

**IN THE SUPREME COURT OF
THE REPUBLIC OF VANUATU**
(Land Appellate Jurisdiction)

Land Appeal Case No.07 of 1996

IN THE MATTER OF: An appeal from a decision of the Santo/Malo
Island Court in Land Case No. 03 of 1992

AND

IN THE MATTER OF: Customary Land known as ASULEKA/MALO
PASS on Malo Island, Santo.

BETWEEN: FAMILY RASU
First Appellant

AND: PETER TALIVO
Second Appellant

AND: GEORGE LIPLIP
First Respondent

AND: SAWA MATARAVE
Second Respondent

Coram: *Justice D. V. Fatiaki*

Assessors: *Chief Molivara Jingo of Avunatavoa, West Malo.
Chief Moli Vurobaravu of Avui, West Malo.*

Counsels: *Mr. S. Stephens for Family Rasu
Mr. J. Kilu for Peter Talivo
Mr. D. Yawha and Mr. W. Kapalu for George Liplip
Mr. E. Nalyal for Sawa Matarave*

Date of Judgment: *gth*
.....December 2016.

JUDGMENT

Background

1. On 28 March 1996 the Santo/Malo Island Court sitting in Luganville, Santo delivered its judgment in Land Case No. 3 of 1992 involving a dispute over customary land on Malo Island known as "Asuleka/Malo Pass" in which there were 5 claimants:

- Tom Rasu representing the Rasu Family;
- George Liplif representing the Tarivaginogino Family;
- Sawa Matarave representing the Matarave Family;



- Peter Talivo representing himself; and
 - Titus Malehi also representing himself.
2. The claim was first lodged by Tom Rasu in 1992 and the Island Court that heard and determined the case was presided over by the late Senior Magistrate Rita Naviti sitting with three native justices Chief Petro Rite, Chief Ianavari, and Chief Atevari. The court heard evidence from each of the claimants and their witnesses and visited and walked the boundaries of the disputed land at Malo Island.

Findings & determination of the Santo/Malo Island Court

3. The Island Court decision is comprised of 17 pages separated into 2 distinct parts. Pages 1 – 11 sets out the nature of each claim and the evidence in support (including maps and witnesses) of the 5 claimants. This part of the decision concludes with the Island Court identifying custom words that it used in its decision namely:

"1. BOSBOSIA – Kastom blong ownem graon blong wan man we hemi no family wetem, but from we hemi berem hem lo kastom hemi gat raet blong klemem graon blong ded man.

2. REDREDIA – Kastom we wan sista hemi must givem sam samting or pem some value igo long olgeta brata blong hem blong introdusim olgeta pikinini blong hem long uncle blong olgeta.

3. BABATAVERA – Wan bigfala kastom boundary we hemi separate olgeta man long West mo long East (Malo)".

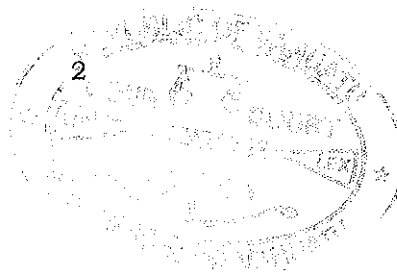
Then beginning at p. 12 to 17 is the second part of the Island Court's decision entitled: JUDGMENT.

4. The Judgment of the Island Court begins with a description of the "BOUNDRI" of the claimed lands and how the Island Court proposed to determine the boundaries viz:

"Se bambae kot imust putum boundris blong hem followem evidence we ikamaot long kot mo long visit long land. Olgeta kastom advisas oli tale too se long kastom marks blong graon oli run followem sun (sun hemi kerap long East go long West so wan point mark blong boundri bambae hemi run igo long east)".

5. Next the judgment sets out the Island Court's determination of the location of BABATAVERA. After considering the conflicting evidence from the claimants, the Court determined the location on the basis of evidence as follows:

"Kot hemi putum boundari blong Babatavera stret long head blong water igo Nagai tri mo stret line go kasem creek".



Finally under this sub-heading the Island Court identified the following customary lands which fell on either side of "Babatavera", namely:

East

A SUENSULAIGRE (smol aeland)

B SULAIGRE, ASULEKA OR MALO PASS (kasem top blong hill)

C ONERMEOU (start long bottom blong hill behind Asuleka)

D BELAVOCO OR NALEPA (narasaed blong white road kasem creek).

West

A NADIUTU (narasaed riva followem sanbis go kasem nanatu tri long solwota go kasem bottom blong hill)

B AINIMOLI (start long bottom blong hill behind Nadiutu)

C NAVIELAGATOU mo NAVUSI (start behind long Ainimoli go kasem creek)".

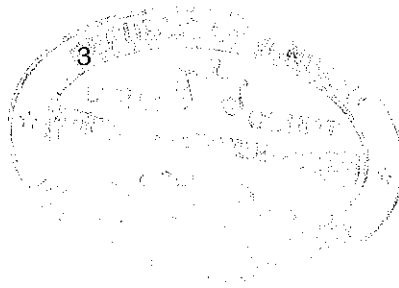
6. In the absence of the original Santo/Malo Island Court file, we have not had access to the original notice of dispute in this claim, but, it is clear from the above lists that the Island Court considered and determined custom ownership of much more than "Asuleka – Malo Pass" which was only one of the seven customary lands identified by the Island Court in its judgment. This should not have been allowed to occur and led in no small measure to the complexity of the case and the generalization in the Island Court's judgment.
7. In our view the Island Court should have strictly confined itself to a consideration of "Asuleka – Malo Pass" and claimants to other lands should have been required to file separate claims and separate maps showing the boundary of each customary land.
8. The Island Court judgment then identifies three (3) main ancestors mentioned in the claims namely: "MOLIVAKALIMA"; "VEVANUATURU" and "ARUMERA" and the Court broadly determined:

"... se graon long East hemi go long right blong Molivakalima mo olgeta graon long West down long solwota igo long Arumera from hemi salem mo andap long bush oli go long Matarav family mo I wan west we Sawei hemi representem olgeta mo hemi klemen. Kot hemi look se klements Tom Rasu; George Liffif; Peter Talivo oli wan family nomo so bambae kot hemi must sherem graon ia".

This latter finding is a major complaint in the grounds of appeal of all named appellants and cross-appellants.

9. The final 3 pages of the judgment is devoted to specific findings and decisions in respect of each claimant which are conveniently translated and summarized in the judgment of Saksak J. as follows:

(A) In respect to Tom Rasu Family (First Appellant)



- (i) He was the son of Rasunaboe the son of Molimatacu who was the bloodline descendent of Molivakalima.
- (ii) Although the Island Court believed that history the Court did not recognize that right because Rasunaboe had not paid bride price for his wife, Tom Rasu's mother.
- (iii) Rasunaboe was Vevanuaturu's cousin but that he had sold his rights over Naleba (Belavoko) land.
- (iv) Family Rasu has not been living in the area over a long period of time.
- (v) **The Court therefore gave part of the land on the east towards the sea to the Rasu Family (Marked "G" on the map).**

(B) **In respect to George Liplip** (deceased – First Respondent) –

- (i) He did not produce enough evidence to show that Molivakalima had a sister called Vemoliafao.
- (ii) He had some blood connection with Tarivaginogino in addition to Bosbosia of Molivakalima.
- (iii) **He had rights to land belonging to Tarivaginogino in the East.**
- (iv) **As regards Nadiutu and Animoli owned by Arumera, the lands belonged to Tarivaginogino because of Bosbosia of Arumera.**

(C) **In respect to Sawa Matarave representing the Matarave Family** – (the Second Respondent)

- (i) He did not set out his history to show any connections with the other four (4) claimants (parties).
- (ii) His primary interest was about the actual position of Babatavera or boundary that separates the East from the West.
- (iii) **Their lands are located behind Nadiutu and Animoli as far as the creek.**

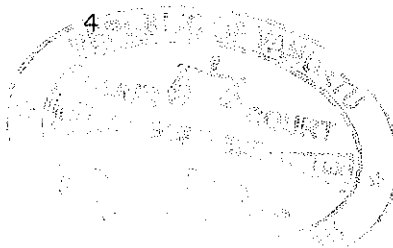
(D) **In respect to Peter Talivo** (the Second Appellant) –

- (i) He did not claim in a representative capacity.
- (ii) George Liplip, First Respondent was head over Vevanuaturu and her descendants.
- (iii) The customary rights of Vevanuaturu over ownership of land bought by Peter Talivo was over specific areas only.
- (iv) Customary rights was a heritage which passes automatically to another and could not be bought.
- (v) **He had rights over Belavocotavera lands only which George Liplip (deceased) marked out for him.**
- (vi) **And in regard to Nadiutu lands, the Court held Peter Talivo had no rights of ownership of this land.**

(E) **In respect to Titus Malehi** –

- (i) He invented a completely new story.
- (ii) He lacked sufficient evidence to show he had any rights of ownership.
- (iii) **His claims failed.**

So much then for the decision of the Island Court.



The earlier Supreme Court judgment

10. **Land Appeal Case No. 07 of 1996** was heard on 23 February 2009 by a Court constituted by Justice Oliver Saksak assisted by two (2) traditional assessors **Chief Saki Robert** and **Chief Salekoro Moli**.
11. On 17 December 2009 the Supreme Court delivered its 49 page judgment. The Court allowed the appeal of Peter Talivo and set aside part of the judgment of the Island Court leaving pages 1 to 11 undisturbed. In the appeal the Supreme Court considered the Island Court record and additional evidence in the form of sworn statements filed by each of the parties to the appeal.
12. The Supreme Court in setting aside the substance of the Island Court's decision considered that it had erred in several respects including its application of relevant customary land tenure principles of Malo. The Supreme Court did not return the case to the Island Court as it was entitled to, instead, after noting the 21 years of previous proceedings and determinations by different Councils of Chiefs in 1988, 1991 and 1992, the Supreme Court with a view to bringing finality to the dispute exercised its powers under Section 23 (a) of the Island Courts Act and made new declarations and orders as follows:

"(i) A declaration that Peter Talivo, Second Appellant is the recognized representative of the Vevanuaturu and David Molivaginogino Family;

(ii) A declaration that Peter Talivo, Second Appellant acquired customary land ownership rights over (a) Belavoco/Nalepa and (b) Belavocotavera lands in accordance with Article 75 of the Constitution and Article 15 of the Malo Traditional Land Rights, and as such Peter Talivo is the custom owner of those named lands;

(iii) A declaration that Vevanuaturu and David Molivaginogino Families and their descendants for all time to come, are the custom land owners of –

- (a) Suensulaigre (small island);*
- (b) Sulaigre/Asekula (Malo Pass Plantation);*
- (c) Auriamapi; and*
- (d) Ounermeau;*

And that Peter Talivo is the recognized representative acting for and on behalf of those declared custom owners (including himself), for the purposes of this appeal, and future proceedings, dealings, negotiations and/or transactions on or concerning those named lands.

(iv) A declaration that Vevanuaturu and David Molivaginogino Families and their descendants for all time to come, are the custom land owners of Nadiutu/Ainimoli lands that include –

- (a) Sanwari;*

- (b) Navialagato; and
- (c) Asmatawoke,

And further that Peter Talivo is the recognized representative acting for and on behalf of those declared custom owners (including himself), for the purpose of this appeal and future proceedings, dealings, negotiations and/or transactions on or concerning those named lands.

- (v) **The appeal of the First Appellant (Family Rasu) is dismissed.**
- (vi) **The cross-appeals of the First (George Liplip) and Second Respondents (Sawa Matarave) are dismissed with costs in favour of the Second Appellant only, which costs are to be agreed or taxed.**
- (vii) *All parties must respect the new boundary placed by this Court and must refrain from interfering with each other's rights to their use of the lands they are legally entitled to under this judgment.*
- (viii) *The First Appellants will pay their own costs;*
- (ix) *The decisions and rulings of this Court are final."*

[See: Land Appeal Case No. 7 of 1996 Family Rasu and Talivo v. Liplip and Matarave delivered on 17 December 2009 (unreported)].

13. It is clear from the above orders that Peter Talivo was the most successful appellant before the Supreme court even in respect of lands that were declared in favour of Vevanaturu and David Molivaginogino Family [**see:** Orders (iii) and (iv)] where Peter Talivo was declared their "recognized representative ..." in pursuing the appeal and for "... future proceedings, dealings, negotiations and/or transactions on or concerning those lands".
14. Furthermore given that George Liplip was the representative of the Taravajinojino Family before the Island Court and neither Vevanaturu or David Molivaginogino were parties before the Island Court or in the appeal, it is unclear why declarations of custom ownership were made in the Supreme Court in their favour while George Liplip's appeal was dismissed in the face of the Island Court's finding that "He had rights to land belonging to Taravajinojino in the East" [**see:** para. 9 (B) (iii) above].
15. Earlier in its judgment the Supreme Court re-defined the "Babatavera" line which notionally divides East and West Malo in the following passage:

"... a good starting point will be the old nasara at the corner of Title 1507. From that old nasara, the boundary goes down and end at the water by Nadiutu School. That is now declared to be the new boundary dividing Navusi lands from Belavoco, Ainimoli and Nadiutu lands. This is in line with the accepted belief that boundaries of land should be placed on stones or rivers or water heads.

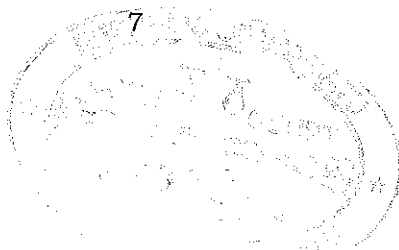
It is generally accepted it seems, that Wagbon and Waisale are the passages or landing grounds for the people of Navusi whose nasara is located near Naviaru.

The new boundary or babatavera does not include those passages. But the effect of placing the new boundary means that Nadiutu and Ainimoli lands belong to the Vevanuatoru Family and her descendants who are from the East. Landowners of Navusi, Belavoco and Ainimoli/Nadiutu may, with the assistance and presence of the Council of Chiefs of East and West Malo, consult with each other and agree to allocate a day on which they can meet and walk and cut the new boundary from the old Nasara down to the water by Nadiutu School. This exercise will be for the benefit of future generations of the landowners of Navusi on the West and Belavoco and Nadiutu on the East.

This boundary does not set the big boundary that separates the East from the West as that is not a matter for the Court to decide”.

16. Unfortunately despite its declared finality, the Supreme Court's judgment did not bring the dispute to an end and appeals were lodged in the Court of Appeal by Sam Matarave (**Civil Appeal Case No. 01 of 2010**); Family Rasu (**Civil Appeal Case No. 02 of 2010**) and by George Liplip in **Civil Appeal Case No. 03 of 2010**.
17. On 30 April 2010 the Court of Appeal in **Matarave v. Talivo** [2010] VUCA 3 declared the decision of the Supreme Court “void” on the basis that “... *apprehended bias on the part of the judge has been established*”.
18. The allegation of apprehended bias before the Court of Appeal was based on the sworn statements of three individuals, Sawa Matarave (Second Respondent); Toa Joseph; and Patrick Tavtavis Jarawari who alleged that:

“... Peter Talivo and Judge Saksak had a very close relationship; they came from the same island and from the same church, Apostolic Life Ministry, and they had worked closely to build church house at Naviau on Malo Island”.
19. They were also seen talking together and Peter Talivo co-ordinated the programs for the opening of the church at which Judge Saksak presided as President of the Apostolic Life Ministry. Judge Saksak had also spent 2 nights at Naviau during the celebrations for the opening of the church. At that time although the appeal case had already been heard, judgment had not yet been delivered.
20. The Court of Appeal summarized the contents of the sworn statement of Peter Talivo denying the closeness of his relationship with Judge Saksak and noted various concessions made by Peter Talivo including his chairmanship of the organizing committee for the Naviau church opening; the fact that Judge Saksak and his wife spent 2 nights at Naviau during the church opening; the fact that Sawa Matarave killed two buluks and provided a lot of food items to feed Judge Saksak and his delegation; and, at the end of the celebrations, Judge Saksak received a live pig and yams to take away.
21. The Court of Appeal's judgment then sets out the relevant objective test where a suspicion or apprehended bias is alleged in the following terms:



"The test requires the Court's assessment of the perception which the circumstances would give rise to in the mind of a fair minded lay observer informed of the facts. The test is to be applied at the time when the circumstances arose. The test is not to be applied after the judgment is delivered and with knowledge of the outcome of the case".

22. In applying the test to the disputed allegations the Court of Appeal concluded that:

"... whichever version of the fact is correct, there was a close relationship between some of the parties and the judge during the (church) opening celebrations"

23. The Court of Appeal noted that contact between the judge and the parties continued over 2 days and the judge and his wife resided at the home of one of the parties and the Court said: *"... Of even greater significance is the giving and receiving of a significant gift at the conclusion of the ceremony"*.
24. The Court of Appeal concluded that a finding of apprehended bias was *"inevitable"* when, added to the above factors, is the acknowledgment by Judge Saksak himself prior to the hearing of the appeal that he had declined an invitation to attend a crusade at Peter Talivo's house *"due to this matter"*. In other words, having previously acknowledged the sensitivity of attending a church function at the home of one of the parties, the judge's subsequent attendance and active participation at a 2 day church celebration whilst a decision on the appeal was pending *"... must inevitably give rise to a reasonable suspicion of bias in the mind of a fair minded observer"*.
25. In our view the Court of Appeal's conclusions and the fact that the particular allegations focused on the *"close relationship"* that existed between the judge and Peter Talivo, is the relevant context to view the non-binding declarations of the earlier Supreme Court which were set aside.
26. The Court of Appeal in any event refused leave to appeal on the basis that pursuant to the provisions of Section 22 (4) the Court of Appeal had *"no power to entertain an appeal on the merits from ... (the Supreme Court's) ... decision"*. The appeal was then *"returned to the Supreme Court to be heard afresh by another judge and assessors"*.
27. It is clear from a reading of the judgment of the Court of Appeal that despite the avoiding of the judgment of the Supreme Court there was no consideration of the merits of the appeal.
28. Accordingly and for convenience, this Court will be adopting uncontroversial formal parts of the earlier Supreme Court judgment in this judgment.

The Grounds of Appeal

Family Rasu

29. On 26 April 1996, the First Appellant Tom Rasu representing Family Rasunaboe lodged an appeal against the Island Court decision to the Supreme Court in Land Appeal Case No. 07 of 1996 on 3 grounds as follows:
- (1) In establishing a new boundary line dividing East and West Malo;
 - (2) In giving to George Liplip and his family a large piece of land that they were not entitled to claim; and
 - (3) In not confirming the claim of Family Rasu based on customary "bride price" but instead accepting the assertions of other claimants.
30. This was later amended and expanded on 18 July 2005 into nine (9) grounds as follows:
1. *The Island Court wrongly exercised its discretion to invoke its inherent power under Island Court Act cap. 122 to award the parcel of land known as "Nadiutu" to George Liplip when the same has never been claimed by Mr. Liplip in his original claim.*
 2. *The Island Court wrongly awarded land known as "Nadiutu" to George Liplip when there is no evidence in court to suggest George Liplip owns the particular land in custom.*
 3. *The Island Court wrongly held that the name Arami appearing on the deed of sale in respect to "Ainimoli" land is the same person as Arumera, thus was the vendor of Nadiutu and Ainimoli land respectively.*
 4. *The Island Court having held that Vuti Namoli has family relationship with Molivakalima and further that Molivakalima's name also appears on the deed of sale, wrongly held that the land Ainimoli should be awarded to Matarave family of West Malo.*
 5. *The Island Court having held that the boundary of Babatavera runs from the water to Nagai tree and thereafter runs across to the creek, wrongly declared that the land known and described as "Ainimoli" and "Nadiutu" comprised and coloured "orange" in the court map is to be awarded to George Liplip.*
 6. *The Island Court having held that Rasunaboe had some right in respect to parcel of land known as "Nalepa", it wrongly awarded the said parcel of land to George Liplip who is not a bloodline of Molimatacu and Molivakalima who are father and grandfather of Rasunaboe.*
 7. *The Island Court wrongly held that Tom Rasu, George Liplip and Peter Talivo are one family, therefore will receive equal shares of the land when evidence indicates otherwise.*



8. *The Island Court wrongly and without jurisdiction subdivided a customary land particularly the subdivision and allocation of land to George Liplip and Peter Talivo.*
9. *The Island Court wrongly and without jurisdiction placed the common boundary of East and West known as "Babatavera" as a line separating the two (2) boundaries running from a water to the Nangai tree and across to the creek."*

Counsel later orally advised the Court that grounds (1) to (8) refers to the George Liplip and ground (9) refers to Sawa Matarave including a tenth ground of appeal introduced in a late amendment on 28 June 2011 as follows:

10. *"the Island Court wrongly and without jurisdiction award the land known as Navusi to Sawa Matarave when indeed Sawa Matarave did not claim within the land of Malopass/Asuleka or land known as Naveilagatou and Navusi in the Island Court".*

Peter Talivo

31. **Peter Talivo** the Second Appellant asserted that the Island Court had erred on the following grounds –
 - (i) *in not giving sufficient weight to his evidence and wrongly applied custom law in regard to land purchased by him in 1979.*
 - (ii) *in failing to take into account that Arumera was the last man from Animoli who was buried by Tarivaginogino who inherited the lands Animoli and Nadiutu. The proper person to inherit those lands was David Molivagino who in turn gave his rights to Peter Talivo.*
 - (iii) *in holding that George Liplip is the first blood of Tarivaginogino when the true son of Tarivaginogino is David Molivagino.*
 - (iv) *in holding that Tarivaginogino had in custom paid for George Liplip's mother, Vemol Vaginogino, when he was only caring for the widow and her children.*
 - (v) *in concluding that Nalepa or Belavoco lands belong to the patrilineal side when evidence showed the lands are claimed under the matrilineal side of Vevanuaturu.*
 - (vi) *in accepting the history and family tree of the Family Rasu and Family Liplip.*
 - (vii) *in holding that Arami appearing on the Deed of Sale was the same person as Arumera.*
 - (viii) *in holding that descendants or children following the female or matrilineal pattern of inheritance is a very heavy custom law of Malo which could override the general patrilineal law that children of male bloodline should take priority over children of the female side.*



(ix) in declaring that Tom Rasu, George Liplip and Peter Talivo were all one family and divided the lands among them.

and Peter Talivo seeks –

“That the judgment awarding Animoli, Nadiutu, Asekula, Belavokotavera, Belavoko or Naleba to George Liplip and Family Rasu be quashed and the orders be substituted in favour of the Second Appellant for and on behalf of Vevanuaturu”;

32. The two other parties to the appeal as respondents and cross-appellants are: George Liplip and Sawa Matarave.

The Cross-Appeals

Again taken from the earlier Supreme Court judgment for convenience.

33. By **George Liplip**

“The First Respondent cross-appealed against the decision of the Island Court dated March 1996 which declared –

- (i) That part of East along the coast belonged to the Rasu Family; (**see**: determination A (v) at para. 9 above)
- (ii) That Peter Talivo’s rights extended only to those areas which he paid for and which were marked out to him by George Liplip; (**see**: determination D (v) at para. 9 above)
- (iii) That Matarave Family and people from the west were entitled to that part found in purple colour on the map.

The grounds of appeal were:

- (i) That the Island Court had erred in holding that the Rasu Family owned the eastern part of the land contrary to their finding at page 15 of the judgment;
- (ii) That the Island Court erred in holding that Peter Talivo had rights to lands shown him by George Liplip;
- (iii) That the Island Court erred in its placement of the boundary dividing East and West Malo known as Babatavera.

And George Liplip sought the following orders:

- Part of Asekula land declared in favour of Rasu Family be declared to George Liplip;
- The land marked out by George Liplip in favour of Peter Talivo be declared as lands held on licence only by Peter Talivo but solely owned by George Liplip;



- *Babatavera be extended to the western boundary of Animoli;*
- *George Liplip be declared custom-owner of lands above Animoli once Babatavera is extended;*
- *Sawa Matarave and any other persons own the land east of Babatavera;"*

34. By **Sawa Matarave**

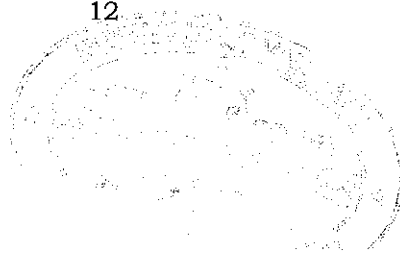
The Second Respondent cross-appealed against those parts of the Island Court's decision which –

- (i) *Recognised and allocated part of East Malo land by the sea to the Rasu Family (page 15); (see: determination A(v) at para. 9 above)*
- (ii) *Allocated Nadiutu and Animoli to Tarivaginogino following Bosbosia of Arumera performed with Arumera's sister (page 16); (see: determination B (v) para. 9 above)*
- (iii) *Did not recognize Peter Talivo's claim to Nadiutu but held that Tarivaginogino's life blood was George Liplip and allocated Nadiutu to him (page 17). (see: determination D (vi) at para. 9 above)*

on the following grounds that the Island Court erred –

- (i) *In holding and awarding part of the East Malo land by the sea including Suensulaigre (small island) to the Rasu Family when the evidence produced by them did not support such finding;*
- (ii) *In awarding Suensulaigre solely to the Rasu Family when the Island is the "main sacred place" of Malo and the Second Respondent have a historical link to it, have used the Island and continue to use it to this day;*
- (iii) *By misdirecting itself as to the applicable Malo customary law and awarding the Island solely to the Rasu Family;*
- (iv) *In awarding Nadiutu and Animoli to George Liplip when the evidence produced did not support such a finding;*
- (v) *In locating Animoli in the wrong place when the right location is on the east side of Babatavera beyond the dirt vehicle road and not on the west side as it is;*
- (vi) *In failing to take account of the Second Respondent's evidence as to their entitlement to Nadiutu."*

35. Before setting out the parties submissions on appeal it needs to be noted that all parties to this appeal were partly successful in their respective claims before the Island Court and although only two (2) parties are initiating appellants, all respondents are also cross-appellants not only against the initiating appellants but also against other respondents. This



plethora of appeals and submissions presents unique difficulties both in managing and organizing the Courts decision in the appeal.

36. This Court proposes for convenience, firstly, to try to isolate for consideration and decision, grounds of appeal that are common to the appeals and cross-appeals (if any) and thereafter, if necessary, deal with grounds that are unique to each appellant or cross-appellant. In this regard the following grounds or subject-matters are common to most if not all appeals and cross-appeals:
- (1) The location of "*Babatavera*";
 - (2) The awarding of "*Nadiutu*" and "*Ainimoli*" to George Liplip (First Respondent);
 - (3) The awarding of "*Navus*" to Sawa Matarave (Second Respondent);
 - (4) The awarding of part of the coastal land on the eastern side and "*Suensulaigre island*" to the Rasunaboe Family;
 - (5) The awarding of specific lands at Belavocotavera to Peter Talivo (Second Respondent);
 - (6) Misapplication of customary land tenure principles.
37. In respect of grounds (1) to (5) the general submission is that the Santo/Malo Island Court determinations were beyond jurisdiction, and against the weight of the evidence. The jurisdictional submission is confined to the awarding of "*Nadiutu*" and "*Ainimoli*" lands to George Liplip when he had not claimed either lands [see: ground (2) above].

Rehearing of the Appeals

38. The appeal was re-assigned to myself and was heard afresh with the assistance of two traditional assessors, **Chief Molivara Jingo** and **Chief Moli Vurobaravu** over 2 days in June and September 2011 and concluded after 3 further days of hearing in Luganville, Santo in late February 2012. The Court also visited Malo Island with the parties to the appeal and viewed the land and several customary features pointed out by the parties at various locations.
39. During the initial stages of the rehearing this Court dismissed an application by Peter Talivo objecting to Chief Molivara Jingo sitting as an assessor. The Court also devoted a whole day to considering opposed applications by all parties to introduce additional sworn statements.
40. Section 22 (3) of the Island Court Act is clear in that the Supreme Court hearing an appeal from the decision of the Island Court may (not must) "*receive (additional) evidence (if any) as it thinks fit*". There is no unlimited right in the parties to an appeal brought under Section 22 of the Island Court Act to lead fresh evidence before the Supreme Court. Rules 16.33 and 16.34 of the Civil Procedure Rules ("*CPR*") deal specifically with appeals to the Supreme Court from a decision of the Island Court.

41. Although Rule 16.34 requires the appointment of 2 or more assessors to sit on the appeal, there is no guidance or requirements as to the admission of further evidence in the appeal other than a reference to orders that a judge may make under Part 6 of the CPR which deals with conferences and the orders that a judge may make in managing a proceeding to trial.
42. The discretion given to the Supreme Court to receive evidence at the hearing of an appeal under Section 22(3) is an unfettered one. However as the Court is exercising an appellate (not original) jurisdiction from the decision of an Island Court, there must be some limitation to the exercise of the Court's discretion to "... receive ... evidence".
43. In our view the additional evidence must be "*new*" in the sense that it relates to matters that occurred after the decision being appealed and if not, then it must be firmly established that the evidence was unavailable at the time of the hearing before the Island Court or could not have been ascertained or discovered by reasonable enquiry. Additionally, the evidence must be relevant to an issue before the Island Court and be credible in that, if it was given at the trial, it would have had a significant effect on the decision of the Island Court.
44. Even if the above requirements are satisfied this Court still retains a discretion to exercise having regard to any prejudice that might arise from receiving the additional evidence; the public interest in achieving finality in court proceedings and the power of this Court to return the proceedings to the Island Court for a hearing de novo.
45. Mindful that the parties had already been allowed in the earlier Supreme Court appeal to introduce additional evidence, applications were disallowed for several reasons including:
 - (1) Much of the evidence sought to be introduced was repetitious and not new and had already been rejected by the Island Court;
 - (2) Although **Pastor Johnson's** evidence was new, it was lacking in important details and contained inadmissible hearsay that was incapable of being tested as the utterer was deceased;
 - (3) Likewise the sworn statement of **Paul Hakwa** was rejected as repetitious and lacking in novelty; and
 - (4) Parts of the sworn statements of **Cyrus Joseph** and **Toa Joseph** (for Sawa Matarave) were rejected as repetitious and added nothing to the grounds of appeal.
46. All counsels were invited to file fresh submissions and all confirmed their reliance on the written submissions provided to the Supreme Court at the earlier hearing of the appeal. All counsels also orally addressed the Court at

the rehearing and were questioned by both assessors. Only Peter Talivo filed fresh submissions.

47. I also had extensive discussions with the two assessors both of whom were traditional chiefs of West Malo. I was impressed with their considerable knowledge of the traditional customary land tenure principles and practices of Malo Island and have summarized below some of their answers and clarifications to the several questions posed to them that arose out of the appeal hearing:

"Discussions with Assessors"

- (1) ***Molivakalima*** is not relevant to this land claim only as an assistant interpreter during the Deeds of Sale of parts of the Land-Asuleka/Malo Pass, Nadiutu;
- (2) ***Babatavera*** is a traditional language boundary and has no land claim or ownership implications; West Malo people were considered indigenous whereas East Malo people were new comers and mixed people;
- (3) Recognise traditional fishing grounds, shell collections but should be subject to the decision of the custom owners as to conservation periods as appropriate;
- (4) **"Belavoko"** is a burial ground in the native land entitled **"NALEPA"**;

"Naivalagato" is an activity of collecting helmet/land crabs and is within the native land entitled **"NADIUTU"**;

"Asmatawoke" is a creeping tree vine white and is part of "Malo Pass";

"Sulaigre" is a "tabu place" within Asuleka;

"Malo Pass" refers to the waterways through which boats and ships may pass on either side of Sensaigre island;

"Onermeou" (a place for digging sand) is an activity as is **"Auriampi"** which records a famous argument over a chestnut tree;

- (5) ***In Malo custom you can't have a female VUI-VANUA;***

Family Rasu – Given Malopass/Asuleka

P. Talivo's evidence falls short of undermining Rasu's claim that he is legitimate.

Q: Molimaimai island given to Rasu through his pig father Havika?

Q: Why does he live at Abaone which has nothing to do with Molimatacu?

Sawa Matarave

*Re: Location of Babatavera from stone through tree and across the island.
Island Court agreed and so do we for the following reasons;*

- (1) Shell fish collection;
- (2) Source of fresh water used by both the sides;
- (3) We observed the prominent landmark stone at the head of the water; batu (head);
- (4) Joel Uriuri's evidence p. 12 about Babatavera'
- (5) Small creek shown in sale;

George Liplip's claim

Should be given to Taravajinojino and then to David his pig son recognized – Nadiuti/Ainimoli;

(6) Applicable Land Tenure Principles

- (A) **Vui Vanua** – Wariwari (Asuleka or Sulaigre)
- (B) **Turu Boe** – real legitimate biological son.
– Kalave;
– Molitalotu & Molimatacu
- (C) **Natui Boe** – illegitimate son from pig wife.
- (D) **Batui Vanua** (Pig father) – Verevanuaturu until she marries.
- (E) **Boen Tumbu** – land right to mother's side but can only be claimed if everyone is dead and you must pay for it.

Peter with Verevanuaturu

Vuti can't claim this right because he is a pig son of Verevanuaturu nor can David Molivajinojino or George Liplip who are blood sons of Tarivaginojino and Tarimolemuele.

Law applicable to Rasunaboe

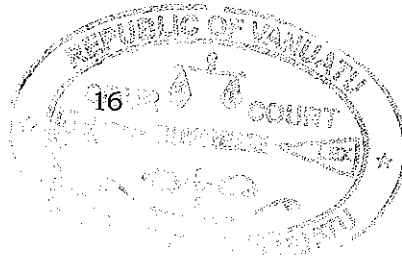
He is turu boe of Molimatacu NOT natui boe of "Havika".

- (F) **Val Bueli** – burial of Arumera

George Liplip through Tarivajinojino BUT David has a stronger right to Nadiutu and Ainimoli.

- (G) **Tano Vuolivuoli**

applies to Peter Talivo's residence at Belavoko which he purchased from his grandmother Verevanuaturu."



48. The Court was also greatly assisted in its understanding of the relevant customary land tenure principles applicable to Malo which are conveniently collected in a pamphlet entitled: **LAND RIGHTS ON MALO** by Vula Vutilolo.
49. From the above-mentioned pamphlet I have extracted from the English translation, the following customary land tenure principles that figured prominently in the assessor chief's responses:

(1) **Batui Vanua**

Literally "*Head of the House*": This is a name given both to a territory and the group of people living there, who consist of:

- * Men born as sons of men of the group;
- * Wives properly paid for with pigs or money;
- * Unmarried daughters of men of the group;
- * Outsiders (marasai) admitted under certain circumstances, as an escape from a tribal war or by invitation from a man who is a member of the group.

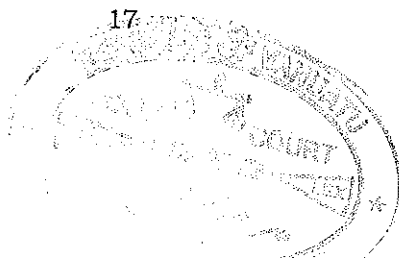
Within the area of each "*batui vanua*", there are smaller and bounded areas over which different members have inherited rights.

(2) **Buen Tama**

This is the land where one possesses "*primary rights*". These rights are possessed by the legitimate children born of the man of that *batui vanua*. ("*Buen Tama*" is sometimes used as a short form of "*Buelin Tama*", meaning the place of the deceased father. Sometimes it is used as "*Boen Tama*" meaning "*Pig of one's Father*".)

The rights are identified as follows:

- (3) **Vui Vanua**: Primary identity: "*Head or Trunk of a house*". The very first person who came to a place and settled there. The founder of the place, tribe, or territory ("*Batui Vanua*"). There could be more than one person.
- (4) **Turu Boe**: Literally "*Stand Pig*". This describes the men who are born as direct descendants of the "*vui vanua*". They have primary identity, provided that their mothers were properly paid for as wives by the men of the "*vui vanua*" or the men of the "*batui vanua*".
- (5) **Natui Boe**: Literally "*Son of the Pig*". This term may be described in three categories:
- (i) A legitimate son of a man of a *batui vanua* (who has properly paid for the son's mother), the son having been born in another man's *batui vanua*, because that other man stole the mother during pregnancy. In this case, the son, once returned to his legitimate father, is identified as "*Turu Boe*".



- (ii) An illegitimate son born of a man of a different batui vanua, a man who has not yet settled the bride price with the first man who originally and properly paid for the son's mother. When that son comes back to his father, his proper identity is "*Natui Boe*".
 - (iii) An illegitimate son born of another man of another place who is refused acceptance by the father who properly paid for the son's mother in the first place. The other man of that other place must pay compensation to the man who properly paid for the son's mother. So then the son was born of that other man can stay with him and be his.
- (6) **Vai Buelia**: "*Custom Death Ceremonial Activities*". At the deceased person's burial place:
- (i) Anyone attending to any sick person until their death, if he is given a plot of land by the sick person before his death, or anything else.
 - (ii) If the deceased person's relatives have all died out (a desolation).
 - (iii) If the deceased person's relatives did not pay the man who did all the death ceremonial activities.
 - (iv) Whether he is next of kin or not.
- (7) **Tano Vuolvuoli**: "*Land of the Purchase*". The following are the different categories:
- (i) There is land acquired by purchase whether by cash or pigs.
 - (ii) "*Boe Vavine*" (pig for the woman).
 - Land acquired for the brideprice;
 - As a compensation.
 - (iii) "*Tanoi Ambe*" (Land of the Kill), "*Boe Tamalohi*" (from Boe vavine) "*pig for the man*". Land given to the "*batui vanua*" of the killed as compensation for the kill.
 - (iv) "*Tano Sombuesombuea*" mean land acquired for the use of the woman (prostitution).

Consideration and Determination

50. For present purposes it is only necessary to deal with the second, third, and fourth common grounds of appeal enumerated at para. 36 above namely,



the awarding of "Nadiutu" and "Ainimoli" to George Liplip and the awarding of "Navusi" to Sawa Matarave and the declaration in favour of Family Rasunaboe.

51. In the Island Court judgment the Court noted that George Liplip had lodged a competing claim to "Asekula" which did not include "Nadiutu" which was a different land and boundary. He based his claim on blood ties through his father Tarivaginogino who descended from Vemolialao the sister of Molivakalima who had no children and who were the "stret las man mo woman Asekula".
52. George Liplip also indirectly claimed "Ainimoli" through "Bosbosia" of his father Tarivaginogino who had cared for and buried his brother-in-law Arumera who was the last man of "Ainimoli".
53. Although "Nadiutu" was not claimed by George Liplip, the Island Court as a matter of fairness ("... mekem hemi fair ...") and in purported exercise of inherent powers under Section 29 of the Island Court Act, accepted that George Liplip claimed "Nadiutu" too (viz "Inherent power blong Kot CAP. 122 Section 29").
54. The above reference is to the provisions of Section 29 of the Courts Act [CAP. 122] (since repealed) which states:

"INHERENT POWERS OF COURTS

29 (1) Subject to the Constitution, any written law and the limits of its jurisdiction a Court shall have such inherent powers as shall be necessary for it to carry out its functions.

(2) For the purpose of facilitating the application of any written law or custom any provision may be construed or used with such alterations and adaptations as may be necessary and every Court shall have inherent and incidental powers as may be reasonably required in order properly to apply such written law or custom."

55. On the face of the provision the Island Court has inherent powers necessary to carry out its functions. It is not an unfettered power however, in so far as it is expressly made "subject to the Constitution, any written law and the limits of its jurisdiction ...".
56. In this latter regard the former Chief Justice d'Imecourt relevantly observed in Tretham Constructions Ltd. v. Malas [1996] VUSC 1:

*"The 'function' of the Island Court in land matters is to determine the ownership of custom land as between the parties before it. Under the Island Courts Act as we have seen, the Island Court has certain limited powers to grant injunctions restraining the 'parties' from occupying or using the land. **Section 29 of the Courts Act extends to the presiding magistrate any other inherent powers of the Court, but he is still limited to the powers conferred on him by the written law, namely section 13 of the Island***



Courts Act. *It is clear that the presiding magistrate under that Act has no power other than to injunct the 'parties to the dispute'. The only parties to a dispute before the magistrate in a custom claim are the customs owners who challenge each other regarding the custom ownership of the land in question."*

And later speaking of Section 29 his Lordship noted:

"These powers are not unfettered powers. By the terms of the Act itself, they are limited in a number of ways:

- i) by any written law [to the contrary];*
- ii) the limit of its jurisdiction; and more importantly;*
- iii) by the necessity of its functions.*

*The 'function' of the Island Court in land matters is limited to **deciding the custom ownership of land**. It has no greater powers than that, and that which is conferred on it by the Island Courts Act itself. It has the very limited powers regarding the use and occupation of land conferred to it by the Act. If one looks at it more carefully, those powers are limited to **the parties before it**. That means the parties before it **in the custom land claim**."*

57. In this regard too the Island Courts (Powers of Magistrates) Order No. 1 of 1990 which is a "written law" that prescribes the powers, functions and duties of a magistrate in respect of matters before an Island Court concerning disputes as to ownership of land, nowhere recognizes an "inherent power" of a presiding magistrate to recognize or include a claim for customary land additional to that in the claim filed by a claimant before the Island Court as a matter of fairness.
58. We accept that in George Liplip's case the Santo/Malo Island Court acted beyond its powers and wrongly included in its judgment a claim for "Nadiutu" which was never claimed by him thereby unfairly depriving other claimants the opportunity to file contrary evidence and cross-examine George Liplip during the course of the trial.
59. The awarding of "Nadiutu" and "Ainimoli" to George Liplip was unfair and ultra vires and must therefore be quashed.
60. In similar vein Sawa Matarave who hails from West Malo, did not claim any particular land, rather, his sole concern and interest was the correct location of "Babatavera" with particular reference to "Navusi" land which allegedly belonged to his grandfather Sombe. It is surprising therefore that he was permitted to call evidence, question witnesses, and address the Island Court when he claimed none of the disputed lands.
61. In its 8 line judgment of Sawa Matarave's claim the Island Court said:

"Hemi no talk about tumas histori connection wetem olgeta 4 narafala klemants but interest blong hem istap nomo long position blong Babatevera we kot hemi mekem decision long hem finis. Graon blong olgeta hemi start behind long Nadiutu mo Aanimoli igo kasem creek. Kot ino look long each boundri long aria blong West. Sawa hemi assurem kot se hemi wetem olgeta blong West oli save stretem boundri blong olgeta nomo".

(our highlighting)


62. On the foregoing basis the Island Court gave Sawa Matarave and the (unidentified) people from West Malo the land coloured "PURPLE" on the map without making a representative order or expressly identifying either the land or the boundaries involved in its order but which on the map (coloured purple) included: "Nadiutu"; "Aanimoli"; "Navulagatou" and "Navusi".
63. In our view such a broad grant of undefined customary land is beyond the powers of the Island Court and is quite inconsistent with the Island Court's earlier declaration that "Nadiutu" and "Animoli" belonged to Tarivaginogino because he had performed "Bosbosia" to Arumera. Such an order cannot be allowed to stand and is quashed.
64. Concerning "Asuleka – Malo Pass" the Island Court accepted the family history of Tom Rasu representing Family Rasu traced through Molimatacu and Molivakalima who the Island Court accepted "... hemi last man Malo Pass mo hemi last man blong salem graon long Malo Pass" as evidenced by his name being closely associated with the sale of three (3) parcels of land in the Malo Pass area, either as a joint vendor or interpreter.
65. The Island Court accepted Molivakalima "... hemi no gat stret pikinini blong hem, but hemi gat blood line istap". Furthermore the Court recognized that "... Rasu oli nomo laef long area ia long taem finis" and "... oli no wandem recognisem right blong Tom Rasu from se oli no pem mama blong hem". This latter finding is a reference to a strong Malo custom "se pikinini blong pig" which the Island Court accepted takes precedence over "blood".
66. Inexplicably and despite the above findings, the Island Court without any attempt to record the boundary limits or identify the land by its traditional or customary name(s) gave: "... part blong East long solwota long Rasu Family (luk long map G.) long back page". In this latter regard the area given to Family Rasu is coloured "Green" on "Map G" and includes: "Sulaigre" and "Asuleka (Malo Pass)". It is unclear if it also includes the off-shore island "Sulensulaigre".
67. In addition, this Court is aware that in Land Appeal Case No. 1 of 2008 the Molimaimai Island Land Tribunal of Malo Island decided on 11 July 2008 that the custom owner of "Navimapeoploolo land in East Malo including Avasise, Abaone and three small off-shore islands emi blong Family Rasunaboe". The assessors are unanimous that this unchallenged

declaration of custom ownership is only explicable on the basis that "Family Rasu" acquired their rights through their "pig father" Havika reinforced by the fact that Family Rasu lives at "Abaone" which land has nothing to do with Molimatacu.


68. The Island Court plainly erred in awarding "Asuleka – Malo Pass" to Family Rasu and that decision is also quashed.
69. Having thus quashed the Island Court's decisions in favour of all three successful claimants this Court declines the invitation to exercise its powers under Section 23 of the Island Courts Act and make fresh declarations.
70. The parties are left to consider how best to advance their claims under the new Custom Land Management Act if they wish to pursue them.
71. As all parties have been partially succeeded in their appeals and cross-appeals we make no order for costs.

DATED at Luganville, Santo, this ^{9th}..... day of December, 2016.

BY THE COURT



Assessor 1
Jif Molivara Jingo



Judge
D. V. FATIAKI



Assessor 2
Jif Moli Vurobaravu