

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

Civil Appeal Case No. 940/21

BETWEEN: HARRY KEMUEL

Appellant

AND: FAMILY TAMAT Represented by Josiah Tamat

Respondent

Date of Hearing: 14th June 2021

Date of Judgment: 25th June 2021

Before: Supervising Magistrate Trevor NAIEU

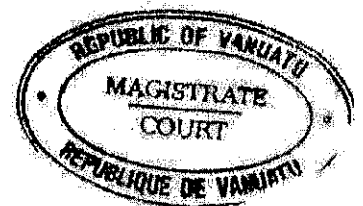
Assessors: Justice Douglas FATDAL

Justice Johnson FRAZER

Appearances: Counsel Christina Thyna for Appellant

Counsel Willie Kapalu for Respondent

JUDGEMENT



Introduction

1. This is a civil appeal against the decision of the Malekula Island Court dated 26 March 2021 concerning the true bloodline of a man named "Tamat".
2. On the 26 May 2021, the parties were given 4 names of assessors to choose only 2 and both parties compromised and agreed to choose the above 2 assessors.

Background

3. Josiah Tamat who is the same person as Josiah Nato who is the respondent in this appeal filed proceedings in the Malekula Island Court seeking orders and declarations that he and his family are the true and only descendants or the only surviving bloodline of the man named *Tamat*.
4. Harry Kemuel who was the respondent in the Court below and is the appellant in this appeal objected to Josiah Tamat's claim in the court below and claims that he and his family members are the true and only descendants or the only surviving bloodline of the man named *Tamat*.
5. After a full hearing by the Malekula Island Court lawfully composed and presided over by three (3) Justices, the Court makes the following orders;

"...

1. *Josiah Nato emi blad laen blong TAMAT;*

2. *Stat tedei I ko defendant emi mas stop blong usem nem ia TAMAT...*"

The Law

6. A). Section 22 and 23 of the Island Court Act Cap 167 states:

"...22. Appeals

(1) *Any person aggrieved by an order or decision of an island court may within 30 days from the date of such order or decision appeal from it to the Magistrates' Court.*

(2) *The court hearing an appeal against a decision of an island court shall appoint two or more assessors knowledgeable in custom to sit with the court.*



(3) The court hearing the appeal shall consider the records (if any) relevant to the decision and receive such evidence (if any) and make such inquiries (if any) as it thinks fit..."

23. Power of court on appeal

The court in the exercise of appellate jurisdiction in any cause or matter under section 22 of this Act may –

(a) make any such order or pass any such sentence as the island court could have made or passed in such cause or matter;

(b) order that any such cause or matter be reheard before the same court or before any other island court..."

B). Rule 16.35 (1), (2), (3), (4), (5), (6), (7) of the Civil Procedure Rules No. 49 of 2002 states:

"Appeal to the Magistrates Court

16.35 (1) This rule applies to appeals from island courts to the Magistrates Court.

(2) The appellant must:

(a) file a Notice of Appeal in the Magistrates Court; and

(b) give a copy of the notice to each other party.

(3) Each party must give an address for service of documents to the Magistrates Court.

(4) The Island Court must ensure that the notice of the appeal and all supporting documents are given to the Magistrates Court.

(5) The magistrate must:

(a) fix a first hearing date; and

(b) tell the parties about this.

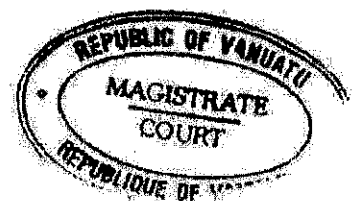
(6) At the first hearing, the magistrate:

(a) must appoint 2 or more assessors knowledgeable in custom to sit on the appeal; and

(b) may make any other orders, or give any directions, for hearing the appeal; and

(c) must fix a date for hearing the appeal.

(7) At the hearing of the appeal, the assessors sit with the magistrate..."



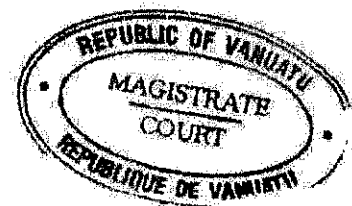
Grounds of Appeal

7. The appellant's grounds of appeal headings are as follows;

- i. Lack of standing
- ii. Abuse of the Court process
- iii. Right to organize an appeal being waived
- iv. Fraud
- v. Assessors being biased
- vi. Failure to consider the appellants arguments
- vii. Irregular Court process

Custom relating to bloodline

8. It is according to the custom of Malekula Island for a person on behalf of their family or tribe claiming a customary name having and holding power and rights over a particular nasara(s), its people and their custom land boundary to be a male who inherited the right to use that name through direct patrilineal lineage connection.
9. The name alone is very crucial and regarded as a sacred name to a particular family or tribe because it is the name of the first person who settled in a particular area of land during the ancient times and the first person who began their very first generation of the entire family or tribe. The name cannot be necessary be the name of a chief or Paramount chief who performed the *Namagi*. *Namangi* is the custom process that one undergoes or performs to be ordained the title of a chief or paramount chief.
10. The patrilineal lineage connection to the name holds more weight in custom compared to the matrilineal lineage. However, matrilineal lineage connection will and can also be given the same weight and custom recognition only in the event that there was or is no surviving blood or descendant of the patrilineal lineage.
11. An adoption performed according to the proper recognized custom process will and can also have the same custom recognition should there be no surviving patrilineal or a matrilineal lineage to the name.



12. This therefore means that that particular specific name can only be used by either of the custom recognized blood connected lineage specified above provided the name is honored as a sacred name that holds the entire generation (s) together including their rights and powers in custom.

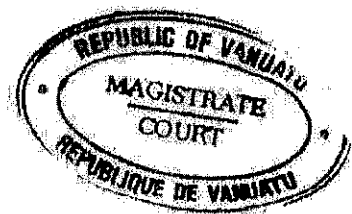
Findings in this Appeal

13. The appellant and the respondent in Land case No.10 of 1993 as one party (Counter Claimant 1) claimed the bloodline history of the man named *Tamat* including his power and right to his nasara, custom practices, his people or tribe and land boundary and the Court make orders and declarations in their favor. It was recorded in that proceedings that Kemuel Harry as Counter Claimant 1 representing family *Tamat* and Josiah Nato as a witness (witness 1) for Counter Claimant 1.

14. In the Court below and this current appeal, the respondent Josiah *Tamat* claims the bloodline of a woman named *Mathlen* as the only surviving daughter of the man named *Tamat*. He stated that *Tamat* married *Ketty* and together they had a daughter named *Mathlen* and a son named *Daniel*. *Daniel* died leaving *Mathlen* the only surviving daughter of *Tamat*. When *Tamat* died with no other child, *Mathlen* was the only surviving descendant of *Tamat* and he Josiah *Tamat* is the surviving descent of that woman *Mathlen*. This bloodline history was confirmed and witnessed by one Jeffrey Willaim of Tautu Village.

15. In the proceedings of the Court below, the appellant filed no written response to the respondent's claim nor a written counter claim. He was represented by a spokesman named Tangen Harry, who only orally responded to the respondent's claim and made submissions on his counter claim during the hearing along with 2 witnesses who also orally gave evidence.

16. In the Court below and this current appeal, the appellant Harry Kemuel claims to be the only living descendant of a man named *Harry* who was adopted by *Tamat*. He claims and say that *Tamat* married *Ketty* and together they only had one child a son named *Daniel*. *Daniel* died living no other child of *Tamat* therefore *Tamat* adopted Harry (Due to the old age and the need to proper health care). He stated that *Mathlen*



was not *Tamat's* daughter because *Ketty* was already pregnant and gave birth to *Mathlen* before she cohabited with *Tamat*. He claimed that *Mathlen's* father must be a man from Ambae Island but agreed that *Tamat* raised *Mathlen* together with his wife *Ketty*.

17. Both the parties submitted and rely on the same family tree of the man named *Tamat* that includes their descent claim connection to *Tamat*.

18. A number of previous proceedings involving the same two parties in this appeal were referred to by counsel for the appellant that occurred in the Supreme Court including the proceeding in the Malekula Island Court in 2004 that we see proper to address. We intend not to override nor question the findings and jurisdictional powers of the Courts but we intend only to identify the issues and final outcomes of each of the proceeding and relate it to this present appeal.

- i. *Land Case No.10 of 1993*: This is the original proceeding that involves the history and family tree of the man named *Tamat* heard and decided in the Malampa Island Court in 2004. The issue before the Court in this proceeding is that of custom land ownership resulting a declaration of custom owner to land. Kemuel Harry who is the same person as Harry Kemuel who is the appellant in this appeal was the *Counter claimant 1* in the above proceeding. Josiah Nato who is the same person as Josiah Tamat as the respondent in this appeal was a witness (Witness 1) who gave evidence in support of *Counter claimant 1* who was Kemuel Harry in the above proceeding. The conclusion of the above proceedings is as follows;

"...IT IS HEREBY DECLARED that Counter Claimant 1, Kemuel Harry representative of Family Tamat as the rightful custom owners of the land of Tervaut as mapped accordingly..."

- ii. *Jonah v Kemuel [2018] VUSC 247*: This was an appeal case before the Supreme Court. The appellant appealed the Island Court Judgement of 2004. Josiah Tamat who is the same person in this appeal as the respondent was added to this proceedings as an interested party. In summary, the appeal was dismissed and the Island Court Judgement of 2004 still stands.



iii. Tuilili v Harry [2018] VUSC 179: This was a civil court claim before the Supreme Court for the tort of trespass and compensation for the loss of crops by way of general damages. In summary, the claim for compensation was awarded to the claimant.

19. Neither of the parties introduced any new evidence during this appeal nor call witnesses therefore the Court only consider the evidences filed and orally submitted during the Court below including the written and oral submissions made by counsels.

Discussions

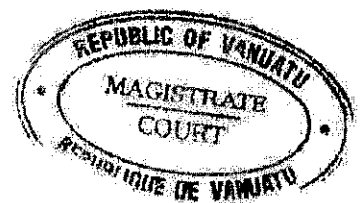
20. When it comes to the determination of matters involving customary rights and issues such and the determination of bloodline before the Courts, the Island Court has the original jurisdiction to hear the matter at first instance. This is because that jurisdiction is vested in the Island Court due to its composition composing of three Island Court justices presiding who are knowledgeable in the custom of that particular island or territory. In the event that their judgement is appealed like this present appeal, the court hearing the appeal will be composed of the Supervising Magistrate and two or more assessors who are usually Island Court Justices knowledgeable in custom of that particular island or territory to advice the Magistrate on matters and issues concerning and relating to custom.

21. We see proper to highlight that the appellant Mr Kemuel Harry and the respondent Mr Josiah Tamat (Josiah Nato) were actually together as one party in the original proceedings in the Island Court for the determination of custom land ownership whereby judgement was delivered in 2004. Mr Kemuel Harry was the spokesperson representing family *Tamat* and Mr Josiah Tamat (Josiah Nato) was a witness and they claim *Tamat's* history and family tree and the Court ruled in their favor. We were not informed why there now decided to have this dispute amongst each other and why this dispute did not arose during the proceedings of 2004.

22. The proceedings of 2004 in *Land Case No. 10 of 1993* did not determine the issue of who of the persons namely Kemuel Harry and Josiah Nato (Josiah Tamat) is the true descendant by blood of the man named *Tamat*.

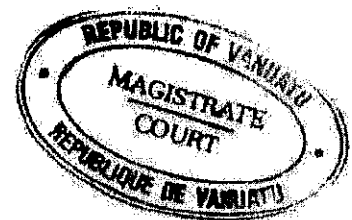


23. The Island Court judgement of 2004 although mentioned a man named *Harry* who *Tamat* had asked to adopt, it did not further elaborate on the adoption process, where it happened, the witnesses and how it happened according to custom. The Judgement also does not mention whether *Tamat* had actually adopted *Harry* since it only mentioned "...*Harry* was asked to be his adopted son..."
24. The appellant *Kemuel Harry* in the Court below did not call any witness to give evidence to prove the adoption of *Harry* with particulars such as; when and where the adoption ceremony occurred, who were the witnesses and what were the words mentioned by *Tamat* during that ceremony or the words of blessing from him to his next successor *Harry*.
25. The appellant *Kemuel Harry* in the Court below did not call any witness to give evidence that *Mathlen* was not the daughter of *Tamat*. Although his two witnesses in the Court below namely *Michael* and *Openi Harry* briefly mentioned it during cross examination, there were very brief uttered statement with no detail information and factual evidence to support. Should the appellant was serious in wholly disputing *Mathlen's* father not to be *Tamat* then he should have called someone from where he believed *Mathlen's* father is from to give evidence to confirm the father of *Mathlen* but he failed to call such crucial witness.
26. In *Jonah v Kemuel* [2018] VUSC 247. Judge *Aru* with two assessors made their own findings with regards to the appellant's grounds of appeal and merely repeats the findings of the Island Court but made no new findings on the issue of bloodline. This appeal also did not determine the bloodline of *Tamat* between the appellant and the respondent in this present appeal.
27. In *Tuilili v Harry* [2018] VUSC 179. Judge *Wiltens* sat alone without assessors and determine a totally different issue that has nothing to do with custom nor bloodline.
28. The determination of the bloodline of *Tamat* between the parties in this appeal was never heard nor determined in any of the cases referred to by counsel for the appellant.



29. The Island Court in civil case No.1849 of 2020 between Family Tamat v Kemuel Harry was the first and only proceeding concerning the issue of *Tamat's* bloodline between the two parties in this appeal.
30. We see the need to provide some explanation to the term "*representative*" in the context of a person's role in Court proceedings. Lawyers represent their clients in Court proceedings whereby the clients give instructions and they acted on those instructions and give legal advice and directions meaning; the lawyers have neither a personal connection nor interest in the matter provided they are merely the mouthpiece of their clients. This explanation is the same for parties who are self-represented and choose someone to be their spokesperson in Court. There may be instances where self-represented litigants choose among themselves or within their family a spokesperson but the spokesperson is not acting on their own behalf but on behalf of a particular group or family. This is the case in the Island Court judgement of 2004 where the Court recorded that "*Kemuel Harry as representative of family Tamat*" meaning Kemuel Harry was merely representing Family Tamat.
31. Our ruling on the appellant's grounds of appeal are as follows';

- i. **Lack of standing:** We dismiss this ground of appeal and rule that the respondent has legal standing to bring the matter for determination in the Court below.
- ii. **Abuse of the Court process:** We dismiss this ground of appeal and rule that there was no abuse of the Court process.
- iii. **Right to organize an appeal being waived:** We dismiss this ground of appeal and rule the proceeding in the Court below was a new proceeding.
- iv. **Fraud:** We dismiss this ground of appeal and rule that this is a totally different issue that was not determined in the Court below.



- v. **Assessors being biased:** We dismiss this ground of appeal and rule that this objection should have been raised in the Court below. Although an objection for Justice Alina Malapa was raised, an explanation was provided and accepted by the parties before the hearing commences.
- vi. **Failure to consider the appellants arguments:** We dismiss this ground of appeal and rule that the Magistrate was not required by the Act to sit with the Island Court Justices during an Island Court proceeding.
- vii. **Irregular Court process:** We dismiss this ground of appeal and repeat that the Magistrate was not required by the Act to sit with the Island Court Justices during an Island Court proceeding.

Result.

32. The Appeal is dismissed.

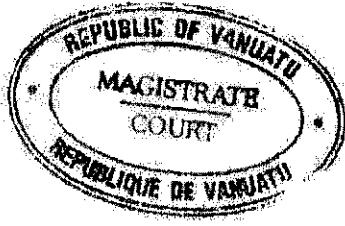
33. The Island Court Judgement of 26th March 2021 is maintained with a substituted Order as follows;

- i. Josiah Tamat and his family are the true and only surviving bloodline of the man named *Tamat* through the matrilineal lineage of the only surviving daughter of *Tamat* named *Mathlen* therefore he and his family has the right to use the name *Tamat*.
- ii. The Appellant Kemuel Harry and his family has no right to use the name of *Tamat* therefore are restrained from using the name of *Tamat* forthwith.

34. Parties to meet their own costs.



DATED at Lakatoro this 25th day of June 2021.



BY THE COURT

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Trevor NAIEU
Supervising Magistrate

A handwritten signature in black ink, appearing to be "D. Fatdal", written over a dotted horizontal line.

Justice Douglas FATDAL

A handwritten signature in black ink, appearing to be "J. Frazer", written over a dotted horizontal line.

Justice Johnson FRAZER