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

Land Appeal Case No.08A of 2009
(LOSERS APPEAL)

BETWEEN: FAMILY NAHIN NISSINAMIN
First Appellant

AND: FAMILY NIPIKNAM
Second Appellant

AND: NAWAKAI KAPATANGATANG
Third Appellant

AND: TRIBE RAKATNE
Fourth Appellant

AND: TRIBE NAHIFA NISSINAMIN
Fifth Appellant

AND: CHIEF TOM NUMAKE
Sixth Appellant

AND: FAMILY NAHEU FAILET NAMEL
First Respondent

AND: NASKET TRIBE & NISINAM
Second Respondent

Coram: *Justice D. V. Fatiaki*

Counsels:
Mr. E. Nalyal for the First Appellant
Mr. D. Aru for the Second Appellant
Mr. D. Yawha for the Third & Fourth Appellants
Mr. K. Loughman for the Fifth Appellant
Mr. G. Nakou for the Sixth Appellant
Mr. J. L. Napuati for the First Respondent
Mr. W. Kapalu for the Second Respondent

Date of Decision: *26 March 2013*

JUDGMENT

1. On 3 December 2009 the **Tanna Island Court** declared custom ownership of customary land known as **Lenkowngen (White Grass)** situated at North West Tanna on part of which the Tanna International Airport is built. It is undoubtedly a nationally important and valuable piece of land generating a

regular annual income and is claimed by numerous claimants as shown in the parties in the present appeal which numbers seven (7) in total.

2. At an early stage of managing the appeal the original appeal file was broken up into a "*LOSERS APPEAL*" file **No. 08A of 2009** and a "*WINNERS APPEAL*" file **No. 08B of 2009** on the basis that the appeals of the successful parties in the Island Court should be kept separate and distinct from the losers or unsuccessful parties because, more often than not, winners only appeal against other winners (if any) and there is no need in a winners appeal to make unsuccessful parties respondents to such appeals. Likewise all appellants in the "*LOSERS APPEAL*" comprised all parties that were unsuccessful before the Island Court and have a common respondent being the successful parties.

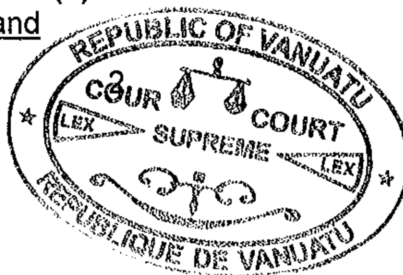
3. The Court also recommended that consideration be given in future Land Appeal Cases (LAC) to a classification and numbering system that gives prominence to the name of the customary land(s) the subject matter of the appeal as opposed to the parties to the appeal, since it is the sole common denominator in all customary land appeals.

4. There is also pending before the Court an opposed application for leave to appeal out of time by **Chief Tom Numake** who although not a named party to the original claim before the Tanna Island Court, nevertheless, claims to be "*a person aggrieved by* (the) *decision of* (the Tafea) *Island Court*" in terms of **section 22** of the **Island Courts Act**, on the basis that customary ownership of the disputed land has already been determined in his favour in an earlier pre-independence decision of the **Native Court** of the Southern District sitting at **Louknapuktuan** on 21 February 1973 in **Civil Case No. 1 of 1973**.

5. In this latter regard the customary name of the land the subject matter of the Native Court's determination, is "*NIOUGAN*" which, on its face, is spelt (although not necessarily pronounced) differently from "*LENKOWNGEN*". Be that as it may the hand drawn map(s) attached to the Native Court's judgment clearly shows the **Tanna Airport** within the agreed customary boundaries of "*NIOUGAN*" which is bounded on its southern and northern boundaries by two (2) creeks namely, **Lamananan creek** and **Lenil creek** respectively. Furthermore both lands are commonly referred to as "*White Grass*" custom land.

6. The application for leave is vigorously opposed by both the successful parties before the Tanna Island Court namely, **Nakane Tribe and Nisinamin** (Counsel: Willie Kapalu) and **Family Nahieu Failet Namel** (Counsel: Less Napuati). Their opposition is put forward on two (2) main grounds:

   (1) The application for leave to appeal out of time is, itself, barred by the provisions of **section 22 (5)** of the **Island Court Act** as interpreted by the Court of Appeal; and



(2) The applicant was initially a party before the Tanna Island Court but later voluntarily withdrew from the proceedings and therefore should not be permitted to re-enter the proceedings at the appellate level.

7. Conversely, **Tribe Nahifa Nissinamin** (Counsel: Kiel Loughman) the Fourth named appellant in the "*LOSERS APPEAL*" (**No. 08A of 2009**), in responding to the application and in affirming the Native Court decision in the applicant's favour states:

> "*The applicant Chief Tom Numake is already a party to this appeal and or his interest in this appeal is represented by tribe Nahine Nissinamin whose spokesperson in the Island Court was Rex Iapen.*"

8. As for the application for leave to appeal out of time, I accept that this Court has no power beyond the terms of **Section 22** to grant an extension of the time(s) within which an "*aggrieved person*" can lodge an appeal against the decision of an Island Court. In this regard, the decision of the Court of Appeal in **Kalsakau v. Jong Kook Hong** [2004] VUCA 2 is clear where it said:

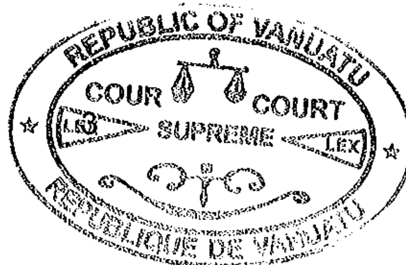
> "*We are of the clear view that strict compliance with the terms of subsections (1) and (5) in relation to an appeal and in relation to an application seeking an extension of time for an appeal is essential. In short the person aggrieved by an order or decision of the Island Court must appeal within 30 days from the date of such order or decision to the Supreme Court in relation to a matter concerning a dispute as to ownership of land. We consider that the "date of such order or decision" commencing the time frame within which the 30 days for an appeal must be made, commences from the date on which the reasons for the decision duly signed and sealed are made available to the parties. Likewise the further 30 days period as specified in section 22 (5) of the Act runs form that date. Further any application for grant of an extension of the 30 day period must be made within 60 days. Outside the 60 days no relief can be sought or granted.*"

(my underlining)

9. Later in **Rombu v. Family Rasu** [2006] VUCA 22 the Court of Appeal reiterated:

> "*The language of section 22 does not permit of any exception to the strict time limits which it imposes, and the application of section 22 in the present case must defeat the late claim of Vanua Rombu, even if he is to be treated as a "person aggrieved" by the Island Court decision.*"

(my underlining)



10. In the present case the applicant in his application **[para 2 (e)]** and in a sworn statement in support dated 9 September 2011 **[para 16]** has confirmed being aware of the **Tanna Island Court** proceedings, and also making written submissions to the Court to take notice of the Native Court decision in his favour.

11. Be that as it may, I have had my attention drawn to an Application dated 21 December 2009 which was filed on 6 January 2010 and supported by a sworn statement filed on 1 February 2010. I am also mindful that both documents were filed in person, and further the **Tanna Island Court** decision was delivered on **3 December 2009**. Both documents are accordingly within the 60 days allowed in **Section 22 (5)** of the **Island Court Act** within which an application for extension of time to appeal could be made. The application is accordingly granted and the applicant, **Chief Tom Numake** is added as the Sixth Appellant in the "*LOSERS APPEAL*" ie. Land Appeal Case **No. 08A of 2009**.

12. I return to the final outstanding matter upon which a decision is sought and that is the discrete and common appeal issue of apprehended "*bias*" alleged against the Island Court Magistrate and Justices who sat and decided the customary ownership of "*LENKOWNGEN*" (White Grass) customary land.

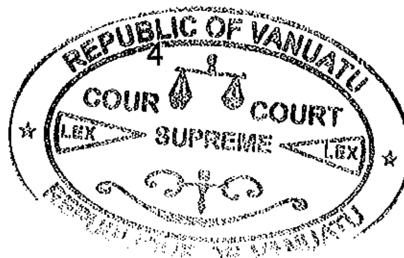
13. In particular, all parties in the "*LOSERS APPEAL*" agreed that this Court should hear and determine, as a preliminary matter, the two (2) issues raised in the appeal grounds which are conveniently summarized in the written submissions of counsel for **Family Naheu Failet Namel** (the First Respondent) as follows:

    "*Firstly, whether the presiding magistrate and her justices erred ... in conducting themselves in a manner which was biased or* (appeared) *to be biased* (in) *accepting ... customary gifts of a pig, a goat and a stem of kava roots during the boundary inspection; and*

    Secondly, whether the composition of the (court) *was* (flawed) *by bias when one of its* (members) *Justice Tom Kaltoi* (failed) *to disclose his familial relationship with* (a party in the proceedings) *and to disqualify himself from the bench* (hearing the case)."

14. Several witnesses were called by the appellants and the respondents on the two issues during a "*mini-trial*" held over 2 days with oral and written closing submissions being filed on 25 June 2010. Thereafter the matter was adjourned for decision.

15. Neither before, during or after the "*mini-trial*" which was agreed to by all counsels, was any objection or question raised as to the composition of the Court or the Court's jurisdiction to determine the issue of *bias* as a preliminary matter and without the assistance of assessors. Furthermore, although the Court of Appeal's judgment in **Matarave v. Talivo** [2010]



VUCA3 was referred to in the course of counsels closing submissions, it was solely relied on as the leading local authority on the law of "*apprehended bias*".

16. That a positive finding of actual or apprehended bias on the part of a Court of Tribunal will render its decision "*void*" is firmly established by the Matarave decision.

17. For present purposes, however, the more important dicta in Matarave is that set out (at p. 6) under the heading Question (a) – Section 22 of the Island Court Act which states:

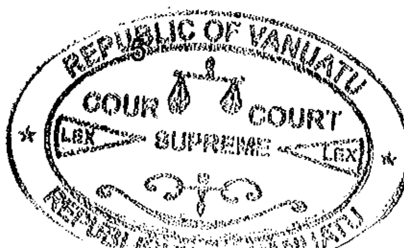
> "*This question in substance raises the meaning s. 22 (1) of the Island Court Act. Stated bluntly, we consider this statutory provision means exactly what it says: the decision of the Supreme Court is final and cannot be the subject of an appeal to the Court of Appeal. However, the limitation imposed by s.22 (4) is in relation to an "appeal made to the Supreme Court". This requirement is only met if the body hearing the appeal is a court validly constituted by a Supreme Court judge and two or more assessors appointed by the judge as required by s.22 (2). That requirement will not met if any one of those persons is subject to any matter that disqualifies them from exercising their statutory functions. Moreover, the "matter" the subject of the appeal must be one concerning disputes as to the ownership of land (see: s.22 (1) (a)), that is, a particular area of land identified by the disputants as the land subject to the dispute. It follows that if the court which purports to exercise the appellate functions under s.22 (1) (a) is not properly constituted, or if the court properly constituted purports to decide custom ownership of land which is not subject to the dispute submitted to the Island Court, the court will not be validly exercising its statutory function. For example, if the court was constituted only by a judge and one assessor, the court would not be validly exercising the statutory function. Nor would it be if it purported to decide ownership of land outside the area of the disputed land the subject of the appeal.*"

(my underlining)

18. In the present case the "*mini-trial*" on the bias issue was conducted and heard by myself sitting alone without assessors, albeit, that all parties agreed and were represented by counsels. As comprised the Court was non-compliant with the requirements of **Section 22 (2)** of the **Island Courts Act** and was therefore not "*validly constituted*".

19. This is reinforced by a more recent decision of the Court of Appeal in **Bule v. Tamtam and Others** [2011] VUCA 16 where the Court in a brief judgment allowing the appeal against an order summarily dismissing an appeal against the decision of an Island Court in a land appeal case said:

> "*... a single judge sitting as the Supreme Court does not have jurisdiction to finally determine title to custom. Jurisdiction to do so, as*



this court has previously held can be exercised only by a Supreme Court judge sitting with 2 assessors."

20. In identical circumstances, in **Family Utissets v. Awop** [2011] VUSC 319 this Court in declining to render a judgment in that case, said:

> *"20. I very much regret this result after all these months when the decision on this appeal has been pending, but, it is preferable that the hearing and determination of this appeal should be undertaken and completed by a properly constituted Court, comprised of a judge sitting with two assessors knowledgeable in custom, rather than, by allowing this preliminary issue (which itself requires findings of fact to be made on disputed evidence), to proceed to a conclusion under a defective procedure that the Court of Appeal has already twice-ruled that a single judge has no jurisdiction to exercise.*
>
> *21. Accordingly, I decline to give a ruling on the apprehension of bias ground as already heard and argued, and order that the entire appeal be reheard after 2 assessors knowledgeable in custom have been appointed to sit with me."*

21. Accordingly and consistent with the Awop's case (op. cit) I direct:

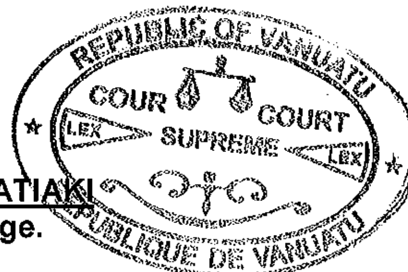
    (1) The **Chief Registrar** with the assistance of the **Tanna Island Court** clerk to appoint two (2) assessors to assist me at the hearing of this appeal not later than **31 May 2013**;

    (2) Each party to prepare and lodge in the Supreme Court registry four (4) properly bound, tabbed and indexed volumes of its grounds of appeal, sworn statements in support (with English translations) and any written submission relied upon in this appeal by **30 June 2013**;

    (3) The appeal be adjourned to 15th July 2013 at 9.00 a.m. to fix hearing dates.

DATED at Port Vila, this 26th day of March, 2013.

BY THE COURT



D. V. FATIAKI
Judge.