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

Civil Appeal
Case No. 21/2088 SC/CVLA

BETWEEN: **Harry Kemuel**
Appellant

AND: **Josiah Nato**
Respondent

Date: 5 January 2022
Before: Justice G.A. Andrée Wiltens
Counsel: Ms C. Thyna for the Appellant
Mr W. Kapalu for the Respondent

Judgment

A. Introduction

1. This is an appeal against a Magistrate's Court decision of 25 June 2021, which dismissed an appeal against an earlier Malekula Island Court determination of 26 March 2021, thereby confirming the true bloodline of a male by the name of Tamat to be Josiah Nato and his family, not Kemuel Harry and his family.

2. This appeal was scheduled to be heard on 20 December 2021.

3. However, some days prior to that date, Ms Thyna asked if the matter could be dealt with "on the papers" already filed with the Court without the need for appearances by counsel or oral submissions. Mr Kapalu agreed to that course.

4. This is my judgment and the reasons for it, based solely on the material provided by counsel.

B. The Decisions

5. The claims of Josiah Nato and Harry Kemuel, although being based on the same family tree, presented differing cases as to inheritance.

6. Mr Nato claimed to be the sole survivor of Tamat through the bloodline of his mother Mathlen, Tamat's only daughter. It was his case that Tamat and his wife Ketty begat 2 children, but their son Daniel passed away before Tamat, leaving Mathlen as his sole surviving progeny. Mathlen had only the one child, Mr Nato. This account was confirmed by an independent witness, Jeffrey Willaim.

7. Mr Kemuel claimed to be the sole survivor of Tamat through the bloodline of his father, Harry, who it was said had been adopted by Tamat. His case was that Tamat and Ketty had only one child, Daniel, who passed away before Tamat. Subsequently, Tamat had adopted Harry to care for him in his old age. His claim was based on being the sole survivor of Harry.

8. Further, Mr Kemuel contended that Mathlen was not Tamat's daughter. He submitted that at the time of Tamat's marriage, Ketty was already pregnant by another, possibly a man from Ambae. Mr Kemuel agreed that Tamat and Ketty had together raised Mathlen.

9. The Malekula Island Court, comprising of three Justices knowledgeable in local custom, made two conclusory orders:

> "1. Josiah Nato emi blad laen blong TAMAT.
>
> 2. Stat tedei I ko defendant emi mas stop blong usem nem ia TAMAT..."

10. The appeal in the Magistrate's Court before the Supervising Magistrate and 2 Assessors, re-iterated the differing claims. As well a number of other judicial decisions involving the competing parties were cited in support of the appeal:

- Land Case No. 93/10 in which Mr Kemuel was a counter-claimant in respect of custom ownership of Tervaut land in north-west Malekula, with Mr Nato as a supporting witness, and which resulted in Mr Kemuel being declared as the true custom owner as the representative of Family Tamat;

- *Jonah v Kemuel* [2018] VUSC 247 reports the appeal arising from Land Case No. 10/93. Mr Nato was added as an Interested Party to this litigation. The appeal was dismissed, leaving Mr Kemuel, as representative, the custom owner of the land in issue; and

- *Tuilili v Harry* [2018] VUSC 179 involved a civil claim for trespass involving the same land as the previous matters.

11. The Magistrate's Court decision noted that the first and second of these decisions did not determine whether Mr Kemuel or Mr Nato was the true descendant of Tamat; and further that there was insufficient evidence to support a finding that Tamat had adopted Harry. The third case was not of assistance as it did not look into the issue of inheritance in any way.

12. The Magistrate's Court considered that the first case in which the present dispute was considered was the in the Malekula Island Case No. 20/1849 which led to the appeal before the Magistrate's Court.

13. The Magistrate's Court considered Mr Kemuel's lack of evidence at the appeal hearing to support his contention that Ketty was already pregnant by another when she became married to Tamat to be significant. The Court considered Mr Kemuel had an onus to establish this contention which he had not discharged.

14. The Magistrate Court's decision went on to make findings in relation to the 7 grounds advanced before it as to why the Malekula Island Court determinations should be overturned and remitted back for reconsideration by the Island Court, as follows:

    - Josiah Nato had legal standing to bring his Claim;
    - There was no abuse of process involved in the Court below;
    - The matter in the Malekula Island Court was a new proceeding;
    - There was no fraud – this issue was not aired in the Court below;
    - There was no evidence of the assessors being biased – also, this ought to have been raised in the Court below;
    - There was no failure to consider all the arguments raised; and
    - The process followed in the Court below was not irregular.

15. Accordingly, the Magistrate's Court maintained the Island Court decision with substituted orders 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."

C. Grounds of Appeal

16. It was submitted that the Magistrate's Court decision ignored submissions made by Mr Kemuel relating to Mr Nato's true bloodline being outside the Tamat lineage due to Ketty's pregnancy by another at the time of her marriage. Further, the Magistrate's Court had not taken into account the adoption by Tamat of Harry, which, it was submitted, was confirmed by the decision in Land Case No. 10/93.

17. The second issue raised was Mr Nato's belated claim of sanguinity to Tamat. It was submitted that when Land Case No. 93/10 was being litigated, Mr Nato had the opportunity and obligation to state his claim at that point in time. To make his claim some 16 years later was submitted to be impermissible.

18. The third ground of appeal raised was that the issue of bloodline was *res judicata*. The argument was put in this way: as the matter had been raised in Land Case No. 93/10 in the Supreme Court, the lower Court had no jurisdiction to reconsider the matter.

19. The fourth ground of appeal advanced related to Mr Kemuel's position as representative for Family Tamat. It was contended the Magistrate's Court was not addressed as to this aspect, and accordingly, it should not have given an opinion on the issue.

20. Finally, it was submitted that the Magistrate's Court was not asked to consider the restraint of the use of the name Tamat. To have done so, and made a restraining order to that effect, was submitted in those circumstances to be an abuse of power.

D. Discussion

21. The first ground of appeal holds no merit. It is a misunderstanding of the Magistrate's Court decision. The decision did not ignore Mr Kemuel's submissions. Instead, in light of the earlier finding by the Island Court that it did not accept Mr Kemuel's unsupported evidence, and with no further evidence being produced to undermine that finding by the Island Court, the Magistrate's Court did not accept Mr Kemuel's contention. In other words, Mr Kemuel's argument was considered, but not accepted.

22. The adoption of Harry by Tamat is not a finding made by the Island Court. Where it is referred to, is in a passage of the decision where Mr Kemuel's contentions are set out. There is nothing in the judgment which indicates the Court's support for a finding that such adoption actually took place.

23. The second ground of appeal has no substance. While Land case No. 93/10 was being litigated, Mr Nato was a witness to the proceeding only. Mr Kemuel had been assigned as the Family Tamat representative for the purposes of that litigation. That did not and cannot equate to his being the sole bloodline survivor of Tamat. There was no opportunity or obligation on Mr Nato to state his case earlier than he did.

24. The third ground of appeal confuses *res judicata* with lack of jurisdiction.

25. The doctrine of *res judicata* prevents disputes previously determined by the Courts from being re-litigated. In this case, the dispute between Mr Nato and Mr Kemuel has not previously been litigated.

26. In relation to lack of jurisdiction, what appears to have been overlooked by counsel for the appellant is that the Island Court was created, and has been legislated, to deal with matters of custom – the Supreme Court has not. The Island Court had jurisdiction to consider bloodline.

27. Lastly in relation to this ground, there has been no determination of the present dispute prior to the Island Court decision. What was submitted to be a statement of fact by Justice Aru in *Jonah v Kemuel* to the effect that Mr Kemuel is "...the last living descendant" is a misunderstanding of what is recorded. Justice Aru was simply recording that Mr Kemuel was the representative for the Tamat family. Justice Aru was in no position to make a definitive statement as to the competing claims of Mr Kemuel and Mr Nato as that was not a live issue before him and no evidence had been produced addressing that issue.

28. The fourth ground of appeal does not challenge a finding of the Magistrate's Court. It need be addressed no further.

29. The final ground advanced was the submission that the Magistrate's Court abused its powers when confirming the Island Court decision but substituting its orders for those of the Island Court without the issue having been addressed by counsel. Section 23(a) of the Island Courts Act [Cap 167] permits the Magistrate's Court to make any order the Island Court could have made. Accordingly, the Magistrate's Court had the jurisdiction to do what it did. That jurisdiction is not dependent on counsel raising the issue first.

30. Further, the substituted order does no more than elaborate of the effect of the order made by the Island Court. There is no merit to this ground of appeal.

E. Result

31. The appeal is dismissed.

32. Costs are to follow the event. I set them at VT 100,000. Mr Kemuel is to pay those costs within 21 days.

33. The matter now being unable to be further litigated, the Stay of Judgment granted on 18 August 2021 is at an end.

Dated at Port Vila this 5th day of January 2022
BY THE COURT

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Justice G.A. Andrée Wiltens

REPUBLIC OF VANUATU
COUR COURT
LEX SUPREME LEX
REPUBLIQUE DE VANUATU