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**IN THE SUPREME COURT OF  
THE REPUBLIC OF VANUATU**  
(Land Appeal Jurisdiction)

**LAND APPEAL CASE No.58 OF 2004**

**BETWEEN:** **FAMILY KALTAPANG MALASTAPU**  
**First Appellant**

**AND:** **FAMILY KALTONGO MARAPONGI**  
**First Respondent**

**AND:** **FAMILY SONGORIKI**  
**Second Respondent**

**AND:** **FAMILY LAKELEO TAUA**  
**Third Respondent**

**AND:** **FAMILY MASAU VAKALO**  
**Fourth Respondent**

**AND:** **FAMILY TARAVAKI**  
**Fifth Respondent**

- *Mr Silas Hakwa for First Appellant, Family Kaltapang Malastapu*
- *Ms Christina Thyna for Second Appellant, Family Kaltoamalas*
- *Mr George Nakou for Third Appellant, Family Kaltongo Marapongi Tarimiala*
- *Mr Bill Bani for Respondent, Family Taravaki*
- *Mr Saling Stephens for Respondent, Family Songoriki*
- *Mr Jack Kilu for Respondent, Family Masao Vakalo*
- *Mr Nakmau Sambo representative of Family Lakeleotaua*

**Coram:** Chief Justice Vincent Lunabek

**Custom Advisers:**

- Chief Peter Masongo Mapula
- Chief Jimmy Kas Kolou

**JUDGMENT**

These are three Notices of Appeal filed by the following Appellants: Family Kaltapang Malastapu, Family Leipoe Kaltoamalas and Family Kaltongo Marapongi Tarimiala against the Judgment of the Efate Island Court (EIC) made on 13 July 2004 over the custom land of Ponatoka in the Land Case No.06 of 1993.



On 13 July 2004, the EIC made the following Orders:

- “1. Forom se ino kat any Original Claimant, nao inok any claim therefore Kot i nao sakem aot kes ia without any cost.  
[Because there is no Original Land Claimant, there is no claim therefore the Court dismiss the claim without costs.]
2. Folem sekson 22 blong Aelan Kot Act [CAP.167] patis oli kat 30 deis blong appeal sapos oli no hapi long decision ia.  
[Parties have 30 days to appeal if there are not happy with this decision by virtue of Section 22 of the Island Court Act [CAP.167]”.

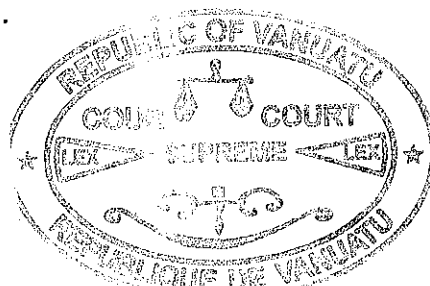
It was against these orders that the appellants filed their notices of appeal.

The brief facts show that Leipoe Kaltoamalas lodged a claim in the Efate Island Court in 1993 claiming the customary ownership of the land called Ponatoka on behalf of her father. The claim had been advertised by the Clerk of Efate Island Court following Rule 8 of Order 6 of the Island Courts (Civil Procedure) Rules 1984. That rule requires that once a land claim is filed, the clerk of the Island Court must put a Public Notice advising the public that a claim has been received by the Court and that any person who considers that he or she has **“an interest”** in the said land in the proposed cause shall apply to the Court to be joined as plaintiffs or defendants, as the case may be. [Emphasis added].

Following the Public Notice, six other plaintiffs filed their claims to the cause (land).

The Efate Island Court (EIC) listed the land claim for hearing on 5 July 2004. On 5 July 2004, the EIC held a conference with all the parties in the land claim. At the conference, the Court identified and considered the following issues:

1. The custom to be applied.
2. The files of each claim with:
  - (a) the statements of witnesses
  - (b) the family tree of the parties.



3. The EIC gave directions to the parties and adjourned the case.

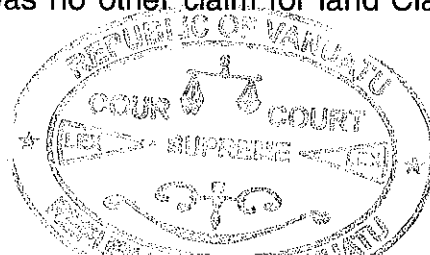
At page 3 of its judgment, the EIC recorded that on the basis of information the Court received from the parties, the custom to apply to the land in dispute is the custom based on patrilineal system. That is a custom based on male bloodline relationship. The custom based on the bloodline of woman (matrilineal) or Naflak is not the right custom to apply in determining the custom ownership of the land in dispute.

This was reconfirmed in the Judgment of the EIC in paragraph 2 at page 5 of the EIC judgment of 13 July 2004.

It was recorded in the judgment of the EIC (at page 4, para.6) that the Justices discovered that two families have the same family trees. The two (2) families are the Original Claimants – Family Leipoe Kaltoamalas and Land Claimant No.4 – Family Kaltapang Malastapu. The EIC found that the family trees of the two parties show that Malastapu married with Leipoe. The representative of the Family Leipoe Kaltoamalas is the daughter of Leipoe and Malastapu. Leipoe (the daughter) was given the name of her mother (Leipoe) who is the wife of Malastapu. Leipoe (the daughter) married with one Delarue Guy, (a French man). The EIC said although Leipoe Delarue has some brothers, she claimed under the name of Leipoe instead of claiming under the name of Malastapu.

The EIC stated it had to decide whether or not to accept the claim of the Original Claimant made under the name of Leipoe which followed a matrilineal line.

At page 5 of its Judgment, the EIC made a ruling that it cannot accept the claim of the Original land Claimant. The reason being that the Original Claimant cannot claim in the name of Leipoe but she must join with Family Malastapu, Claimant No.4 to lodge the land claim. The EIC attempted to join the Original Claimant with the Land Claimant No.4. It was unsuccessful. The EIC, then, ruled that Family Leipoe Kaltoamalas could not stand as a Claimant in this land case. Subsequently, the EIC ruled that because there was no Original Claimant after its ruling, there was no land claim and there was no other claim for land Claimants



Nos.1, 2, 3, 4, 5 and 6 to counterclaim, therefore, the EIC struck out the land case over Ponatoka land.

The three Appellants, then, filed their Notices of appeal against the EIC Judgments of 13 July 2004. After discussions with counsel and parties, they agree on the following common grounds:

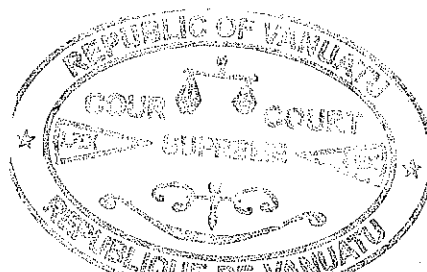
- (a) That the EIC has misdirected itself in purporting to dismiss or strike out the Family Leipoe Kaltoamalas, original Claimant for the custom ownership of the whole land in dispute.
- (b) That the EIC has misdirected itself in holding that as there is now no original Claimant following its ruling, it automatically follows that there is no other claims before the Court to consider, determine and/or try.
- (c) That the EIC was wrong in law in purporting to dismiss or strike out the Appellant's claim in land case No.06 of 1993.

The Court considers the submissions and arguments of each and all the parties. The Court peruses and considers the sworn statements filed in support of each and all parties. The custom advisers provide advice as to custom ownerships rights and other secondary rights or interests in customary land in the area of land. The Court provides the following answers to the issues raised in the appeal.

As to the first ground of appeal, Family Leipoe Kaltoamalas filed a claim claiming for custom ownership of Ponatoka land.

The first challenge under the first ground of appeal is whether or not a woman can file a land case claiming for the land of her father. The second is whether a woman can claim the land of her father under her own name.

Under Chapter 12 of the Constitution, all land in the Republic of Vanuatu belongs to the indigenous custom owners and their descendants (Article 73). The Rules of



custom shall form the basis of ownership and use of land in the Republic of Vanuatu (Article 74).

By perusing the provisions of Articles 73 and 74 of the Constitution, a woman can file a land case claiming customary ownership of the land of her father as one of his descendants. A woman can claim the customary ownership of her father's land under her own name as the bloodline descendant of her father.

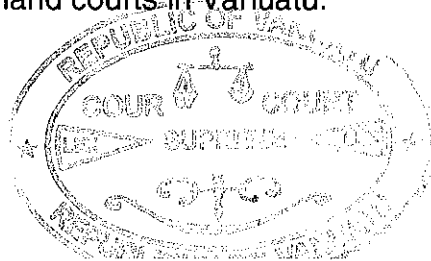
There is nothing wrong in law for Leipoe to file a claim claiming the customary ownership of the land of her father being it in her own name. The rules of custom of the land in dispute will determine **its ownership and use**. [Emphasis added].

What is wrong in the Judgment of EIC is that after the EIC realised that the Land Claimant No.4 (Family Malastapu) refused to join their claim with the Original Claimant (Family Leipoe Kaltoamalas) the EIC dismiss the claim of the Original Claimant without giving an opportunity to hear their case.

Whether the Original Land Claimant has a strong or a weak case is irrelevant. The EIC cannot dismiss her claim without hearing her side of the case.

Before this Court, there was material evidence of Malastapu, the common ancestor of the Original Claimant (Leipoe Kaltoamalas) and the land Claimant No.4 (Family Malastapu) of having two (2) sons. Kaltoamalas Malastapu, the father of Leipoe Kaltoamalas (representative of Original Claimant) and Kalorong Malastapu, the father of Kaltapang Malastapu (Land Claimant No.4). There was a dispute between the 2 parties as to who was the first born son. These are matters of evidence for the EIC to determine instead of summarily dismissing the claim of the Original Claimant. In this case, the Original Claimant has a cause of action. The similarities in Family trees would not justify dismissal of the Original Claimant. The Original Claimant must have an opportunity to explain what is the basis of their claim. The EIC's requirement that the Original Claimant and the Counter-Claimant No.4 come together as one party does not justify a dismissal of the Original Claimant's claim.

What follows is some assistance to the land courts in Vanuatu.



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The customary land disputes in the Courts of Vanuatu show that absolute ownership of land is the greatest interest in land recognised by the customs of different Islands and areas of Vanuatu. However, they reveal also that custom ownership is not the only interest in land. There are other interests in land than customary ownership interest which are recognised by the customs of Vanuatu. A member of a land-owning group, family or clan or community has a custom interest to use, occupy or reside and make gardens on the land. That custom right include taking fruits from trees on the land, water and Salt and fishing and to cut trees for houses and pass across the land. These rights are also recognised to a person who is married to a member of land-owning family or group. These rights are described as usufructuary rights or secondary rights.

Land courts established through out the country have to bear in mind that when dealing with customary land disputes after determining the customary ownership interests, they must also consider and determine the existence of the secondary rights on the land in dispute. This is important for three (3) reasons:

First, to set the extent and scope of the secondary rights within the traditional purposes and customary limits vis-à-vis the primary ownership rights. Second, to limit future internal disputes between the declared custom owners and other members of the land-owning families, groups, tribes or communities and others. Third, to develop a consistent body of customary law on the land in accordance with [Chapter 12 of the Constitution – Land: Articles 73, 74, 78(2), 79(2) and 81] and the land courts legislations and rules (when relevant).

This approach allows the land courts to have wider and better understanding of the customary law and concepts on the customary lands in Vanuatu in the performance of their duties. It will assist the land courts to discover, apply and make declarations of the applicable relevant rules of custom concerning the form of ownership of customary land whether the form of ownership is individual or family/group or communal. If it is a group (family) or communal ownership whether the members of the group or community own joint individual interests in the land



where the group or community is located. What is the basis of their relationship to ownership interest? Blood relationship which means that they all related by blood, having descended from a common ancestor or tribes relationships or titles in the land in question (or both of these).

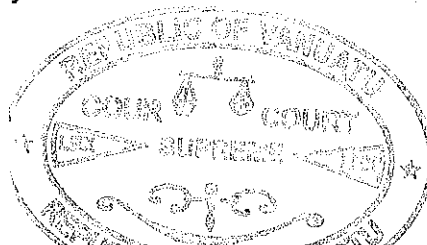
If it appears that only some members of the group/family or community, according to custom, have rights to ownership of that land, are both male and female legitimate descendants of the original owners have equal rights or only male or female legitimate descendants of the original owners are regarded as having ownership rights.

If the relevant custom is that only male (or female) legitimate descendants of the original owners are entitled to customary ownership of land, the relevant land courts must determine whether or not other legitimate descendants have some custom rights other than customary ownership interests. The same exercise must be done for illegitimate and adopted children in relevant land cases.

If the relevant custom is that individuals have rights to customary ownership of land, according to custom, the relevant land courts must declare so in accordance with the relevant custom rule. It is important to note that some land cases before the courts reveal that customary land is attached to a chiefly title, and the holder of a chiefly title has power under custom to determine what is done with the land attached to his (or her) title. Land courts may appreciate that the power is a very different thing from beneficial ownership. The land courts may appreciate in relevant cases that a chief holding land under his unlimited customary administrative powers, may hold the land in the capacity of trustees of his people but not for his personal benefit. The chief may have rights of control rather than ownership rights.

Apart from the form of customary ownership, the land courts are also confronted with the basis of rights in custom to ownership of land.

The land courts may inquire in relevant cases as to the method of land acquisitions and transfer of customary interests in land. Discovery or original



occupation of land constitutes each a basis of the rights in custom to ownership of land. Inheritance, that is, succession to the original owners is another. The land court must determine the relevant custom for succession. The land courts must consider (when relevant) whether succession is based on patrilineal system (only male children to succeed to their father's interests) or matrilineal (only female children to succeed to their mother's interest or ambilineal (children succeed to both either their mother or father's interests or bilineal (children succeed to both their father and mother).

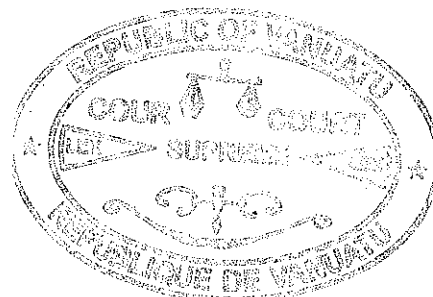
The land courts must also consider (when relevant) whether all children descendants are treated alike or whether the relevant custom makes ranking priorities between oldest and younger children; male children and female children; legitimate and illegitimate children; natural and adopted children; adopted children within the family or adopted children outside the family.

On the second ground of the appeal, the Court held that EIC misdirected itself in holding that as there is now no original Claimant following its ruling, it automatically follows that there is no other claims before the Court to consider, determine and/or try.

On the third issue, the Court held that EIC was wrong in law in purporting to dismiss or strike out the Appellants' claim in Land Case No.06 of 1993.

The three appeals are allowed and the Court makes the following Orders and Declarations:

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 of the Appeals is set aside.
2. The Court declares that the Appellants' claims for custom ownership of the land which are the subject of the appeals are valid and still pending determination.

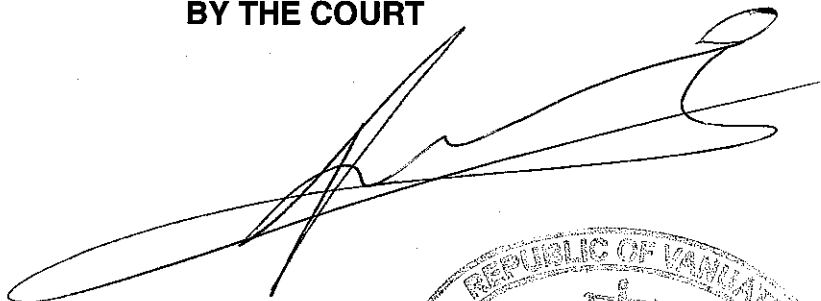




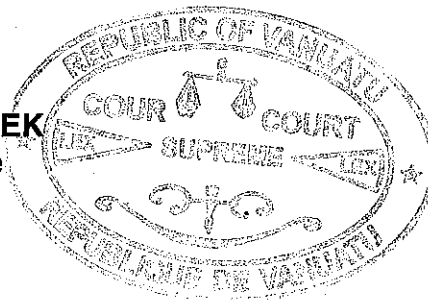
3. The Land Case No.06 of 1993 is remitted back to the Efate Island Court differently composed to re-hear the case as soon as possible.
4. Each party to bear their own costs.
5. The Interim Orders made on 19 December 2006 in Land Appeal Case No.58 of 2004 are still alive and continued until determination 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 members of the Family Lakeleotaua Nakmau and their representatives are informed about the same and shall be bound by this Order.

**DATED at Port-Vila this 14<sup>th</sup> day of September 2009**

**BY THE COURT**



**Vincent LUNABEK**  
Chief Justice



**Custom Advisers:**

**Chief Peter Masongo Mapula**

*Mapula*.....

**Chief Jimmy Kass Kolou**

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