

**IN THE SUPREME COURT
OF THE REPUBLIC OF VANUATU**
(Other Jurisdiction)

Land Appeal
Case No. 19/3025 SC/LNDA

BETWEEN: Family Naeiu Faelet
First Appellant

AND: Naih Nissinamin
Second Appellant

AND: Rakatne Tribe
Third Appellant

AND: Family Natuka Matua
Fourth Appellant

AND: Tom Numake
First Respondent

AND: Nawakai Kapatangtang
Second Respondent

AND: Katanek Mei Nemake Tuan
Third Respondent

AND: Family Iahlien Asul
Fourth Respondent

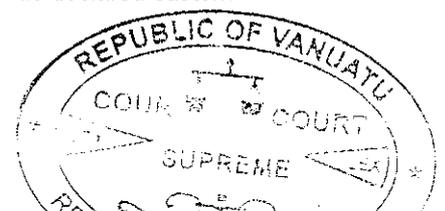
Coram: *Justice Dudley Aru*

Counsel: *Mr. R. Rongo (Family Naeiu Faelet)*
Mr. E. Macreveth for the Second Appellant (Naih Nissinamin)
Mr J. Mesao for the 3rd Appellant (Rakatne Tribe)
Fourth Appellant (Family Natuka Matua)
Mrs. M.G. Nari for the First Respondent (Tom Numake)
Ms J. Kaukare for the Second and Third Respondents (Nawakai Kapatangtang) and (Katanek Mei Nemake Tuan)
Fourth Respondent (Family Iahlien Asul)

RESERVED DECISION
(Application re: Apprehended Bias)

Background

1. This matter is an appeal from a decision of the Tanna Island Court (TIC) dated 30 October 2019 concerning Lengkowngen land at White grass area, Tanna. Tom Numake was declared custom



owner of the land in a previous decision and that is no longer an issue in this appeal. This appeal only concerns the rights of use and access to Lengkoungen land. During management of the appeal, the issue of apprehended bias was raised by the appellants.

2. The first appellant then filed an application on 20 August 2020 supported by a sworn statement of Tom Naieu, Sam Naiu lopil, Trenold Naieu and Charley Nangou. The orders sought in the application are:-
 - a) An order that the judgment of the TIC dated 30 October 2019 be set aside in its entirety;
 - b) An order that the matter be referred back to the TIC for re hearing before a differently TIC
 - c) Costs
3. The main ground is that the Court in the process of determining the rights of use and access of white grass land was biased.

Evidence

4. The evidence given in support by Sam Naieu lopil as the spokesman of the 1st appellant is supported by the evidence deposed by Tom Naieu, Trenold Naieu Charley Nangou.
5. Sam Naieu lopil deposes at paragraph 5 onwards that:

"

5. Long 23 October 2019 kasem 25 October hearing I complete mo Court I talem out long ol parties se long 28 October 2019 every party I mas locate mol boundaries mo ples blo access blong olgeta within long long Lenkougen land long wan white board long open Court. Every party I kat right blong askem kwesten long each other kasem time oli agree long ol boundaries blong olgeta.

6. Long 28 October 2019 ol parties oli attendem Court blong locate mol boundaries blong olgeta long white board long open Court be ino kohed mo Court I talem outse bai I adjourn I ko long namba 30 October 2019.

7. Long 30 October 2019 every party I kam long Court . Magistrate mo ol justice I stap insaed long chamber blong Magistrate mo oli singaotem two (2) parties nomo blong go insaed long chamber.

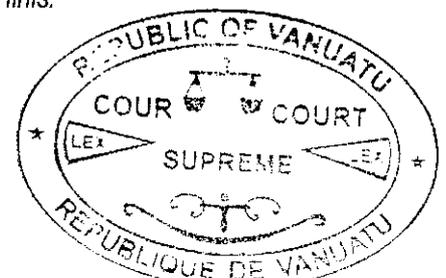
8. Mi representem Family Naih Nissinamin mo Pastor Mark lalien I representem Family lalien Asul I go inside fes wan. Taem mitufala I go inside mi sek long Tom Numake mo Merian Numake I stap sitaon inside wetem Magistrate moo I justice be clerk ino stap.

9. Court I askem mifala blo locatem boundary blong ol parties we mitufala I representem long wan white board we I stap long chamber nomo.

10. Mi locatem boundary blong mifala long white board ia mo Pastor Mark I agree long hem. Afta long hemia mitufala I kam aotsaed be Tom Numake mo Merian Numake I remain nomo I stap long chamber blong Magistrate.....

6. Tom Naieu deposed the following:

8.Tufala fes wan hemi spokesman blong mifala Sam Naieu lopil wetem mo Pastor Mark Ialien I ko insaed.
9. After we tufala I finis Erick Ialulum o Charley Nangou I go insaed.
10. Taem tufala I finis Naieu Failet mo Philip lala I go insaed .
11. After long hemia Merian Numake I kam aotsaed mo hem mo Rex Iapen we oli related family I gio insaed be Tom Numake I stap insaed nomo.
12. After long hemia Philip lala hemi go insaed bakeken mitim ol justices, Magistrate, Tom Numake , Merian Numake mo Rex Iapen.
13. Mi observem we Philip, Rex Iapen mo Merian Numake I kam aotsaed long Court Haos .
14. Mi observem Teriki blong White sand I drivem truck I kam long door blong Court haos mo deliverem kakae. Mi luk clerk blo Island Court Blandine Tebi mo VMF Samson Nipau I tekem kakae I go insaed long chamber blong Magistrate we Magistrate , justices mo Tom Numake I stap .
15. Taem mi luk se olgeta oli stap insaed long taemmi ko luk VMF Samson Nipau mo askem hem about wanem I stap happen insaed be hemi se door lock.
16. Mi kam narasaed long op'len Court closap nara door we I go insaed mo luk clerk blo island Court Blandine Tebi mo askem lo hem se wanem I stap happen insaed .Hemi talem long mi se "samting ia I wrong finis" mo afta long hem mi narasaed long door we VMF I stap long hem mo luk clerk blo Magistrate Court Gloria Kuaumo askem hem se from wanem I tekem long taem olsem , hemi talem long mi se "samting ia I wrong finis". Mi kam luk ol parties blong mi bakeken mifala I wait aotsaed.
17. Afta long hem mi luk Tom Numake I kam aotsaed mo toktok long mifala se bai long 2 o'clock pm long aftanun bambae Court I deliverem judgment blong hem.
18. Mi surprise taemhemi talem time ia from hemi no shud talem from hemi duty blong clerk blong Court blong talem timing blong delivery blong judgment.
19. Taem mifala I go blong delivery blong judgment mo judgment I no kamaot yet ol parties ia I kat Tom Numake family, family Ialien Asul mo family Philip lalao li line mol truck vinis from oli save decision finis.

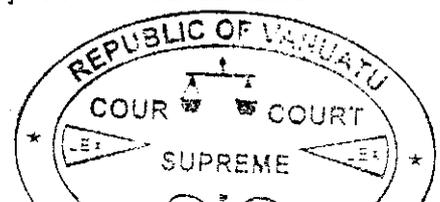


20. *Mifala wetem family I stap wet yet long judgment Philip lala I bin talem out long ol family blong hem se oli mas glad mo happy from oli win finis.*
21. *Bifo judgment I kamaot justice Lomai William I kam out bakeken mo askem nara nem blong Naieu Faillet . Mi wantem talem out se hemia ino folem process blong Court from every samting I finis finis .*
22. *Taem decision I kamaot long favour blo ol parties ia ol truck is oli whistle folem olgeta.*
23. *Mifala I out long truck blong mifala istap go back long haos mifala I witnessem bigfala celebration we oli bin preperem in advance from Tom Numake, Merian Numake Tuan mo Rex lapeni bin stap insaed wetem ol justices wetem Magistrate mo oli save decision finis .*
24. *Mi wantem talem out long Court se Mr Tom Numake wetem family blong hem olsem Merian Numake , Rex lapen, I bin influensem decision blo Court. Philip lalat u I bin influensem decision blo Court.*
25. *Mi wantem talem out se taem ol justices, Magistrate mo Tom Numake I grup together mo kakae tugeta hemi wrong from judgment ino kam out yet*

7. Trenold Naieu and Charley Nangou's evidence confirm what is said by Tom Naieu.

Submissions

8. The first respondent denies any apprehended bias on his part. It was submitted by Mrs Nari that Mr Tom Numake and Merian Numake attended the chamber upon the request and direction of the Court to confirm the names and locations of land already written out and discussed in the 1973 Native Court judgment and all the parties knew that Tom Numake and family are the custom owners of lengkowngen custom land.
9. Next it was submitted that the TIC was entitled to have lunch at its own office. The lunch was not provided by Tom Numake but was organised by Island Court clerk. It was also submitted that if Tom Numake was celebrating in 2019, it was his right to do so.
10. It was submitted that the case of the first respondent is distinguished from Matarave case as Tom Numake was the declared custom owner of Lengkowngen custom land since 1973. Furthermore, the case before the TIC only related to secondary rights of use so the presence of Tom Numake was important to confirm the claims. It was submitted that the learned Magistrate was properly assisted by justices Nieru, Sam and Lomai and there were no objections to their participation in the first place.
11. It was finally submitted that Tom Numake was not participating as land claimant as he was the declared custom owner therefore the application alleging bias has no basis and should be dismissed.
12. For the second appellants, Mr Mcreveth submitted the first respondent and the Court are bound by the test for apprehended bias set out in Matarave v. Talivo [2010] VUCA 3. It was submitted



that the parties as lay observers had developed an apprehension in their mind when witnessing the process followed by the Court as not being a fair process. It was submitted that the rest of the parties could not be left out of the Court and allow the Court and the first and second respondents decide the outcome of their rights of access. It was submitted that the outcome of the identification process over rights of use and access was made in favour of other parties such as family Katanek Mei who is a surviving bloodline of Tom Numake's father lalamei.

13. Next it was submitted that by way of comparison there was no fairness in the proceeding in that it was questionable why the same relief was not granted to the appellant.
14. Mr Mesao on behalf of the third appellant submitted that Tom Numake and his daughter in law had extended exclusive access to the Court members during the whiteboard session and lunch while other parties were excluded. It was submitted that a fair-minded observer might reasonably apprehend that the Court's impartiality could be compromised in this case.

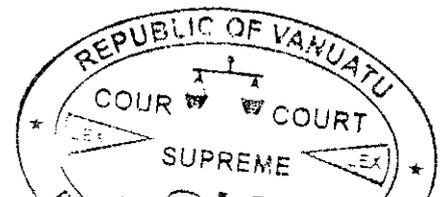
Discussions

15. The parties were heard on their oral submissions. However, they indicated to the Court that they wanted to file written submissions for consideration before a decision is given. Each party was then allowed time to file their written submissions.
16. At the outset, Tom Numake was a party in the proceedings before the TIC and he was named as the original claimant. The TIC recognised that Tom Numake was the declared custom and the matter before the TIC was for determination of secondary rights and rights of use of the other parties. The first respondent does not deny that he and Merian Numake were present with the court in chambers to the exclusion of others for a period of time. Second, Mr Numake does not deny that lunch was had by the Court when he and Merian Numake were present in chambers with the Court to the exclusion of others.

17. In *Matarave v Talivo* [2010] VUCA 3, the Court of Appeal said:-

"where a suspicion or apprehension of apparent bias is said to arise from particular circumstances, the test is an objective one. The test requires the Court's assessment of the perception which the circumstances would give rise to in the mind of a fair minded lay observer informed of the facts. The test is to be applied at the time when the circumstances arose. The test is not one to be applied after the judgment is delivered and with knowledge of the outcome of the case. In the matter before the Court, the test must be applied to the facts as they existed when the celebration to open the church concluded, and without taking account of which party succeeded or failed. If a fair minded observer at that time would have reasonably apprehended the judge might not bring an impartial mind to the resolution of the case, it is not to the point to explore whether the outcome of the case adds weight to that apprehension. Indeed, this would be an impossible exercise as the possible effect of relationships, gifts and improper contacts could influence the decision maker in a myriad of ways either consciously or, more relevantly, subconsciously.

18. The facts in *Matarave* are distinguished from the current case.
19. The test for apprehended bias is an objective one and is to be applied at the time when the circumstance arose before judgment was given. The circumstances are that all four (4) witnesses



state that all the parties were informed by the Court that on 28 October 2019 a white board would be put in open court for all the parties to attend and to indicate their claimed boundary and they will be subject to questioning.

20. On 28 October 2019 when the parties attended Court, they were informed that the matter was adjourned to 30 October 2019.
21. On 30 October 2019 when the parties again attended Court, the Court sat in chambers with Tom Numake and Merian Numake and they called parties to enter the chamber two at a time. When the parties left Tom Numake and Merian Numake continued to remain with the Court in chambers until all the parties had been called. At lunch time, when the food was brought into chambers, Tom Numake and Merian Numake continued to remain in the chambers with the Court and the doors were locked with only the court and Tom Numake and Merian Numake in the chambers. Later Tom Numake came outside to announce to the parties that the decision will be given at 200pm in the afternoon.
22. Having considered these facts, I conclude that a fair-minded lay observer at that time would have reasonably apprehend that the Court would not bring an impartial mind to the resolution of the case.

Result

23. The claim for apprehended bias is made out. I now make the following orders: -
 - a) The decision of the TIC dated 30 October 2019 is declared void.
 - b) The matter is returned to the Island Court to hear the matter a fresh by a differently constituted TIC.

DATED at Port Vila this 26th day of January, 2026

BY THE COURT

Dudley Aku
Judge

