

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

**CIVIL LAND APPEAL CASE NO. 19 OF 2012**

**BETWEEN:**           **FAMILY KALTANGO TARIMIALA**  
*Appellant*

**AND:**               **FAMILY KALTOAMALAS**  
*First Respondent*

**FAMILY SONGORIKI**  
*Second Respondent*

**FAMILY LAKELEO TAUA**  
*Third Respondent*

**FAMILY MALAS NIWANGO**  
*Fourth Respondent*

**FAMILY MASAU VAKALO**  
*Fifth Respondent*

**FAMILY TARAVAKI**  
*Sixth Respondent*

**FAMILY THERESA ANATU**  
*Seventh Respondent*

*Coram:*       Hon. Justice Bruce Robertson  
              Hon. Justice John von Doussa  
              Hon. Justice Oliver Saksak  
              Hon. Justice Robert Spear  
              Hon. Justice Dudley Aru

*Hearing:*     10 July 2012

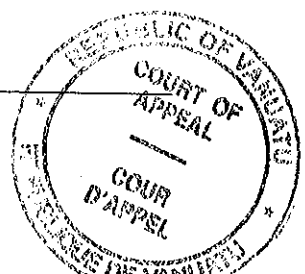
*Counsel:*    Appellant:       George Nakou  
              First Respondent:   Steven Joel  
              Second Respondent:   No appearance (Saling Stevens)  
              Third Respondent:    No appearance (James Tari)  
              Fourth Respondent:   Silas Hakwa  
              Fifth Respondent:   Jack Kilu  
              Sixth Respondent:   Bill Bani  
              Seven Respondents: John Timakata

*Decision:*   19 July 2012

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**JUDGMENT OF THE COURT**

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### *Introduction*

1. This is an appeal primarily against a decision of the Supreme Court to dismiss an interlocutory application by the appellant “*for disobedience of a Court order*” although there are wider issues that arise.

### *Background*

2. This case relates to claims for customary ownership rights in respect of (what was generally described as) PONATOKA land near Mele. Those claims have had a somewhat troubled past since they were commenced in 1993. While it is necessary to have some regard to the history to the attendant customary land issues, a relatively brief summary will suffice.
3. As this is an appeal against an interlocutory order, leave is required for the hearing of this appeal.

#### *The First Efate Island Court Case<sup>1</sup>*

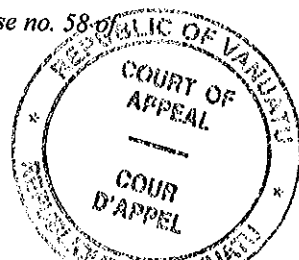
4. Claims were brought in the Efate Island Court in 1993 by seven separate families. The first Island Court that was convened to hear the case did not hear any of the claims but rather dealt with a preliminary point that had been raised. That preliminary point related to the status of one of the parties who was referred to by the Efate Island Court as “the original land claimant”. The outcome of that particular consideration was the dismissal of the entire proceeding. It was immediately appealed by three of the parties.

#### *The First Supreme Court Appeal<sup>2</sup>*

5. The appeal to the Supreme Court was successful. The Chief Justice (sitting with two custom advisers) set aside the decision of the first Efate Island Court and remitted the case to be reheard by a differently constituted Island Court.

<sup>1</sup> *Family Leipoe Kaltoma Malas and other Families; Efate Island Court Civil Case no. 6 of 1993*

<sup>2</sup> *Family Kaltapang Malastapu v Family Kaltongo Marapongi & Ors Supreme Court, Land Appeal Case no. 58 of 2004 (14 September 2009)*



*The Second Efate Island Court Case*<sup>3</sup>

6. In a decision given on 2 March 2010, the Island Court made a number of declarations as to custom land ownership rights and interests. That decision was appealed to the Supreme Court.

*The Second Supreme Court Appeal*<sup>4</sup>

7. In the Supreme Court, the Appellant Family Kaltonga Tarimiala (represented then and now by Mr Nakou) applied for the abovenamed 2<sup>nd</sup>, 3<sup>rd</sup>, 5<sup>th</sup>, 6<sup>th</sup> and 7<sup>th</sup> Respondents (the same designation as to parties in the Supreme Court as here) to be struck out of the Supreme Court appeal proceeding. This application was advanced essentially on the grounds that those five parties had not participated in the first Supreme Court appeal and that the decision of the Supreme Court on that appeal prohibited their participation in both the second Efate Island Court case and, by extension, the second Supreme Court appeal.
8. The application was struck out by the Supreme Court on 16 May 2012. That order simply appears as follows:

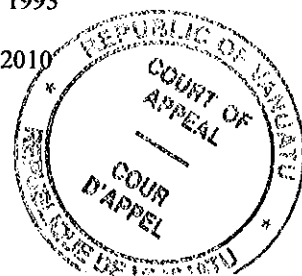
*“Mr Nakou’s application is dismissed for disobedience of Court Order”*

9. A judicial conference was listed before Fatiaki J on 13 April 2012. We are informed by counsel that the conference was late starting as the Judge was delayed. The six counsel in attendance decided, in the absence of the Judge, to leave on the basis that they would request a date for a new conference. Only Mr Kilu was present when the Judge returned.
10. The record made by Fatiaki J on 13 April 2012 suggests that six counsel were present and that only Mr Joel (for the 1<sup>st</sup> respondent) and Mr Timakata (for the 7<sup>th</sup> Respondent)

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<sup>3</sup> Family Kaltoa Malas v Family Kaltonga Tarimiala & Ors: Efate Island Court, Land: Kes Namba 6 of 1993 (2 March 2010)

<sup>4</sup> Family Malas Niwango v Family Kaltonga Tarimiala: Supreme Court, Land Appeal Case No. 02A of 2010

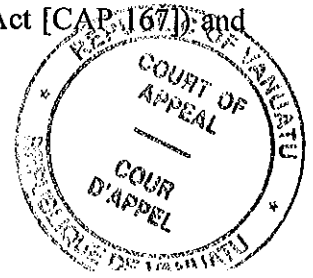


were absent. However, the record is not entirely clear in that respect and it may be that the list of counsel is more a distribution list rather than a note of counsels' attendance.

11. It is important for judges to ensure that the record made of conferences or hearings, whether by way of minutes or decisions, specify not only the date of the conference or hearing but also who represented each party at the conference or hearing. If a party was unrepresented then that should be specified as well.
12. Mr Nakou's application had already been served on all the other parties by the time of the conference on 13 April 2012. That would have been explained to Fatiaki J if the conference had proceeded as originally planned. The "unless" order left Mr Nakou understandably uncertain as to the need for his application to be served again.

***Consideration***

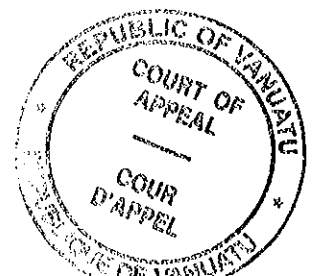
13. It is not clear what reasons might have been behind the summary dismissal of Mr Nakou's application. No reasons were given except that it was for, "*(the) ... disobedience of Court Order*". The only court order that we have been able to identify as relating to the application is that recorded as being made on 13 April 2012 requiring service and proof of service. In those circumstances, we are inclined to treat this dismissal of the application as a misunderstanding from which the Appellant should not suffer.
14. However, as leave to bring this appeal is required, we have to consider whether this application (to strike out those five parties from the Supreme Court proceeding) had any prospect of success if it had, indeed, been heard.
15. The second Efate Island Court determined the case before it having regard to claims from a total of eight claimants; being the seven claimants from the first Efate Island Court case and the abovenamed 7<sup>th</sup> Respondent, Family Theresa Anatu.
16. Mr Nakou informs us that objection was taken in the second Efate Island Court to the court hearing claims from any of the parties who did not participate in the first Supreme Court appeal. That, at least, is his understanding as the claimants were not entitled to be legally represented before an Island Court (s. 27 Island Courts Act [CAP. 167]) and



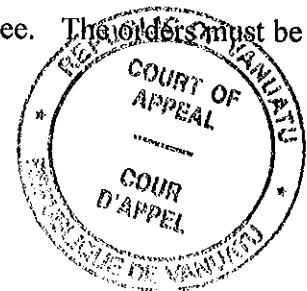
so Mr Nakou was not present. Our perusal of the decision of the second Efate Island Court does not identify any ruling on such an objection or even any mention of it. It is clear that the second Efate Island Court considered and determined all eight claims before it and so it can be safely accepted that the objection, if made, was overruled.

17. This is the background to the interlocutory application to the Supreme Court by the Appellant to have the 2<sup>nd</sup>, 3<sup>rd</sup>, 5<sup>th</sup>, 6<sup>th</sup> and 7<sup>th</sup> Respondents removed from the appeal and which application is the subject of this appeal.
18. If the application had been allowed, it would have left the appeal in the Supreme Court to be determined just between the Appellant, the 1<sup>st</sup> Respondent and the 4<sup>th</sup> Respondent notwithstanding that the decision under appeal determined claims from eight claimants. That made this a somewhat novel application. It sought to deny certain parties to the second Efate Island Court case the opportunity to be heard in the appeal that followed. If the objection was to the participation of certain parties in the second Efate Island Court case then that should properly have been a point for the substantive appeal.
19. The application was quite misconceived in that it attempted to restrict who could be heard on the appeal rather than who was entitled to be heard by the second Efate Island Court. It is fundamental to any notion of justice that all the parties to a case are entitled to be heard on any appeal arising from a decision in that case absent extraordinary circumstances.
20. The wider issue raised by Mr Nakou is whether the decision of the first Supreme Court appeal restricted the second Efate Island Court as to the claims that could be considered or the parties that could be heard.
21. The application was stated to be based on the orders made in the first Supreme Court appeal. Mr Nakou advanced his appeal in this respect in these terms,

*“the Supreme Court of September 14, 2009, prevented the so-called parties by making orders to the effect that (the) custom ownership issue ... pertaining to the so called parties is no longer pending be for the Efate Island Court”.*

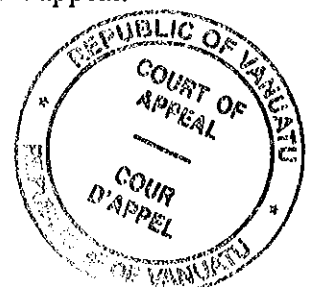


22. Mr Nakou's argument is those parties who did not participate in the first Supreme Court appeal were prohibited from participating in the second Island Court case by the orders made by the Chief Justice in the first appeal decision.
23. The orders made by the Chief Justice in his decision of 14 September 2009 are as follows:
1. *The Court declares that the Judgment made by the Efate Island Court on 13 July 2004 to dismiss or strike out the Appellants' claims for custom ownership of the land which is the subject to the Appeals is set aside.*
  2. *The Court declares that the Appellants' claims for custom ownership of the land which are the subject to the appeals are valid and still pending determination.*
  3. *The Land Case No.6 of 1993 is remitted back to the Efate Island Court differently composed to re-hear the case as soon as possible.*
  4. *Each party to bear their own costs.*
  5. *The Interim Orders made on 19 December 2006 in Land Appeal Case No. 58 of 2004 are still alive and continued until determination of Ponatoka Land.*
  6. *Family Malasikoto, Family Elmu Labua Kaltamate and Family Lakeleotaua Nakmau in Efate Island Court Land Case No. 01 of 1997 are informed about Order 5 above and notified about the same. Mr Felix Laumae, counsel for Family Malasikoto, Mr George Frederick Boar, counsel for family Elmu Labua Kaltamate and member of the Family Lakeleotaua Nakmau and their representatives are informed about the same and shall be bound by this order".*
24. We are unable to see how any of the orders could have the effect that Mr Nakou urges on us. Indeed, order 3 remits the case back to the Efate Island Court to be re-heard. That can only mean, at least, a re-hearing of the claims that were originally before the first Efate Island Court which included the claims of the 2<sup>nd</sup>, 3<sup>rd</sup>, 5<sup>th</sup> and 6<sup>th</sup> Respondents.
25. Mr Nakou placed considerable reliance on order 2 and argued that this should be read as a direction that only those parties who were "appellants" in the first Supreme Court appeal (the Appellant, the 1<sup>st</sup> Respondent and the 4<sup>th</sup> Respondent) had valid claims for consideration by the second Efate Island Court. We do not agree. The orders must be



considered in the context of the appeal that was before the Chief Justice. That was just in respect of that preliminary point that saw the whole Island Court proceeding dismissed. At no stage did the Chief Justice enter into a consideration of the merits of the various competing claims as to custom ownership that were before the first Efate Island Court. Without such a consideration of the merits of the competing claims, it is difficult to see how the Supreme Court could attempt to restrict the rehearing in the manner suggested.

26. The position of the 7<sup>th</sup> Respondent may be somewhat different to the other parties as it alone did not participate in the first Efate Island Court case. We do not know why the 7<sup>th</sup> Respondent did not advance a claim before the first Efate Island Court in time for the hearing in 2004. It may have had something to do with the original claim being commenced in 1993 but not heard until 2004. It may also have had something to do with the land being considered as all PONATOKA land whereas the 7<sup>th</sup> Respondent's claim was for ILAMA land that was found by the second Efate Island Court to have a common boundary with PONATOKA land.
27. We also do not know why the second Efate Island Court received and considered the 7<sup>th</sup> Respondent's claim except that this late arrival appears to have passed without comment having regard to the decision of the second Efate Island Court.
28. We know of no absolute barrier to the 7<sup>th</sup> Respondent taking advantage of the claim as to customary ownership being returned for rehearing and then joining that proceeding. Such joinder would primarily be a matter for the discretion of the second Efate Island Court which was presided over by a Senior Magistrate and three Island Court Justices. It must be of some significance; however, that the second Island Court considered a detailed claim by the 7<sup>th</sup> Respondent, supported by evidence, and declared that the 7<sup>th</sup> Respondent was the custom owner of ILAMA land which it determined was land that shared a common boundary with PONATOKA land. Furthermore, that any rights asserted by the 2<sup>nd</sup> 3<sup>rd</sup> or 5<sup>th</sup> Respondents over ILAMA land were subject to the those rights of the declared custom owner; that is, that they would be secondary rights in the sense given to that term by the Chief Justice in the first Supreme Court appeal.



**Conclusion**

29. We accordingly consider that the application to the Supreme Court to strike out the 2<sup>nd</sup>, 3<sup>rd</sup>, 5<sup>th</sup>, 6<sup>th</sup> and 7<sup>th</sup> Respondents from the appeal proceeding was misconceived and that it had no prospects of success. In all those circumstances, leave to appeal is refused.

**Costs**

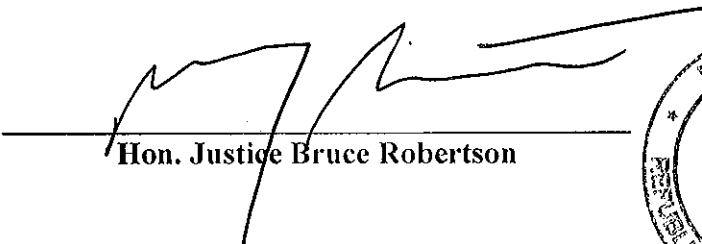
30. We note that the appeal was supported by the 1st and 4th Respondents and so they are not entitled to costs on this appeal.

31. The Appellant will meet the costs of the 2<sup>nd</sup>, 5<sup>th</sup>, 6<sup>th</sup> and 7<sup>th</sup> Respondents on the standard basis to be agreed or taxed.

32. Mr Stephens (for the 2<sup>nd</sup> Respondent) did not appear at the appeal hearing and we understand the pressing circumstances that had required him to be overseas at that time. The 2<sup>nd</sup> Respondent is entitled to costs on this basis for such work that was undertaken by Mr Stephens in preparation for the appeal.

33. The 3<sup>rd</sup> Respondent did not participate in the appeal and it is not entitled to costs.

**BY THE COURT**

  
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Hon. Justice Bruce Robertson

