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

Land Appeal Case No.05 of 2009

IN THE MATTER OF: **SANDLENG PLANTATION LAND**

AND:

IN THE MATTER OF: **THE DECISION OF THE PENTECOST ISLAND COURT IN LAND CASE No. 01 OF 1995**

BETWEEN: **LEON ENOCK and FAMILY**
Appellant

AND: **JOHN MARK MELTEN and FAMILY**
First Respondent

AND: **MORRIS TABIMAL and FAMILY**
Second Respondent

AND: **DOMINIQUE TEMABU and FAMILY**
Third Respondent

Coram: ***Judge D. V. Fatiaki*** *sitting with Island Court justices* ***Abel Bebe*** *and* ***Pastor Basil Tabe Vanua***

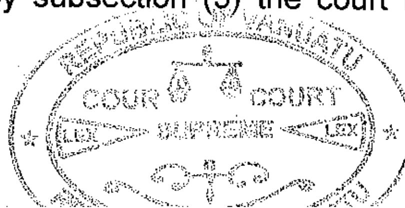
Counsels: *Appellant in person*
Mr. B. Yosef for the First Respondent
Mrs. Mary Grace Nari for the Second and Third Respondents

REASONS FOR DECISION

1. On 25 September 2014 this Court by consent quashed the decision of the Pentecost Island Court in **Land Case No. 01 of 1995**. On that occasion, the Court said it would deliver fuller reasons for its decision which is now provided.

2. The Island Court was originally created by **Act No. 10 of 1983** with a limited jurisdiction to deal with minor civil claims and criminal offences that occurred within its territorial jurisdiction without the benefit of legal counsel. The Island Court is comprised of justices *"knowledgeable in custom"* who are appointed by the President and sit as a court of three justices. The Island Court applies customary law in its decisions and each Island Court had a designated supervising Magistrate who exercised confirmation and revision powers over the Island Court. By an amendment of the Island Court Act in **Act No. 35 of 1989** the jurisdiction of the Island Court was extended to include "*... disputes as to ownership of land*" and required a nominated Magistrate to preside on the court (with 3 justices) when hearing a land dispute case.

3. **Section 22** of the **Island Court Act** [CAP. 167] ("*The Act*") provides for an appeal to the Supreme Court in all matters concerning disputes as to the ownership of land <u>and</u> by subsection (3) the court hearing the appeal *"shall*



appoint two or more assessors knowledgeable in custom to sit with the Court." By subsection (4) an appeal to the Supreme Court shall be final.

4. The decision in the present appeal was delivered by the Pentecost Island Court at Lakatoro, Malekula on 15 July 2009 and concerned "*Sandleng land*" situated in the central part of the island of Pentecost. The decision had attached to it a hand-drawn unscaled map of the land the subject matter of the claim and decision. A cursory view of the map clearly indicates that the western boundary of Sandleing land follows the coast line and the other three(3) inland boundaries are designated by straight lines with peg marks at the eastern intersections of the 3 lines.

5. The Pentecost Island Court delivered a lengthy considered judgment in which it upheld the claims of the appellant ("*Enock*") and the first respondent ("*Melten*") and dismissed the claims of the second and third respondents ("*Tabimal*" and "*Temabu*" respectively). In particular the court declared :

   > *"(1) That the original claimant, Mark Melten and Counter claimant Enock Leon and their family are the custom owners of the land of Sandleng as advertised."*

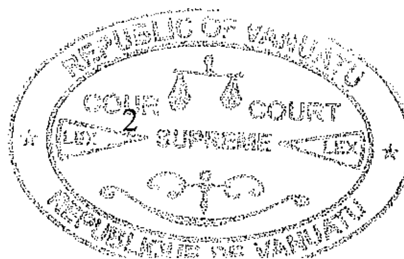
6. On 15 September 2009 despite its partial success in the Pentecost Island Court, Enock lodged a Notice of Appeal against the decision. On 13 October 2009 Enock sought leave to appeal out of time relying on Section 22(5) of the Act and the (mis) statement in the Island Court's judgment that the parties had:

   > *" .....(a) right to appeal within 30 days period at the receipt* (sic) *of this written judgment".*

   Melten's opposition to leave was not pursued after reference was made to relevant dates and documents.

7. Interestingly, in his sworn statement in support of the application for leave to appeal out of time Enock deposes (**para 11**):

   > *"The Court will probably find it strange that I should try this hard to appeal and all when the Island Court judgment favours me and my family too. I actually appeal because the Court grants (sic) me ownership of 3* (unidentified) *pieces of customary land within Sandleng Plantation (a surveyed pre independence Title 770) which I did not claim at all in my Pentecost Island Court claim. This is wrong because my ancestors have never used or live on this land. There are people of these lands who reside in them. I do not want any trouble. This Court should quash the Island Court judgment for purpose of rehearing appeal".*



8. Enock's <u>Grounds of Appeal</u> filed rather belatedly on <u>15 October 2010</u> advanced 2 grounds as follows:

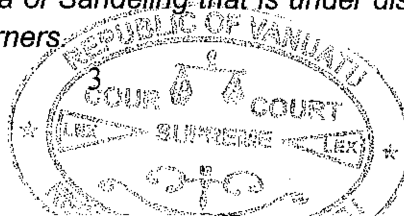
> "*1. The Pentecost Island Court erred in not complying with Order 18, Rule 2 of the Island Court Subsidiary Act particularly in that there was no reading and confirmation of the witnesses statements by the Clerk during Trial little or insufficient cross examination of the witnesses by the parties who possess little or no skills in reading the documents themselves took place.*
>
> *2. The Pentecost Island Court was wrong in proceeding with the hearing pursuant to Order 18, Rule 6 in Land Cases adopting the documentary evidence filed without the Consent of the parties, taking the evidence as read and then directing the parties to conduct their cross examination in contradiction of Section 25 of the Island Court Act Cap. 167.*
>
> ***The resulting effect of failure to follow legal and proper procedure during hearing amongst others result in:-***
>
> *a) The Island Court in its judgment wrongly awarding ownership of 5 separate customary land with distinct customary history to the original claimant against the weight of the evidence.*
>
> *b) The Island Court in its judgment wrongly accepting the evidence of the original claimant particularly the family tree linking and relating his family to the appellant's family.*
>
> *c) The Island Court not giving weight or sufficient weight to the evidence of the Appellants and other Claimants who have been living on their respective parts of the disputed land for many years."*

9. With the exception of Melten who was a partially successful claimant before the Pentecost Island Court, <u>both</u> Tabimal and Temabu support the appeal and both agree that the appeal should "*.... be allowed and the matter be re-heard.*"

10. Given the nature of Enock's complaint about the procedure that was adopted by the Pentecost Island Court <u>and</u> the map attached to its decision, the parties requested and were granted leave to file sworn statements in support of the appeal and their respective responses.

11. In this regard the sworn statement dated 14 June 2011 of **Chief Roy Melten** for Melten is revealing where he deposes (**paras. 4 to 6**):

> "*4. In regards to the issue of mapping, I would like to clarify to the court, that, the clerk of Pentecost Island court ask us to produce a map of Sandeling land. And so we produced the map that was being attached to the judgment itself. That reflects the condominium title that was registered under the old title. It is the only best map that fits in the description of the area of Sandeling that is under dispute. It has pegs erected on its four corners.*



5. *I wish to clarify that Sandeling is the name that is being registered on the map, however, inside within the boundary of Sandeling that was being advertised on the map, there are smaller parcels of land identified by creeks and they have their own names. Most of this* (sic) *lands are communally owned by members of a tribe who originated form one family tree, but divided according to clans and sub clans and live through out the entire land area. All the members of the tribe own the entire land in a communal fashion.*

6. *However, Sandeling is the name of the area under the condominium title, but Sandeling itself is located inside a big customary land territory known as Vagro. ....*"

and as to the complaint that the Island Court had not conducted a full and proper inspection of the disputed land, he deposes (**para 10**):

> "*I wish to confirm to this court again that, during the site inspection of land, the appellant did not know much information about the land that is subject to dispute. This was the very reason why the magistrate told us that if he did not know information about this land then there is no need for the courts to visit the other part of the land*".

12. In this regard it is only necessary to refer to **Rule 6 (10)** of the Island Court (Civil Procedure) Rules 2005 which clearly states:

"*(10)* Land to be visited

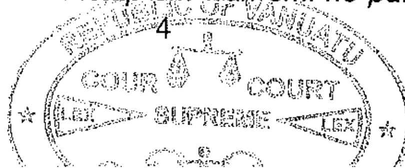
> *If a claim is in respect of ownership or boundary of customary land, the court must visit the land and inspect the boundaries before making judgment.*"

Nowhere in the Rule is there an option given to the Island Court to decide not to "*inspect the boundaries*" (plural) of the claimed land however inconvenient or difficult, nor is the duty capable of being waived by the claimants or by the Island Court which "*must*" (mandatory) visit and inspect the land.

13. Chief Roy Melten is also corroborated in both respects by the second respondent (**Morris Tabimal**) who deposes in his sworn statement of 24 May 2011 (**paras. 5 and 6**):

"5. *Sandleing emi wan plantation ino kastom boundary. Original claimant itekem plantation mo putum evri kastom graon blong mifala igo wan ples we ino folem kastom blong mifala.*

6. *Insaed long kleim blong Sandleing plantation igat 5 difren kastom graon. Long kastom bae yu no save givim graon blong difren ona igo long difren man olsem we Pentecost Island Kot imekem long keis ia. Graon we mi klemem istap em wan emi no pat blong plantation. Bae*



yu luk long map ia we istap mak "A" tufala ples blong plantation iborder long graon blong ol abu blong mi".

and by Temabu's witness **Jean Bule Temabu** who deposed as follows (**paras. 3 to 5**):

> "3. *Mi confem tu se kot igo long Ranov kastom graon nomo taem emi visitim graon. Ranov emi ples we Appellant emi claim long em. Mifala ino go long Lalsah we mifala istap claimem. Luk map mak "A".*
>
> 4. *Sandleing plantation emi no wan kastom boundary. Original claimant emi tekem five difren kastom graon mo putum wan ples from claim ia.*
>
> 5. *Pentikos Aelan Kot imekem mistake long ol storian mo pruf blong mifala mo mekem desisen we ino folem kastom blong mifala. Wan samting tu from evri jastis oli blong Not Pentikos we oli no save kastom blong mifala long Sental Pentikos.*"

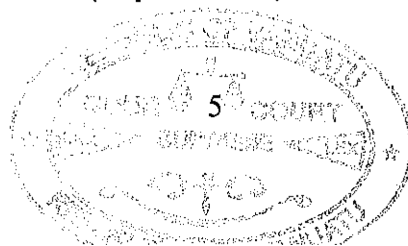
14. This latter averment about the origin of the justices of the Island Court being "*... from North Pentecost and do not know the custom of Central Pentecost*", is a common ground of appeal in customary land appeals and needs to be firmly addressed and dismissed as wholly unmeritorious.

15. Section 3 of the Island Court Act is relevant. It provides:

> ***"3. Constitution of island courts***
>
> *(1) The President of the Republic acting in accordance with the advice of the Judicial Service Commission shall appoint not less than three justices knowledgeable in custom for each island court at least one of whom shall be a custom chief residing within the territorial jurisdiction of the court."*

16. Strictly speaking, on the plain wording of the section, the island of origin <u>or</u> place of residence of an Island Court justice is <u>not</u> a statutory criterion or requirement for the appointment of an Island Court justice and, an Island Court composed of one (1) <u>or</u> even two (2) justice from other islands <u>or</u> who are not residents on the part of the island where the disputed customary land is located, would still be valid and unobjectionable provided that the third justice was a custom chief resident on the island where the disputed land is located and the fourth presiding member of the Court is a duly nominated magistrate.

17. The above is sufficiently clear from the judgment of the Court of Appeal in <u>Family Molivakarua v. Family Worahese</u> [2011] VUCA 9 where the court in rejecting a similar ground of appeal based on the origins and knowledgeability of Island Court justices said (at **paras. 15, 16 and 19**):



"15. ... Civil proceedings relating to land are still taken in the Island Court within the territorial jurisdiction of which the land is situated.

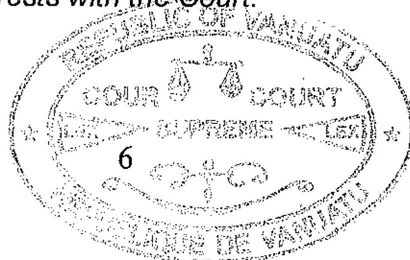
16. We return to section 3(1) of the Act. It deals with the appointment by the President of the Republic of three or more justices knowledgeable in the custom of the territorial jurisdiction of the Island Court and further it is a requirement that one or more justices shall be a custom chief residing within the territorial jurisdiction of that Court. It is not a requirement under section 3(1) of the Act for an Island Court Justice to "have knowledge in custom" of a particular area within the territorial jurisdiction of the Island Court, that is of a particular part of the Island Court area. There can be many sub-areas of custom within an Island Court area, and it would be quite impractical to have to find three knowledgeable justices for each of them. Section 3(2) means what it says. The three justices must be knowledgeable in custom for the Island Court area, and that is sufficient. If the particular sub-area is not the area that they are from, then it can be expected that they will take the necessary steps to gain familiarity of the area that is not their home area before the hearing.

19. It is further necessary to note that if the skills and knowledge in custom of an Island Court justice becomes an issue, they are matters to be addressed by the Judicial Service Commission and by the President of the Republic pursuant to s.3(1) of the Act. Ultimately, it is for the President to make appointments to the Island Court."

18. Earlier in Tula v. Weul [2010] VUCA 42 the Court of Appeal observed (at **paras. 18 and 19**):

"18. Section 22 (2) further provides that assessors are to be 'knowledgeable in custom'. No doubt assessors knowledgeable in custom are also better suited with local knowledge of the area in question as well but equally too close a connection with the same area on their part will result in more submissions for recusal or disqualification based on being too closely related to the land or the families involved in the dispute.

19. Assessors, just as is the case with judges, are subject to the duty to disclose any reason for not sitting on a case, more so where the reason is only known to them, for similar reasons an Assessor or potential Assessor should indicate prior to the hearing if he or she does not have the requisite knowledge. Before confirming any appointment it will be for the judge to ascertain that the Assessors have the appropriate knowledge necessary to assist him or her in the determination of the issues before the Court. It is not for the parties to undertake their own assessment of the knowledge of the Assessors, but a decision that rests with the Court."



19. In light of the foregoing there can be little support for any challenge to the knowledgeability in custom of an Island Court justice based on his island of origin or place of residence.

20. Be that as it may, at the hearing of the appeal this court pointed out to the parties that on the basis of the sworn statements filed, it appears that "*Sandleng*" or "*Sandleing Plantation*" is not the name of a traditional customary land nor is its surveyed straight-line boundaries and corner "*survey pegs*" consistent with a traditional customary boundary which, according to the Pentecost Island Court judgment, "*... from ages past and present are normally indicated by natural features such as creeks, rivers, mountains, man-made features and other geographical surroundings*".

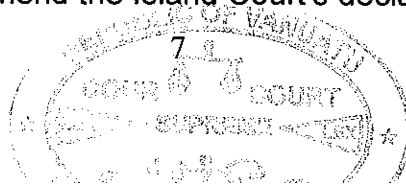
21. Furthermore, on the sworn statements of the parties it appears to be common ground that contained within the surveyed boundary of "*Sandleing plantation*" (which was the creation of a pre-independence surveyed title), there are several traditional customary lands including "*Ranov*" and "*Liangol*" (claimed by Enock); "*Laubor*" (claimed by Tabimal); "*Msaribar*" or "*Lasah*"(claimed by Temabu) and possibly a customary land called "*Vatlu*" or "*Lal*" which is closely associated with Melten.

22. After much discussion between counsels and their respective clients and **Leon Enock** of the appellant family, all parties accepted and agreed that the appeal should be allowed and the declaration of the Pentecost Island Court be quashed.

23. The appellant's representative **Leon Enock** then requested that the original claim should be returned for a rehearing before a differently constituted Island Court, but, given the court's unanimous view that "*Sandleing Plantation*" is neither a customary name or a customary boundary, it would not be appropriate to return the original claim "*as advertised*" to the Island court and risk perpetuating the error.

24. Alternatively, **Leon Enock** proposed that the Court should allocate to his family, the customary lands known as "*Raniov*" and "*Liangol*" which he was claiming and allocate the remaining customary lands within "*Sandleing plantation*", to Melten the other successful claimant. This would involve an amendment by this Court of the Island court's declaration on a basis that was never advanced or considered by it nor was such an order sought in the present appeal.

25. Furthermore, given that the "*Sandleing plantation*" boundaries on the landward side are comprised of "*straight lines*" the probability that they do not follow the traditional boundaries of the abutting customary lands is very high and would involve this court in a lengthy hearing of fresh evidence as well as visit(s) to the customary lands. The fact that the "*straight line*" boundaries dissects several customary lands and customary boundaries is further reason for this Court to decline any attempt to amend the Island Court's declaration.



26. In Rombu v. Family Rasu [2006] VUCA 22 the Court of Appeal speaking of the Island Court's duty to visit the disputed land said:

> *"Order 18 of the Island Court (Civil Procedure) Rules lays down procedures to be followed at the hearing. Rule 9 of that Order requires that the Court visit the land before reaching a decision.*
>
> *In combination, these various provisions as to notice and the Court's attendance on the land are intended to remove the chance that someone who has a genuine interest in the land will not become aware of the proceedings…."*

27. The powers and procedures of this Court on an appeal from the Island Court are not in doubt and are clearly stated in subsection (3) of Section 22 of the Act as follows:

> *"(3) The court hearing the appeal shall consider the records (if any) relevant to the decision and receive such evidence (if any) and make such inquiries (if any) as it thinks fit."*

and more fully, in Section 23 which relevantly provides:

"23. Power of court on appeal

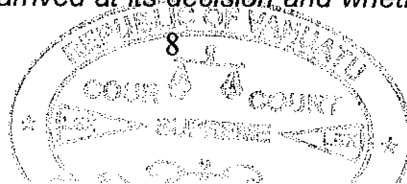
The court in the exercise of appellate jurisdiction in any cause or matter under section 22 of this Act may –

(a) make any such order or pass any such sentence as the island court could have made or passed in such cause or matter;

(b) order that any such cause or matter be reheard before the same court or before any other island court."

28. In this regard the Court of Appeal relevantly observed in Tula's case (op. cit) (at **paras. 3 and 8**):

> *"3. The appeal to the Supreme Court was brought under section 22 (1) Island Court Act [Cap 167]. Such an appeal is by way of rehearing and not review. This is provided by section 22 (3) of Cap 167, and reflects the very practical issue of the possible lack of an accurate record from an Island Court proceeding. The powers on appeal are to be found in section 23 of Cap 167 and allow for a remittal for rehearing to the same or another Island Court and for the Supreme Court to make any order that the Island Court may have made.*
>
> *8. … Whilst relevant on review, where the matter is to consider how it was that the Island Court arrived at its decision and whether this was the proper*



course, on an appeal the whole matter is looked at afresh and any procedural irregularity found to have taken place in the Island Court is not carried through into the new hearing. Thus the point raised cannot be an issue in this appeal; nor was it a matter that the Supreme Court necessarily had to deal with in determining the appeal before it. ...."

29. It can be seen from the wording of section 23 (above) that the Supreme Court does not have power to rewrite or amend the declaration of the Island Court by identifying and separating "*the land of Sandleing*" into its 4 or 5 component customary lands and then sharing the separated lands between Enock and Melten even if the parties agree. In any event it may be recorded that Enock and Melten do not agree on what are the correct names or correct boundaries of the component customary lands or on how they should be shared between them.

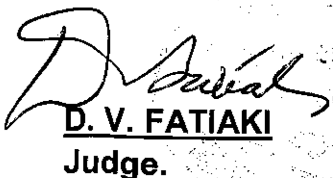
30. Finally, given that the original claim was advertised as "*Sandleing land*" it is very doubtful in this court's view, that the proposed alternative order is one that the Island Court "*could have made*" at the hearing of the claim for "*Sandleing land*" and, therefore, neither can the Supreme Court on this appeal.

31. Instead, the parties were advised to issue fresh claims according to the traditional names of the customary lands contained within "*Sandleing plantation*" under the new **Custom Land Management Act No. 33 of 2013** which came into effect on 20 February 2014 and which provides:

   "*for the determination of custom owners and the resolution of disputes over ownership of custom land by customary institutions and for related purposes*".

32. The foregoing are the reasons for the Court's decision delivered at Waterfall, Pentecost Island on 25 September 2014.

BY THE COURT



D. V. FATIAKI
Judge.

Justice Abel Bebe

Justice Basil Tabe Vanua