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

Civil Appeal
Case No. 21/3470 CoA/CIVA

BETWEEN: SILU MALASIKOTO, TORIKO MALASIKOTO AND FREDDY MALASIKOTO
Appellants

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

AND: HUMPHREY TAMATA, National Coordinator, Custom Land Management Office
Second Respondent

Coram:	***Hon. Chief Justice V. Lunabek*** ***Hon. Justice J. Hansen*** ***Hon. Justice R. White*** ***Hon. Justice D. Aru*** ***Hon. Justice G. Andrée Wiltens*** ***Hon. Justice V.M. Trief*** ***Hon. Justice E. Goldsbrough***
Counsel:	***Mr P. Fiuka for the Appellants*** ***Mrs E. Blake for the First Respondents*** ***Mr S. Aron for the Second Respondent***
Date of Hearing:	***8 February 2022***
Date of Judgment:	***18 February 2022***

JUDGMENT OF THE COURT

A. Introduction

1. This was an appeal against the Supreme Court's dismissal of two interlocutory applications seeking leave to seek clarification of the Supreme Court decision of 12 July 2019 in *Vatoko v Tamata* [2019] VUSC 84 or alternatively of the Efate Island Court judgment of 22 July 2004 in *Malasikoto v Nakmau* [2004] VUICB 7; Land Case 01 of 1997.

2. However, in the course of the hearing, Mr Fiuka accepted that neither decision contained orders that required clarification. Additionally, neither decision had determined any issue as contended for by the Appellants Silu Malasikoto, Toriki Malasikoto and Freddy Malasikoto ('Messrs Malasikoto').

3. In the face of these concessions, the submissions in support of the appeal cannot be sustained; they are rejected. The appeal is devoid of any legal merit and must be dismissed.

4. Further, this appeal was filed without leave to appeal having first been obtained in the Supreme Court. As Messrs Malasikoto had absolutely no prospects of success, leave to appeal must be denied.

5. For the reasons given below, the Court concludes and concurs with the primary Judge that the interlocutory applications were an abuse of process.

6. The First Respondents Silas Vatoko, Morris Kelly Vatoko and Nakmau Sambo ('Messrs Vatoko') are entitled to their costs on an indemnity basis.

7. The Second Respondent National Coordinator of the Custom Land Management Office ('CLMO') abides the Order of the Court and is to bear his own costs.

B. Background

8. The following background is adapted from the judgment in *Vatoko v Tamata* [2021] VUCA 44.

9. In its judgment dated 22 July 2004 in Malasikoto v Nakmau [2004] VUICB 7; Land Case 01 of 1997, the Efate Island Court declared that Family Malasikoto was the custom owner of Pangona customary land, and that two other families had interests in that land, as well as Family Malasikoto, which had the main authority.

10. There was no appeal from the 22 July 2004 judgment.

11. Both Messrs Malasikoto and Messrs Vatoko are members of Family Malasikoto.

12. This appeal is the latest iteration in litigation between Messrs Malasikoto and Messrs Vatoko as to who are named as Family Malasikoto's representatives on the Certificate of Recorded Interest, also called a 'green certificate'.

13. The Court of Appeal explained a 'green certificate' as follows in *Vatoko v Tamata* [2021] VUCA 44 at paras 9 and 10:

> *9. A so-called green certificate is a certification issued by the [National Coordinator of the CLMO] confirming the recording under the CLM Act of a decision made by an appropriate customary court of tribunal as to the custom owners of custom land. As the Court of Appeal explained in its judgment in Malasikoto v Vatoko [2019] VUCA 65 referred to below, a recorded decision will be used by the National Coordinator as a basis for two reasons. The first is to identify the custom owners for the purposes of a negotiator's certificate application under the Land Reform Act. The second is for the rectification of lessors in leases in existence prior to the commencement of the CLM Act in 2013. The term 'recorded interest in land' is defined in section 2 of the CLM Act, and its significance is explained*

in the decision of the Court of Appeal in Kwirinavanua v Toumata Tetrau Family [2018] VUCA 15 at [22] – [24].

10. The green certificate in issue in the Supreme Court proceedings followed the standard form used by the National Coordinator. It certified not only the declared custom owners for Pangona Custom Land, but also the representatives of the custom owners. The certification 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.

14. Messrs Vatoko applied in Judicial Review Case ('JRC') No. 1168 of 2018 for the quashing of the green certificate dated 20 March 2018 issued by the National Coordinator under the *Custom Land Management Act* ('CLM Act'). The certificate certified that the Messrs Malasikoto were the representatives of the Pangona Custom Land owners. The certificate was based upon resolutions passed at a meeting on 30 November 2016.

15. Messrs Vatoko also claimed in the judicial review proceedings that the issuing of the green certificate in favour of Messrs Malasikoto breached section 6H of the *Land Reform Act* which provides as follows:

6H. (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 ...

16. After considering the evidence, the Supreme Court (Saksak J) found by judgment dated 12 July 2019 that none of the Messrs Vatoko were present at the meeting at which the resolution was passed appointing Messrs Malasikoto as representatives of the custom owners: *Vatoko v Tamata* [2019] VUSC 84.

17. The Supreme Court decision relevantly started with reference to the definitions of 'Custom owners' and 'Custom land' in section 2 of the CLM Act. Section 57 of the CLM Act concerns the status of the decision of the Efate Island Court about custom ownership in 2004, as it was made before the commencement of the CLM Act. Section 57 was substituted by the *Custom Land Management (Amendment) Act* No 12 of 2014. It provides:

Existing decisions of Island Court, Supreme Court, ...

57. (1) Decisions of the Island Court, Supreme Court, single or joint area Customary Land Tribunal and island Customary Land Tribunal which determine the ownership of custom land and which were made before the commencement of this Act, are deemed to create

a recorded interest in land in respect of persons or persons determined by such Court or Customary Land Tribunal to be the custom owners.

(2) Decisions made under subsection (1) will enable the custom owners so recorded to be identified for the purpose of consenting to an application for a negotiator's certificate or a lease, or is to provide the basis for rectification of an existing lease instrument...

18. The judgment of 22 July 2004 of the Efate Island Court is the relevant decision, and it is clear what it decided.

19. As Saksak J observed, the Efate Island Court in its 22 July 2004 judgment found that the custom owner of Pangona Land is Family Malasikoto. Justice Saksak in the same judgment also noted that the Island Court findings included that Family Lakelotaua Nakmau and Family Elma K. Thomas had interests in the land, and further that it found that dealings in the land would require the permission of the three family groups. Those findings meant that the three family groups fell within the definition of 'custom owners' in section 2 of the CLM Act in relation to Pangona Land. The judgment of Saksak J then records that the two families Family Lakelotaua Nakmau and Family Laltamate Thomas had 'cancelled' their claims as recorded in the decision of the Efate Island Court, so that their separate interests did not need to be addressed.

20. It remained important to identify the status of Family Vatoko. Justice Saksak noted that Silas Vatoko had been the spokesman for Family Malasikoto before the Efate Island Court. He referred to the Family Tree of the Malasikoto Family. He found expressly at paras 32 and 33 that Family Vatoko are part of Family Malasikoto, and that they have interests in Pangona Land.

21. Consequently, the failure to have Family Vatoko participate in the meeting at which the representatives of Family Malasikoto were selected meant that the meeting was not in accordance with section 6H of the *Land Reform Act*. As Messrs Vatoko were not present at the relevant meeting, their interests were not adequately protected as prescribed by section 6H of the *Land Reform Act*. The green certificate issued as a consequence of that meeting was quashed.

22. Accordingly the Supreme Court ordered in favour of Messrs Vatoko in the following terms at paras 37 and 38, *Vatoko v Tamata* [2019] VUSC 84:

37. The certificate of Recorded Interest in Pangona Land issued on 20th March 2018 is hereby quashed.

38. All the members and descendants of the Malasikoto family including those from the Taea Family, Vatoko Family, Sambo Family and Family Elmu Thomas Kalamate in conjunction with the Office of the National Coordinator, be required to arrange a meeting for all the members of

these families in accordance with Section 6H of the Land Reform Act, not later than 29 July 2019.

23. Messrs Malasikoto appealed to the Court of Appeal from those orders. They wanted the green certificate re-instated. The appeal was dismissed by judgment dated 15 November 2019: *Malasikoto v Vatoko* [2019] VUCA 65.

24. The Court of Appeal noted the extensive amendments to the *Land Reform Act* in 2013, in conjunction with the enactment of the CLM Act, so that they are intended to work together. Consequently, whatever the precise relationship or position of Family Vatoko within Family Malasikoto, it confirmed that Family Vatoko (and relevantly Messrs Malasikoto) were entitled to participate in the meeting of Family Malasikoto, including to vote at that meeting, to determine the representatives of Family Malasikoto for the purposes of the green certificate. In short, the Court of Appeal took the same view of the meaning of section 6H of the *Land Reform Act* and its application to the circumstances as Saksak J in his decision of 12 July 2019.

25. On that appeal, the National Coordinator cross-appealed, as he said that the Supreme Court had wrongly quashed that part of the green certificate which declared the custom owner of Pangona Custom Land to be Family Malasikoto. The Court of Appeal also dismissed that contention because, as it pointed out, the wider purpose of the green certificate is to identify the representatives of the custom owners, and no decision had been made in accordance with the legislation validly appointing Messrs Malasikoto as those representatives.

26. It is noteworthy that the Court of Appeal at the conclusion of its reasons noted that Messrs Vatoko, against advice, called a meeting of their immediate family on 18 July 2019 at which they appointed themselves as representatives of Family Malasikoto, and then the National Coordinator saw fit to issue another green certificate on 12 August 2019 naming Messrs Vatoko as the proper representatives. The enforcement of that new green certificate was then stayed by the Supreme Court by order of 19 August 2019, pending the outcome of the appeal.

27. The effect of the Court of Appeal judgment was that, until new representatives are appointed at a meeting properly held under section 6H of the *Land Reform Act*, the identity of the representatives of the custom owners of the Pangona Land are not known and no green certificate should issue.

28. The Court of Appeal decision was given on 15 November 2019. Messrs Malasikoto were not slow to take further steps.

29. Following that decision, Messrs Malasikoto first planned a meeting of Family Malasikoto on 12 December 2019. That meeting did not proceed, and it is not necessary to refer to it in detail. There was then a further meeting on 19 December 2019. The details of that meeting are set out below. It resolved to appoint Messrs Malasikoto as the representatives of Family Malasikoto. On the basis of the resolution at that meeting, the

National Coordinator on 20 December 2019 reinstated or reissued the previous green certificate naming Messrs Malasikoto as the representatives of the custom owner of Pangona Land, namely Family Malasikoto.

30. The notice of 18 December 2019 calling the meeting on 19 December 2019 was given to Messrs Vatoko. That notice said that Messrs Vatoko, and generally Family Vatoko, would not be allowed to vote at the meeting. In the circumstances, they did not attend the meeting on 19 December 2019.

31. That led to the application to the Supreme Court by Messrs Vatoko of 22 September 2020. They said that the meeting of 19 December 2019 was contrary to the decision of the Supreme Court of 12 July 2019 and of the Court of Appeal of 15 November 2019, and also that the meeting of 19 December 2019 was not in compliance with section 6H of the *Land Reform Act*.

32. The application of 22 September 2020 also sought an order that the National Coordinator be punished for contempt in relation to his reinstatement or reissuing of the green certificate – the Certificate of Recorded Interest – dated 20 March 2018 following and as a consequence of the meeting on 19 December 2019, in the face of the earlier decisions of the Supreme Court of 12 July 2019 and of the Court of Appeal of 15 November 2019. He re-instated or reissued that certificate on 20 December 2019.

33. The application in relation to Messrs Malasikoto and their alleged contempt related to them calling the meetings on 12 and 19 December 2019 which they said was in compliance with section 6H of the Land Reform Act, but which (Messrs Vatoko said) was contrary to the same decisions, because they were not allowed to vote at the meeting of 19 December 2019..

34. Consequential orders were sought in the application of 22 September 2020 to have the Certificate of Recorded Interest dated 20 March 2018, and reinstated on 20 December 2019, formally cancelled. As well, Messrs Vatoko sought orders that the Shefa Custom Land Officer attend a meeting to be jointly called by Messrs Vatoko and Messrs Malasikoto on behalf of Family Malasikoto for the purposes of resolving representatives under section 6H of the *Land Reform Act*, and to prohibit dealings in the Pangona Land until a valid Certificate of Recorded Interest is issued.

35. There was a form of pleading in relation to the Application of 22 September 2020, by both the National Coordinator and the Second Respondents filing Responses to the Application.

36. The National Coordinator through his Response said that that meeting took place at Mele Village, with the attendance of a Customary Land Officer to assist in facilitating the meeting. There were 59 family members present. Chief Silu Malasikoto made a welcome speech and explained the purpose of the meeting. There was a motion that Messrs Malasikoto be appointed to be the family representatives and that was passed without

dissent. He says then that he acted on that resolution to reinstate the effect of the earlier Certificate of Recorded Interest.

37. Messrs Malasikoto in their Response adopted the same position. They also started from an earlier position, to say that Messrs Vatoko had no standing to apply for the orders they were then seeking. They disputed that Messrs Vatoko are either custom owners of Pangona Land, or that they have the right to vote at any meeting under section 6H of the *Land Reform Act*, or that they are members of Family Malasikoto at all. They said further that that was recognised by the Court of Appeal in [17] of its decision. They further said that a notice of the meeting on 19 December 2020 was given on 18 December 2020, including to Messrs Vatoko, but that Messrs Vatoko refused to attend that meeting.

38. By judgment dated 30 April 2021, the Supreme Court dismissed the Application of 22 September 2020 with costs. In short, and in effect on uncontested evidence, it found that Messrs Vatoko were notified of the meeting on 19 December 2020, but did not attend it. They could have done so, and could have contributed to the discussion on the appointment of the representatives. It was said by the judge that Messrs Vatoko chose not to attend.

39. Messrs Vatoko appealed. The critical issue was whether the meeting of 19 December 2019 was or was not held in compliance with section 6H of the *Land Reform Act*. Messrs Vatoko indicated that they did not pursue any claims that either the National Coordinator or Messrs Malasikoto should be punished for contempt. Their focus was directed to showing that the meeting was invalid and so the reissue or reinstatement of the green certificate on 20 December 20019 was also invalid. And, of course, to have a valid meeting of Family Malasikoto for the purpose of selecting the representatives.

40. The appeal was allowed in judgment dated 16 July 2021: *Vatoko v Tamata* [2021] VUCA 44.

41. The Court of Appeal recognised that the starting point was to recognise that the Efate Island Court decided that the custom owner of Pangona Land is Family Malasikoto. It did not nominate any particular members of Family Malasikoto as the custom owner: *Vatoko v Tamata* [2021] VUCA 44 at [35].

42. The Court of Appeal also recognised that in 2013, the Efate Island Court in Land Case 3 of 2013 decided that Silu Malasikoto is the person who holds the title of Chief Silu Malasikoto. That decision did not set out to, and did not, change the description of the custom owner of Pangona Land in the Island Court's earlier decision: *Vatoko v Tamata* [2021] VUCA 44 at [36].

43. The Court then examined closely the Supreme Court decision of 12 July 2019 and the Court of Appeal judgment of 19 November 2019. After setting out the reasoning in both, it stated at paras 44 and 45, *Vatoko v Tamata* [2021] VUCA 44:

> *44. It is then necessary to ask why the same reasoning does not apply to the meeting of 19 December 2019. Again, the Appellants were*

precluded from voting at that meeting when they were entitled to vote at it for the same reasons as already identified by the Supreme Court and the Court of Appeal. In our view the meeting was invalid. We respectfully do not agree with the view of the judge whose decision is presently under appeal that the Court of Appeal in its decision on 15 November 2019 decided that the Appellants were entitled to attend the meeting but were not entitled to vote at it. If that were the effect of the decision of the Court of Appeal on 15 November 2019, the result may well have been that the appeal of the present Respondents would have been allowed rather than dismissed. The Efate Island Court did not itself distinguish between patrilineal and matrilineal succession lines. If there is to be such a distinction, or if there are to be primary and secondary rights in the land, it is not for the Second Respondents themselves to make that decision.

45. We make no comment upon whether, as counsel for the Appellants suggested in the course of submissions, there is a procedure available under the CLR Act for the identification of the particular persons who are the 'custom owners' of a more subtle character than 'Family Malasikoto' (as expressed by the Efate Island Court) of Pangona Land in the light of the decision of the Efate Island Court by reference to their Nakamal, and then the other procedures under that Act. Nor is it either necessary or appropriate at this point to make any observation about any distinction between patrilineal and matrilineal descent lines within Family Malasikoto. As we have noted, that distinction is not in the wording of the Efate Island Court description of the custom owners of Pangona land.

44. On 3 August 2021, Messrs Malasikoto filed a new claim Civil Case No. 2538 of 2021 in the Efate Island Court and on 24 August 2021 and 7 October 2021, urgent interlocutory applications in the Supreme Court seeking clarification of the Supreme Court's judgment of 12 July 2019 and Efate Island Court's judgment of 22 July 2004 and stay of judgment dated 12 July 2019 pending final determination by the Efate Island Court of Civil Case No. 2538 of 2021.

45. The applications were opposed.

46. The Supreme Court in its decision dated 15 October 2021 dismissed the applications for the reasons that the applications were an abuse of process and there was no ambiguity as the Efate Island Court in its 2004 judgment did not make any distinction between patrilineal and matrilineal descent lines within Family Malasikoto in its description of the custom owners of Pangona land. The Court further ordered that all members and descendants of Family Malasikoto including those from Family Vatoko be required to arrange a meeting in accordance with section 6H of the *Land Reform Act* within the next 21 days (by 8 November 2021). The 15 October 2021 decision is the subject of the present appeal.

47. The 12 July 2019 order that the parties hold a meeting under section 6H of the *Land Reform Act* was not complied with by the time ordered (29 July 2019) nor since. The 15 October 2021 order that a section 6H meeting be held by 8 November 2021 was also not complied with.

C. Consideration

Appeal against 15 October 2021 decision and abuse of process

48. First, as set out in the introduction, neither the Supreme Court decision of 12 July 2009 nor the Efate Island Court's 22 July 2004 judgment contained orders that required clarification.

49. Secondly, the Court did not in either decision determine any issue as to the differing rights of patrilineal and matrilineal descent lines within Family Malasikoto.

50. Accordingly, there was nothing to seek clarification about in either decision.

51. Thirdly, the Efate Island Court judgment of 22 July 2004 was not appealed. It cannot now be appealed: subs. 22(1), *Island Courts Act* [CAP. 167].

52. Fourthly, the Supreme Court decision of 12 July 2019 determined the original claim in JRC No. 1168 of 2018. The original claim in the JRC proceedings in the Supreme Court having been determined, those proceedings had been completed. The 12 July 2019 decision was appealed and the appeal dismissed: *Malasikoto v Vatoko* [2019] VUCA 65.

53. Fifthly, the Supreme Court ordered at para. 38 of its judgment of 12 July 2019 that all the members of Family Malasikoto in conjunction with a CLMO officer meet in accordance with section 6H of the *Land Reform Act*, no later than 29 July 2019. The time by when the order needed to be complied with having lapsed, no stay of that order can now be granted. We note that there is no reason why enforcement steps cannot be taken in relation to the that order.

54. For reasons given, the interlocutory applications by Messrs Malasikoto seeking leave to seek clarification of the 12 July 2019 and 22 July 2004 decisions were misconceived and doomed to failure, and were an abuse of process. The primary Judge did not err in fact or in law in his decision of 15 October 2021.

55. Messrs Malasikoto filed this appeal without first having obtained leave to appeal from the Supreme Court. Given that Messrs Malasikoto had absolutely no prospects of success, leave to appeal must be refused.

56. The applications lacked legal merit and given the abuse of process, the costs of this appeal must be paid by Messrs Malasikoto on an indemnity basis.

Mis-reading of the Court of Appeal judgment dated 16 July 2021

57. Mr Fiuka submitted at paras 25-28 of his written submissions that:

25. *On 16 July 2021, the Court of Appeal allowed the appeal and stated at paragraphs 44 and 45 that if there is any distinction between patrilineal or matrilineal succession lines, primary or second rights, it is not for the parties to make that decision.*

26. *Therefore on 3 August 2021, the Appellants filed a new claim in the Efate Island Court Civil Case No. 2538 of 2021 to make that decision stated in para. 25 above.*

27. *On 24 August 2021, the Appellants filed an urgent application for interlocutory orders.*

28. *On 7 October 2021, the Appellants filed an urgent application for leave to amend the urgent application for interlocutory orders, clarifications of judgments of 12 July 2019 and Efate Island Court judgment of 22 July 2004 and stay of judgment dated 12 July 2019 pending final determination of Efate Island Court claim No. 2538 of 2021.*

58. However, paras 44 and 45 of the Court of Appeal judgment dated 16 July 2021 in *Vatoko v Tamata* [2021] VUCA 44 stated, relevantly, as follows:

44. *... The Efate Island Court did not itself distinguish between patrilineal and matrilineal succession lines. If there is to be such a distinction, or if there are to be primary and secondary rights in the land, it is not for the Second Respondents themselves to make that decision.*

45. *.... Nor is it either necessary or appropriate at this point to make any observation about any distinction between patrilineal and matrilineal descent lines within Family Malasikoto. As we have noted, that distinction is not in the wording of the Efate Island Court description of the custom owners of Pangona land.*

(our emphasis)

59. Mr Fiuka's submission at his para. 25 therefore stems from a serious mis-reading of paras 44 and 45 of the Court of Appeal judgment in *Vatoko v Tamata* [2021] VUCA 44. In those paras, the Court of Appeal clearly pointed out that the Efate Island Court's 2004 judgment made no distinction between the rights of patrilineal and matrilineal descent lines within Family Malasikoto. The Court of Appeal further stated that if there was to be such a distinction, it was not for Messrs Malasikoto themselves to make that decision. Accordingly, Mr Fiuka's submission improperly set out what the Court of Appeal stated in its paras 44 and 45.

New case filed in the Efate Island Court

60. Mr Fiuka submitted that Messrs Malasikoto filed Efate Island Court Civil Case No. 2538 of 2021 to obtain declarations as to the differing rights of patrilineal and matrilineal descent lines within Family Malasikoto.

61. However, the application in Civil Case No. 2538 of 2021 does not seek any declaration as to the rights of patrilineal and matrilineal descent lines within Family Malasikoto. Instead, the application seeks an order declaring that Sailas Kalopovi Vatoko and Family are not members of Family Malasikoto, do not have a right to use the name 'Malasikoto' and do not have any rights over the custom property of Family Malasikoto.

62. Family Vatoko's membership of Family Malasikoto and rights as custom owners of Pangona land were already decided in the Efate Island Court's 22 July 2004 judgment. That judgment was not appealed and cannot now be appealed. The Supreme Court in its decision of 12 July 2019 made findings of fact that Family Vatoko are part of Family Malasikoto and that they have interests in Pangona land. The Court of Appeal dismissed the appeal against that decision: *Malasikoto v Vatoko* [2019] VUCA 65. Without deciding the point, it would appear then that the orders sought in Efate Island Court Civil Case No. 2538 of 2021 are *res judicata*.

D. Orders

63. In the result, leave to appeal is refused.

64. Even if this had been a valid appeal, the Court would have ordered that the appeal is dismissed in its entirety.

65. The Appellants' interlocutory applications of 24 August 2021 and 7 October 2021 were an abuse of process.

66. The primary Judge did not err in fact or in law in his decision of 15 October 2021.

67. The Appellants are to pay the First Respondents' costs of the appeal on an indemnity basis as agreed or taxed.

68. The Second Respondent abides the Order of the Court and shall bear his own costs.

DATED at Port Vila, Vanuatu, this 18th day of February, 2022

BY THE COURT

Chief Justice Vincent Lunabek

REPUBLIC OF VANUATU COURT OF APPEAL COUR D'APPEL REPUBLIQUE DE VANUATU