IN THE COURT OF APPEAL
OF THE REPUBLIC OF VANUATU
(Civil Appellate Jurisdiction)

Civil Appeal
Case No. 19/1225 CoA/CIVA

BETWEEN: TOM NUMAKE
Appellant

AND: SAM NAIU IOPIL
Respondent

Coram:	***Hon. Chief Justice Vincent Lunabek*** ***Hon. Justice John Mansfield*** ***Hon. Justice John Hansen*** ***Hon. Justice Oliver Saksak*** ***Hon. Justice Stephen Felix***
Counsel:	*Mrs. Mary Grace Nari for the Appellant* *Mr. Willie Kapalu for the Respondent*
Date of Hearing:	*16th July 2019*
Date of Judgment:	*19th July 2019*

JUDGMENT

Introduction

1. This is an application to the Court of Appeal to set aside a decision of the Supreme Court made on 9 May 2019 in a matter involving the custom ownership of the land known as "Niougan" or White Grass on Tanna.

2. It is important to recognise that the Native Court, Southern District of Tanna in 1973 decided after a full hearing that the applicant Tom Numake was the custom owner of the land. This judgment at [8] of the conclusions is quite clear:

> *"The Court of two Assessors and the President are one mind in ths matter, and the Court in the firm opinion that the Plaintiff, Tom Numake, is the lawful owner of the land known as "Niougan" situated at White Grass Tanna, and that the boundaries declared by the Plaintiff are the correct boundaries in custom law."*

3. The Court said at [9] that there are some remaining disputes about the status of certain small parcels of land within the "Niougan" area, which should be resolved by agreement.

4. There was a detailed hand drawn map attached to the judgemnt.

5. There was no appeal from that judgment.

The Current Proceedings

6. In 2014, over 40 years later, Chief Sam Naiu Iopil representing the Family Ialame Iapar brought a claim in the Tafea Island Court for an order that Tom Numake was not part of the true bloodline of Ialamel Iaper.

7. Counsel for Sam Naiu Iopil in the Court of Appeal accepted that the consequence of such a decision, if validly made, would mean that Tom Numake was not the custom owner of the land. It was in effect an application to change the 1973 decision of the Native Court, although it was first said by Counsel for Sam Naiu Iopil that that was not the case.

8. Unfortunately, and unwisely, Tom Numake chose not to take part in the Tafea Island Court hearing. He should have done so, at least for the purpose of arguing that that Court had no power to change the 1973 decision in his favour.

9. The Tafea Island Court on 25 September 2016 decided that Tom Numake was not a "true bloodline" descendant of Ialamel Iapar. That had the consequence referred to, namely to say Tom Numake was not the custom owner of the land.

10. Tom Numake appealed to the Magistrates Court under s.22 of the Island Courts Act [CAP 167] from that decision. He argued that the 1973 Native Court decision in his favour could not be reversed by the Tafea Island Court.

11. The Magistrates Court was properly constituted by a Magistrate and two assessors as required by s.22 of the Island Courts Act: see section 22 (2).

12. Its decision was given on 5 December 2018. Relevantly at [27] the Court said that the 1973 Native Court decision was *"to determine the custom land ownership"* of the land, but that the decision of the Tafea Island Court was different because it concerned *"the customary ownership of the name lalamel lapar, in which bloodline must be determined."*

13. Tom Numake appealed to the Supreme Court, also under s.22 of the Island Courts Act.

14. On 9 May 2019, the Supreme Court constituted by a single judge dismissed the appeal with costs. That meant that the Tafea Island Court decision stands, with its effect that Tom Numake is no longer the custom owner of the land.

15. The present application is made from that decision.

The Role of the Court of Appeal

16. There is no appeal from the Supreme Court to the Court of Appeal by reason of s 22 (4) of the Island Courts Act. The decision of the Supreme Court (properly constituted) on the merits of an appeal under that section is final.

17. However the Court of Appeal retains the jurisdiction to ensure that the Supreme Court and if necessary the Magistrates Court and the Island Court) do not exceed their respective jurisdictional limits: Matarave v. Talivo [2010] vuca 3, Hapsai v. Attorney General [2010] VUCA 30, and Family Absolom Vanaf v. Family John Ashwin Wetelwer [2016] VUCA 52.

The Composition of the Supreme Court

18. As noted, in this instance the Supreme Court was constituted by the Supreme Court without assessors.

19. Section 22 (2) of the Island Court Act provides that the Court hearing on appeal against a decision of an Island Court shall appoint one or more assessors knowledgeable in Custom to sit with the Court.

20. It has previously been held that section 22 (2) applies to the appeal to the appeals to the Magistrates Court and to the Supreme Court: See Kaites v. Kaising [2010] VUCA 19; Bule v. Tamtam VUCA 16; Hapsai (above at [27]; Matarare (above, at page 6).

21. That is because the appeal to the Supreme Court may also be an appeal on the merits of the case, involving an assessment of evidence: see Tula v. Welu [2010] VUCA 42 at [3]. It is not simply an appeal from the Magistrates Court on a question of law. Section 22 then requires that, when an appeal is heard by a Court which may look at the merits of the case, the Court should do so with the benefit of assessors.

22. As the Supreme Court in this instance was not properly constituted, its orders were made without jurisdiction and are set aside.

23. That does not prevent the Supreme Court, before its final hearing, from giving directions for the management of the appeal by a single judge: see Hapsai (above at [27]).

Should the appeal be remitted to the Supreme Court?

24. This is now accepted by Sam Naiu Iopil, by the "true bloodline" application in the Tafea Island Court, he was attempting to remove Tom Numake as the custom owner of the "Niougan" land.

25. The effect of the Tafea Island Court decision is that he achieved that objective. It is not proper to do indirectly what cannot be done directly.

26. So the Tafea Island Court could not, in the face of the 1973 Native Court decision, decide that Tom Numake was not the custom owner.

27. In the circumstances, the Supreme Court and in turn the Magistrates Court should have decided that the Tafea Island Court decisions should not properly have been made. It did not have jurisdiction or power to contradict the 1973 decision of the Native Court.

28. The proper order therefore is, in addition to setting aside the decisions of the Supreme Court and the Magistrates Court, to set aside the decision of the Tafea Island Court of 25 September 2016 and instead make an order that the application to that Court be dismissed.

Further Comments

29. It is important to make the point that an application based on "true bloodline" cannot be used to indirectly invalidate or contradict a lawful decision about custom ownership.

30. There may be cases where there is a dispute about whether a particular person or family is included in the group on whose behalf the custom owner holds certain land. That is a different sort of inquiry. This judgment does not prevent such an application.

31. These may be applications where the extent of the lands of a custom owner need to be sorted out. That, too, is quite proper.

32. We note that, on the application in this matter to the Court of Appeal, there is a reference to Land Appeal Case No. 17/400 in the Supreme Court: Family Nahieu Failet and Rakatne Tribe and Family Nahine Nissinma v. Tom Numake. The order of the Supreme Court on 18 October 2018 that that appeal be discontinued allows expressly for application in the future to precisely mark the boundary of the Lengkowgen Land (the same land as the 1973 Native Court decision relates to).

33. As noted above, the 1973 Native Court decision at [9] also recognized that there may be small portions of land within the "Noivgan" land that may require more consideration.

34. Finally, but most importantly, the Court of Appeal in Laus v. Noam [2017] VUCA 40 at [34] specifically approved of what the Chief Justice had said in Family Kaltapang Malastapu v. Family Kaltongo Marapongi, Family Songoriki, Family Lakeleo Taua, Family Masau Vakalo and Family Taravaki (Supreme Court Land Appeal Case No. 58 of 2004, 14 September 2009) about the importance of

secondary rights in custom land, and the means of enforcing them. See also Kalwatsin v. Willie [2009] VUCA 47 at [32].

35. In the course of his submissions, Counsel for Sam Naiu Iopil appeared at one point to suggest that the concern of his client (and those of his family) may fall within the concept of asserting secondary rights of that character. As that was not developed, we do not take that matter further in this judgment.

Orders

36. 1. The decisions and orders of the Supreme Court and of the Magistrates Court are set aside.

2. The decision of the Tafea Island Court of 25 September 2016 is set aside and instead of the orders then made, it is ordered that that application be dismissed.

3. As part of the cause of the ongoing issues is that Tom Numake chose not to appear before the Tafea Island Court, we do not think he should recover costs in the Magistrates' Court or the Supreme Court.

4. Sam Naiu Iopil is to pay to Tom Numake the costs of the application to the Court of Appeal, fixed at VT50,000.

DATED at Port Vila this 19th day of July, 2019.

BY THE COURT

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Vincent Lunabek
Chief Justice

REPUBLIC OF VANUATU COURT OF APPEAL COUR D'APPEL