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

Land Appeal Case No. 03 of 2008

BETWEEN: LIRO COMMUNITY
Appellant

AND: HARRY HASLIN JOSEPH and FAMILY
First Respondent

AND: MAEL HOPA VOVI and FAMILY
Second Defendant

Coram; ***Justice D. V. Fatiaki***

Counsels: *Mr. Stephen Joel for the Appellant*
Mrs. MG Nari for the First Respondent
Mr. Robin T. Kapapa for the Second Respondent

Date of Ruling: *13 April 2012*

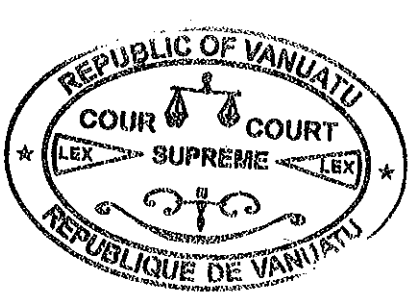
RULING

1. On **10 April 2008** the **Paama Island Court** delivered its judgment in **Land Case No. 03 of 2000** declaring the respondents joint custom owners of the land called "***Meteyang***" situated on the north western part of the island of **Paama**.

2. On **6 May 2008** the appellant filed a **Notice of Appeal** against the Island Court judgment "*UPON SUCH GROUNDS to be filed by the Appellant*". **No** grounds were filed and the appeal went to sleep until the first respondent filed an Application to Strike Out the Land Appeal Case on **4 September 2009**.

3. This prompted the appellant to provide his long-awaited grounds of appeal on **14 September 2009**. The grounds of appeal amongst others, complains about the lack of assistance provided to the appellants by the Court and its clerk in drawing up the appellant's claim and in the conduct of the hearing before the **Island Court**. The grounds also includes several identified misdirections as well as a failure to determine the proper boundary of the land in dispute.

4. On **11 March 2011** the appellant filed a response opposing the first respondent's application on the basis that the grounds of appeal had been filed and the existence of the **Notice of Appeal** meant that an appeal was already "*on foot*".



5. Unsatisfied the first respondent filed a second application to strike out the appeal on **6 May 2011**. The application invokes **Rules 9.10 (1) (a)** and **(2) (d)** of the **Civil Procedure Rules** and complains about the lengthy periods of inactivity on the appellant's part after **Notice of Appeal** was filed and non compliance with Court orders. This second application to strike was supported by two sworn statements also filed on **6 May 2011**.

6. At a conference hearing on **9 May 2011** counsel for the respondents sought time to respond to the appellant's written submissions filed in the substantive appeal and counsel indicated that the respondent swho are very elderly and sickly are "*no longer interested* (in pursuing) *the strike out application*". After extensive discussions the Court adjourned the case to **13 June 2011**:

> "*to allow the parties to attempt seriously to resolve their remaining fears and dispute with a view to the discontinuance of the appeal and the recognition of the respondents as declared custom owners and the appellant as longtime users of the parts of land for their subsistence*".

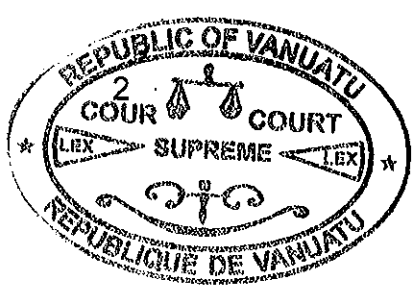
7. Instead of heeding the court's advice to settle the proceedings, counsel for the appellant wrote to the respondents' counsel on **8 June 2011** advising that "*they* (the appellants) *do not wish to negotiate as it would be wrong in custom to do so*" and further, that "(the first respondent) *who is from Hinovoi does not have legal or customary standing to claim any part of Meteyang customary land or Liro customary land*". Any talk of settlement was clearly becoming remote.

8. On **30 June 2011** the appellants filed four (4) sworn statements in support of the substantive appeal. On the same day a second sworn statement in support of the first respondents' second application to strike out the appeal was filed and served on the appellant.

9. At the scheduled conference on **1 July 2011** counsel for the first respondent indicated that he now wished to pursue the second strike out application on the three (3) principal grounds raised in the application namely:

> "*(a) Failure to prosecute the appeal;*
> *(b) Disobedience of court orders;* and
> *(c) Absence of locus standi*".

Written submissions were ordered from the parties and these were finally submitted on **22 September 2011**. I am grateful to counsels for the assistance.



10. It is convenient to deal with **grounds (a)** and **(b)** above together. The first respondent's submissions highlights the appellant's continuing failure to prepare an appeal book as ordered by the Court on **11 March 2011** and which counsel submits, constitutes good cause to strike out the appeal [*see:* **Rules 9 (1) (b)** and **9 (2)** of the **Civil Procedure Rules**].

11. Without conceding the applicability of the above **Rules**, appellant's counsel submits that the appellant has complied with the relevant applicable **Order 16.34** of the **Island Courts Rules** which expressly deals with appeals from **Island Courts** to the **Supreme Court** and which provides at **sub-rule (4)** that:

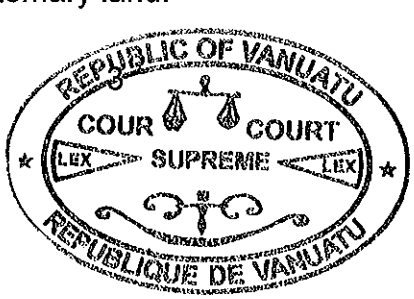
> "*The Island Court must ensure that the notice of appeal and all supporting documents are given to a judge*".

I note however that the **Order** does **not** require service of the appeal papers on the **Island Court**. Nevertheless counsel submits, that the relevant "*supporting documents*" which must be supplied under the sub-rule, would include most, if not **all**, the documents that would be included in an appeal book, and, therefore the failure of the **Island Court** to fully comply with the above **sub-rule** is a major hinderance or impediment to the appellant's ability to prepare the appeal book as ordered.

12. Additionally, **Rule 6.8** of the **Civil Procedure Rules** which deals specifically with a party's non-compliance with orders made at a conference (*such as, the Court's order on **11 March 2011**, for the appellant to prepare an appeal book*) provides the Court with several alternatives, including, ordering costs against the non-complying party (*which was ordered in the present case against the appellant and was paid on **30 June 2011***) and counsel submits that striking out the appeal now would entail the appellant being punished twice for the same failure.

13. Having considered the applicable rules and counsels competing submissions and sworn statements, I am satisfied that neither **ground (a)** or **(b)** warrants the exercise of the Court's summary power to strike out the appeal. I am of course mindful that the respondents have **not** themselves filed any responses or written submissions opposing the substantive appeal **nor** have they filed any sworn statements responding to the four (4) sworn statements filed by the appellant in support of its substantive grounds of appeal. **Grounds (a)** and **(b)** are accordingly dismissed.

14. I turn next to consider **ground (c)** which relates to the "*locus standi*" of the appellant to bring the appeal. In this regard the respondents' simple straight-forward submission is that custom ownership of land is constitutionally vested in "*indigenous custom owners and their descendants*" and a "***Community***" comprised of disparate, unrelated, individuals or families albeit living in the same locality is incapable, in law, of claiming or owning customary land.



15. In short:

> "*The Community is not a custom owner or a descendants (sic) therefore cannot be a party to land ownership determinations*".

and

> "*Community does and cannot dispute customary lands and cannot own land and is not a form of customary ownership in Vanuatu custom, or elsewhere in the Pacific, as far as customary law is concern*".

The respondents also rely on dictum in the **Efate Island Court** case of **Family Sope v. Family Nikara** [1994] VUIC 2 where in rejecting a claim by the "***Ifira Community***" to custom ownership of **Marope Land** the Court said:

> "*Since 30 July 1980, customary land ownership disputes have exclusively been between indigenous ni-Vanuatu. To determine ownership and the use of land, the Court applies customary rules as provided in Section 74 of the Constitution. Therefore the Court is not satisfied that Ifira Community is the true custom owner of Marope Land. There are a lot of people in the Ifira Community who belong to Ifira Community but don't have any customary rights to Marope Land*".
>
> (my underlining)

16. Appellant counsel's response is slightly longer and begins with a contextual analysis of the relevant statutory provisions dealing with **Island Courts** including **Order 8** of the **Island Court Rules** which authorizes the Court to make a representative order "*where more persons than one have the same interest in one cause*".

17. On that basis counsel submits:

> "*It is enough to ascertain that they* (the parties however identified) *would be affected one way or another by any judgment issued in the proceedings*";

and

> "*This claim concerns a dispute over customary land which affects a person's status* (and identity) *... hence the Island Court Act and its Rules must always be construed liberally*".

Counsel also distinguishes the dictum in **Family Sope v. Family Nikara** (op. cit) on the basis that in the present case, the appellant although named as "***Liro Community***" was in fact, represented by **Chief Kora Vanosivi** at the hearing before the **Island Court** which said in its final orders: "*(2) The counterclaim of Kora Vanosivi on behalf of Liro Community is hereby refused and dismissed*".

18. I note in passing that the **Paama Island Court** in dismissing the appellant's claim was conscious of the possibility of the existence of other claimants within the "***Liro Community***" who were **not** represented by **Chief Kora Vanosivi**, when it said:

> "*The area claimed has been in use for gardening purposes by* (Chief Kora's) *ancestors to date .... This occupation had occurred around the arrival of the early missionaries who thereafter stationed the Presbyterian mission at Liro*"

Later in its decision the Court said:

> "*... the land is claimed by a handful of claimants such as Family Obed, Maki Hilialong his witness in this case and others from Liro who failed to pay the required fees and be part of the case ...*".

And finally, in a reference to a well-recognized "*rule of custom*" that forms the basis of ownership of customary land on **Paama**, the Court said:

> "*... traditionally there should be a common ancestor to the land of Liro with its recognized boundaries. In our case it could not be shown that all claimants from Liro Community originated from one single ancestor or nasara instead of having separate family trees and histories*".

19. Counsel's final submission is that the respondents have **not** cross-appealed challenging the **Island Court** decision on any aspect and, therefore, this Court has no reason to rule on this ground of the application. The respondents disagree. In this regard, the observations of the Court of Appeal in **Rombu v. Family Rasu** [2006] VUCA 22 are relevant where it said:

> "*The Island Courts Act makes no provision for cross appeals. We consider it does not do so for the simple reason that a notice of cross appeal by other parties is not necessary. Once an appeal is validly instituted by one of the parties, the power of the Court under s.23 of the Island Courts Act is enlivened. ..... In other words, once the appeal is instituted, the Supreme Court can make whatever order the Island Court could have made, as is appropriate. The other parties to the appeal are able to contend for whatever outcome they think is proper. If on the hearing of the present appeal, the Supreme Court concludes that there should have been a result more favourable to the third or fourth respondent, the Court is empowered under s.23 to reflect that conclusion in its judgment. To achieve such an outcome, formal cross appeals by the respondent are not necessary.*"

20. **Section 23** of the **Island Court Act** relevantly provides that:

> *"Any person aggrieved by a ..... decision of an Island Court may within 30 days of the date ..... of such decision appeal therefrom to*
>
> *(a) the Supreme Court in all matters concerning disputes as to ownership of land;"*

In the absence of a definition in the **Island Courts Act**, the **Interpretation Act** [CAP. 132] defines a "***person***" as including "*any statutory body or company or body of persons corporate or unincorporate*"

21. The question that is necessarily raised by the this ground for striking out the appeal and the above provision may be distilled as follows: "***Is the 'Liro Community' a 'person' for the purposes of Section 23 of the Island Court Act?***"

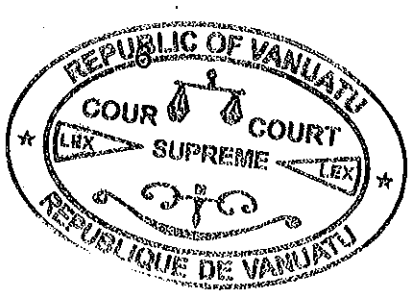
22. In my view the answer to the question does **not** lie in the **Interpretation Act** definition which gives an extended meaning to the term "***person***", rather, the answer lies in a consideration of the overriding **Articles** of the **Constitution** as they relate specifically to the ownership of customary land, in particular, **Article 73** which declares: "*All land in the Republic of Vanuatu belongs to the indigenous custom owners and their descendants*".

23. The irresistible inference in my view, is that land can only be owned by natural persons and does not extend to inanimate corporate entities or unincorporated associations that must be considered alien concepts to "*the rules of custom* (that) *form the basis of ownership of land*" (**Article 74**). By this I mean, that neither juridical "*concept*" can be equated with any institution or collective description known or recognized by the "*rules of custom*".

24. Even if such collective entities are comprised of indigenous persons, the function, management, and regulation of the rights of individual members in relation to each other and their collective rights, including their decision-making as a "***Community***", in relation to land, persons and things outside it, would still be governed by the "*rules of custom*" distinct from and independent of the provisions of the **Companies Act** [CAP. 191]; the **Charitable Associations (Incorporation) Act** [CAP. 140]; or the **Cooperative Societies Act** [CAP. 152].

25. As the **Efate Island Court** in the **Marope Land** case (op. cit) said in rejecting the claim of **Ifira Tenuku Community Holding Limited**:

> *"Unfortunately the court finds it difficult to believe that a company would be a custom land owner. The forefathers who lived way up in the mountains have no knowledge of a company which was a land*



owner. Therefore the Court does not consider Ifira Tenuku Community Holding Limited as a customary land owner".

26. Having said that, I accept that the "*rules of custom*" appears to recognize some collective entities such as a "***Family***"; "***Clan***"; or "***Tribe***" which are comprised of members who have blood ties and other customary links to a common ancestor, head, or chief and, through them, to customary land with a recognized boundary.

27. In the present case the **Paama Island Court** in discussing the applicable "*rules of custom*" said:

> "*Turning to customary practices, generally the island of Paama is predominantly a pratrilined society. Ownership of customary land is communal or collectively owned based on common descent, residence within a nasara and participation in common activities. A tribe or bloodline is identified with the land through nasaras. Individuals within the clan are closely tied up with their territory by affinity and consanguinity through blood and marriage*".

And later:

> "*The clan which forms the land surging unit is normally based on blood relationship, meaning, they are all related by blood, having descended from a common or original ancestor. Practically, the first person and his family to arrive at the disputed land and build a nasara there, are the custom owners of the land*".

And lastly:

> "*Land in the island of Paama is traditionally transferred or inherited patrimonally from the chief or original ancestor to the eldest son ... this is a male predominated system which is twinned with the land tenure system handed down from generations to the present*".

28. In light of the foregoing I uphold **ground (c)**. I am not unmindful of counsel's submission that the appellant always had a designated representative in the **Island Court** proceedings but the actual composition of the "***Community***" that he represented was and remains unknown both as to the number and identity of its members. Even allowing for the possibility of a representative order under the relevant Island Court Rules, nevertheless, the fact remains that collectively a "***Community***" is an entity unrecognized by the "*rules of custom*" and is therefore, incapable, of initiating or maintaining a claim for custom ownership of land with or without a representation.

29. Furthermore, the conditions precedent for a representative party order are:

(1) that all represented persons "*have the same interest in the subject-matter of the proceeding*"; **and**

(2) "*could have been parties in the proceeding*" (ie. be genuine claimants to custom ownership of the disputed land).

In this regard, given the above-mentioned applicable "*rules of custom*" identified in the **Paama Island Court** decision, it is highly unlikely that either "*condition*" would be fulfilled by the appellant had the matter been properly investigated.

30. Accordingly the appeal is dismissed for want of standing on the part of the appellant with costs to the respondents to be taxed if not agreed.

DATED at Port Vila, this 13th day of April, 2012.

BY THE COURT

D. V. FATIAKI
Judge.