of the customary land known as "Lengkowgen" situated at Whitegrass, Tanna?"*".
8. I do not overlook the observations of the Court of Appeal when it said in **Kalotiti's** case:

*"In our opinion it does not follow that a failure to mark out the boundaries in 1972 renders the 1972 NHNC judgment meaningless or of no continuing relevance. The judgment awarded individual rights to Kalran, and difficult though it may now be, the boundaries of that land will have to be determined on the basis of the best evidence available as to where the boundaries exist. In our opinion that is a matter within the jurisdiction of the Supreme Court. It is a question which concerns the scope and effect of the Native Court judgment. The Native Court has given a judgment on custom ownership. The Supreme Court would not be revisiting that issue, but would simply be making consequential orders to give a proper effect to the judgment."*




9. Notwithstanding the above, at an appeal conference on Friday 23<sup>rd</sup> August 2013 attended by a representative of the First Respondent family who were successful before the Island Court, counsel for the First Respondent after discussing and taking instructions from his client's representative, accepted and conceded that the criticisms that were advanced by the appellants in relation to the Island Court's omissions in dealing with the boundaries of "Lengkowgen" customary land were correct.
10. In light of counsel's concession which in the Court's view was rightly and properly made, the Island Court judgment cannot be sustained and accordingly is quashed and the matter is returned to be reheard before a differently constituted Island Court.
11. At counsels request and to assist the Island Court to avoid the pitfalls identified in this appeal, I give the following directions:
- (a) Before hearing the oral evidence in the case the Island Court must comply with the requirements of Rule 6 (10) of the Island Court (Civil Procedure) Rules 2005, and ideally, have the area surveyed at the cost of the parties or at least, adopt a single hand-drawn map accepted by all the parties showing an agreed boundary, boundary marks and custom features [ see in this regard: the Native Court judgment (op cit.) paragraph (1)]
  - (b) The rehearing is to be confined to the existing parties including Chief Tom Numake if he wishes to participate;
  - (c) Fresh filing fees are hereby waived save for any additional sworn statements that are filed by the parties at the rehearing;
  - (d) As agreed there will be no order as to the costs of this appeal; and
  - (e) In order to prevent and avoid further litigation and disputes and to maintain the "status quo" pending the rehearing and determination of this claim and with the consent of the parties I order:

***"Until further order of the court all parties, their servants and agents are hereby restrained from conducting any new developments including the erection of fences, within the perimeter of "Lengkowgen" land at Whitegrass, Tanna."***

**DATED at Port Vila, this 6<sup>th</sup> day of September, 2013.**

**BY THE COURT**

  
**D. V. FATIAKI**  
Judge.

