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

Civil Appeal
Case No. 19/1860 CoA/CIVA

BETWEEN: **SILU MALASIKOTO, TORIKI MALASIKOTO and FREDDY MALASIKOTO**
Appellants

AND: **SILAS VATOKO, MORRIS KELLY VATOKO and NAKMAU SAMBO**
First Respondents

AND: **HUMPHREY TAMATA**
Second Respondent

Coram: ***Hon. Chief Justice Vincent Lunabek***
Hon. Justice John William von Doussa
Hon. Justice John Hansen
Hon. Justice Dudley Aru
Hon. Justice G Andrée Wiltens
Hon. Justice Viran Molisa Trief

Counsel: *Mr Philip Fiuka for the Appellants*
Mr Edward Nalyal for the First Respondents
Mr Tom Loughman for the Second Respondent

Date of Hearing: *8th November 2019*

Date of Judgment: *15th November 2019*

JUDGMENT

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1. This appeal is against a decision of the Supreme Court delivered on 12th July 2019 which quashed a "*green certificate*" dated 20th March 2018 issued by the Second Respondent, the National Co-ordinator of the Land Management (the Co-ordinator) under the Custom Land Management Act 2013 (CLMA) which certified that the appellants were the representatives of the Pangona Custom Land. The decision also directed that the appellants and respondents in conjunction with the office of the Co-ordinator arrange a meeting of all members and the families of the appellants and the respondents in accordance with Section 6H of the Land Reform Act [CAP. 123] (LRA).

2. The appellants seek to have the Supreme Court decision overturned and the green certificate dated 20th March 2018 re-instated. There is also a cross-appeal by the Co-ordinator seeking to set aside part of the decision of the Supreme Court.

3. A so-called green certificate is a certification issued by the Co-ordinator confirming the recording under the CLMA of a decision made by a customary institution as to the custom owners of an area of land. A recorded decision will be used by the Co-ordinator as a basis for: (a) the identification of custom owners for the purposes of a negotiator's certificate application under the LRA; or (b) the rectification of lessors in leases in existence prior to the commencement of the CLMA. See the definition of "recorded interest in land" in s.2 of the CLMA and the decision of this court in Kwirinavanua v Toumata Tetrau Family [2018] VUCA 15 at [22] – [24].

4. The standard form used by the Co-ordinator for a green certificate certifies not only the declared custom owners for the custom land in question but also the representatives of the custom owners. The identification of the representatives is necessary for the purpose of a negotiator's certificate, and for signing leases or other legal documents relating to dealings in the land: for example, see ss.6D(2) and 6G(1) of the LRA. Section 6H of the LRA requires that representatives of the custom owners are appointed by the custom owners. The procedure laid down in that section for any variation of the names of the representatives reflects the importance of the role of the representatives of the custom owners for the purposes of CLMA and the LRA.

5. The requirements of s.6H are critical to the issues between the appellants and the first respondents in this case. Section 6H reads:

Land Reform Act (Amended) [Cap 123]

6H. Variation of the names of representatives

(1) All representatives of the custom owner group are appointed by the custom owners and must not act without the consent of the custom owners.

(2) Custom owners may at any time meet and pass a resolution by consensus to vary their representatives. All members of the custom owner group or all members listed as descendants if original members have died must be present at a meeting to vary the representatives of the custom owners.

(3) The custom owner group must inform a custom land officer of the date and time of a meeting of the custom owner group to vary the names of their representatives.

(4) The custom land officer must attend the meeting referred to in subsection (3) and record in writing, the resolution to vary the representatives of the custom owners. The resolution must be signed by all the custom owners and by the custom land officer as a witness to the signature of the custom owners.

(5) Any variation made to the names of the representatives of the custom owner group must be filed with the office of the National Coordinator.

6. The custom ownership of the Pangona Land was determined by the decision of the Efate Island Court in Land Case No. 1 of 1997 delivered on 22nd July 2004. The declarations are found on page 6 of the judgment. Before making the declarations the Island Court made findings after visiting the land and its boundaries. The Court said:

"..... Kot I faenemaot se family Malasikoto hem nao hemi tru kastomary land owner blong land ia Pangona. Kot I faenem tu se Family Lakelotaua Kalo Kanue Nakmau mo Family Elmu Labana Kaltamate Thomas tufala I gat raet long sam boundaries insaed long land ia Pangona." (Emphasis added).

Declaration 2 states –

"Family Malasikoto hemi true Kustomary Landowner blong land in Pangona.

Declaration 3 states –

Family Lakelotaua Kalokanue Nakmau mo Family Elmu Kaltamate Thomas oli gat raet long land ia Pangona tu be tufala stap long under long authority blong Family Malasikoto. (Emphasis added).

The Court then made orders. Order 1 states –

"Olgeta we oli no partis long land ia Pangona be oli stap kat access or stap mekem ol development long land ia bae oli mas kat permission long Family Malasikoto together wetem family Lakelotaua Kalokanue Nakamau mo Family Elmu Kaltamate Thomas blong oli continue wok long ples ia. (Emphasis added).

Orders 2 and 3 state in similar terms that permission must be obtained from Malasikoto Family together with ("*together wetem*") Family Lakelotaua Nakmau and Family Elmu K. Thomas.

7. At the time when the EIC proceedings were underway, and at the date of judgment, it is common ground that the late Charlie Kaltava Malasikoto was the custom owner representative for the Pangona land. Charlie Kaltava died in January 2011. Thereafter there has been a dispute between the appellants and the first respondents as to which of their groups should be recognised as the representatives of the custom owners, and so named in the green certificate.

8. It is not necessary to canvas many events between the two competing groups that have happened since Charlie Kaltava's death. At different times one or other of the groups have been identified on a green certificate as the custom owners' representative.

9. The issue before the Judge in the Supreme Court was raised on an application by judicial review to challenge a green certificate issued by the Co-ordinator on 20th March 2018. That certificate named the appellants as the custom owners' representatives. By their application the respondents sought to have the certificate of 20th March 2018 quashed, with the aim of having a new certificate issued showing them as the custom owners' representatives.

10. The appellants contended before the Supreme Court that they were properly named as representatives as they had been so appointed by meetings held for the purpose of s.6H on 30th October 2016 and 2nd November 2016. These meetings had been held to determine new representatives following Charlie Kaltava's death.

11. The meeting held on 30th October 2016 was attended by the three appellants and their wives, seven other men with their wives, and three other people all of whom were present as part of the

immediate custom owner family. The first respondents and members of their families were not invited and were not present at the meeting. Further, there was no custom land officer present, and to remedy this defect, another meeting was held on 2nd November 2016 at which a custom land officer was present. At that meeting some of those who had been at the meeting on 30th October 2016 were not there. Again, representatives and members of the families of the first respondents were not invited participants.

12. Before the Supreme Court the appellants argued that under s.6H(1) the function of appointing new representatives was solely that of the custom owners, and that the meetings achieved the valid appointment of them as new representatives. That argument was rejected. The court noted that the first respondents through their membership of their family Lakelatua Nakmau and family Kaltamate Thomas had been parties to land claim No. 1 of 1997 but in the course of the proceedings cancelled their claim and became one with family Malasikoto in the claims. The Judge held that Family Lakelatua Nakmau and Family Kaltamate Thomas were within the definition of "*custom owners*" in the legislation. As such the respondents should have been included in meetings under s.6H of the LRA. As they were not the meetings held on 30th October 2016 and 2nd November 2016 could not validly appoint new representatives. For this reason the green certificate dated 18th March 2018 was quashed and the court directed that a new validly constituted meeting be held.

13. For reasons more fully discussed in *Kalsakau and others v the National Coordinator and others*, Civil Appeal Cases 2396 of 2019 and 1749 of 2019, judgment delivered by this Court today, we do not agree that Family Lakelatua Nakmau and Family Kaltamate Thomas are "*custom owners*" within the meaning of that definition in s.1 of the LRA as they were not the groups holding the ownership power of ultimate control over the use of the custom land. They were however holders of the more limited custom right of use, that is they are holders of so-called "secondary" rights, and as such come within the definition of "*membership of the custom owner group*" as defined in s.2 of the CLMA. That definition is not repeated in the interpretation section of the LRA, but the CLMA and the LRA are intended to work in conjunction with one another and use similar expressions. Both Acts contain the same definition of custom owner, and in s.6H(2) the same notion of membership of the custom owner group is used.

14. The two definitions are as follows:

> ***Custom owners*** *means any lineage , family, clan, tribe or other group who are regarded by the rules of custom, following the custom of the area in which the land is situated, as the perpetual owners of that land and, in those custom areas where an individual person is regarded by custom as able to own custom land, such individual person:*
>
> ***Membership of the custom owners group*** *means the members including all descendants of a custom owner group who are determined by customary processes and in accordance with the rules of custom to be members of that group and includes all people who hold ownership or use rights over land in accordance with the rules of custom.*

15. It is clear from these definitions that membership of the custom owner group includes people who are not custom owners but who hold lesser or secondary interests in custom land.

16. In s.6H of the LRA a clear distinction is made between the role of custom owners in subsection 1 and the membership of the custom owner group in subsection 2.

17. In our opinion the Supreme Court was correct to hold that the meetings held in 2016 did not comply with the process laid down in s.6H(2), and the Court was correct to order that a properly constituted meeting which includes the members of the family Lakelatua Nakmau and family Kaltamate Thomas must be held to achieve a variation of the names of the representatives for the custom owners of the Pangona Land. At that meeting a custom lands officer must be in attendance and carry out the functions required of the officer by s.6H(4). Whilst under s.6H all people who are members of the custom owner group may be present, the decision as to who will be the representatives is one to be made only by custom owners, and not by the whole gathering of the membership of the custom owner group. Section 6H envisages a meeting with a wide audience of all those who hold interests in custom, even minor use interests. Those present are there to witness the important selection of the representatives and to observe and be educated in the customary processes that take place, but it is by s.6H(1) that only the custom owners are entitled to decide who will be representatives. In other words, perhaps more easily understood, only the custom owners will have voting rights. Others there may participate in discussion and observe the process, but cannot vote.

18. This distinction between the role of custom owners, and that of the wider membership of the custom owner group is also recognised in s.6H(4) as the custom land officer must record the resolution passed at the meeting and have that resolution "*signed by all the custom owners*".

19. As distinction is made by the legislation between custom owners and the wider membership of the custom owner group the possibility for future argument over who is and who is not a custom owner is recognised. It is for this reason that s.6H requires the custom owners to sign the resolution. It would be desirable as well that a comprehensive record is kept of all those people who attend the meeting.

20. For the reasons already given the appeal by the first respondent must be dismissed. The second respondent, the Co-ordinator, has filed a cross-appeal. The Co-ordinator was the decision maker responsible for the issue of the green certificate under challenge. Normally where a decision is challenged by parties whose interests are affected by the decision, the decision maker adopts a neutral position and agrees to abide the decision of the court. However the Co-ordinator in this case has chosen to take an active part in the argument. He contends that the Supreme Court was in error in quashing that part of the green certificate of 20th March 2018 which declared the custom owner of the Pangona land to be Family Malasikoto. He argues that there is no dispute about custom ownership and the green certificate was wrongly quashed. This argument overlooks the wider purpose of the green certificate which is to identify the representatives of the custom owners. The green certificate was rightly quashed as there was no decision made in accordance with the legislation validly appointing the appellants as representatives. There is no substance in the cross-appeal which is dismissed.

21. Finally we note from the papers before the Court that after the decision of the Supreme Court now under challenge was delivered the respondents, apparently against advice from a lawyer, a custom land officer and from police officers called a meeting of the respondents' immediate family on 18th July 2019 at which they had themselves appointed as representatives of Family Malasikoto. For reasons that are not disclosed in the papers the Co-ordinator saw fit to issue another green certificate on 12th August 2019 naming the first respondents as the proper representatives. The enforcement of that new green certificate was stayed by order of the Supreme Court on 19th August 2019 as was the order of 12th July 2019. The stay operates pending the outcome of this appeal.

22. It follows from what is said in this judgment that until new representatives are appointed at a meeting properly held under s.6H the identity of the representatives of the custom owners of the Pangona Land are not known, and no new green certificate should issue.

23. The final orders of the Court are:

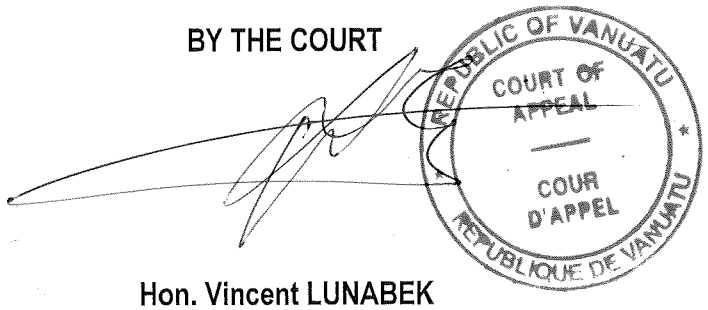
    (a) Appeal and cross-appeal dismissed;

    (b) Appellants to pay the first respondents' costs of the appeal to be agreed or taxed at the standard rate;

    (c) No order for costs for or against the second respondent.

DATED at Port Vila this 15th day of November 2019

BY THE COURT



Hon. Vincent LUNABEK
Chief Justice