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

**Land Appeal Case No. 02 /2011**

**IN THE MATTER OF:** **MALAWORA LAND**

**AND IN THE MATTER OF:** **The decision of the Efate Island Court in Land Case 3 of 1993 dated 22 July 2011**

**BETWEEN:** **TERRY SAEL URITALO as representative of Masaai family**
*First Appellant*

**AND:** **KALCHIRAU LUA THESA ANATU as representative of the Thesa Anatu Family**
*Second Appellant*

**AND:** **MAHIT CHILIA as representative of Narewo Kaltolu Lulu Family**
*First Respondent*

**AND:** **NAKMAU SAMPO as representative of the Lakeotaua Manawora Family**
*Second Respondent*

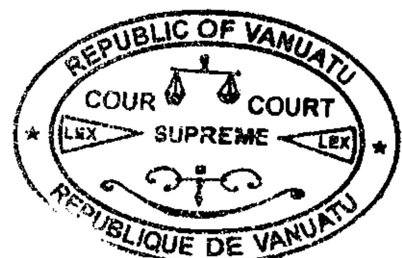
**AND:** **SIMEON POILAPA as representative of family Mariki Langani Vate Lapa**
*Third Respondent*

***Date of Hearing:*** ***Tuesday 9 February 2016***

***Date of Judgment: Thursday 18 February 2016***

***Before:*** ***Justice Stephen Harrop***
***Ary Kaltavara – Assessor***
***Jerry Shem - Assessor***

***Appearances:*** ***First Appellant – Daniel Yawha***



***Second Appellant – Bryan Livo***
***First Respondent – Kiel Loughman***
***Second Respondent – James Tari***
***Third Respondent – Jack Kilu***

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## RESERVED JUDGMENT AS TO BALANCE OF APPEAL GROUNDS

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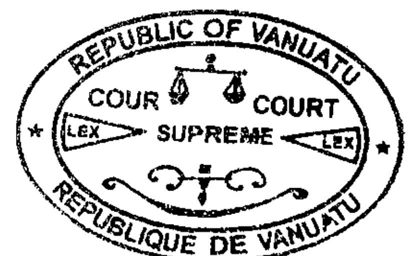
### Introduction

1. This case concerns a land dispute over land called Malawora in the vicinity of Mele Village on the island of Efate. The case began with a claim lodged by Family Sopusu in the Efate Island Court on 16 July 1993.

2. It was not until 2 April 2004 that the Island Court delivered its judgment but on 1 November 2005 the Supreme Court allowed an appeal: see *Masaai Family* v. *Lulu* [2005] VUSC 124. The primary reason for the appeal being allowed did not relate the merits of the case but rather to the way in which the Island Court had conducted itself during the hearing: members of the Court had had lunch with some of the parties in the absence of the other parties. Also, when the requisite inspection of the land had occurred this was done in the company of individual parties, in the absence of other parties.

3. The matter came back before a differently-constituted Island Court and its judgment was issued on 22 July 2011.

4. Appeals were lodged by the first and second appellants covering a number of grounds.



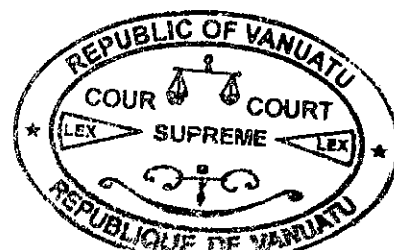
5. In August 2015, this Court heard the primary ground of appeal, that the Island Court erred in including title number 69 in its declarations in favour of the third respondent family. By way of the reserved judgment delivered on 13 August 2015, that appeal was upheld as to its substance but, contrary to the further submission of the appellants, I determined that the appropriate response was not to set aside the 2011 judgment and to send the matter back to the Island Court for rehearing under section 23 (b) of the Island Courts Act, but rather to excise the reference to title 69 in declaration 4.

6. Subsequently the appellants confirmed that they wished to pursue their other grounds of appeal. Submissions for and against those grounds were heard on 9 February 2016. This judgment determines the balance of the grounds of appeal advanced by the first and second appellants. Essentially these are contained in the document entitled "Grounds of appeal" filed by counsel for the first appellant, Mr Yawha, on 11 June 2012, there being a total of ten grounds. These were supported, and to an extent expanded on, by Mr Livo, counsel for the second appellant.

7. The grounds of appeal may usefully be divided into four topics:-
   a) The delay in the issue of the Island Court judgment;
   b) Addition of new parties;
   c) Apprehension of bias; and
   d) Substantive criticisms of various findings as not being supported by the evidence.

**The Island Court Judgment of 22 July 2011**

8. The Court was constituted by the late Senior Magistrate Nesbeth Wilson and three Island Court Justices, Chief Sam Marpakoa, Chief Joshua



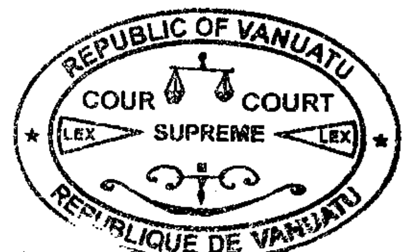
Harry and Chief Eddie Karis. The Court heard presentations from the relevant parties in January 2010 but on 27 June 2010 it granted an application by Kalchirau Lua Thesa Anatu for the Thesa Anatu Family to become a party to the case. They became counterclaimant number five. That family, and the Pierre Nikara Family, were given time to submit documents to the Island Court Office.

9. On 4 August 2010, Kaltango Tarimiela Munmulou on behalf of the Lakelopoi Family applied for his family to become a party. That application was also granted and that family became counterclaimant number six.

10. According to Mr Livo's submissions, the hearings concluded in July 2010 but the Court then made visits to the customary sites of all parties over two days in late August 2010.

11. The Court issued a notice of decision on 26 November 2010 but when the parties arrived they were informed that there was an error in the judgment and it would not be issued that day. A second notice of decision was issued on 13 July 2011 and the full written judgment of the Court was delivered on 22 July 2011.

12. The judgment is detailed and quite lengthy, running to some 34 typed pages. It records the presentations of the representatives of the Sopuso Family, the Nikara Family, the Lakelotaua Family, the Masaai Family, the Mariki Langa Ni Vailapa Family, the Thesa Anatu Family, and the Lakelopoi Family in considerable detail. It records briefly the fact of the site visit and then the Court states its findings in respect of the claims of each of the families. Prior to setting out its declarations and orders the



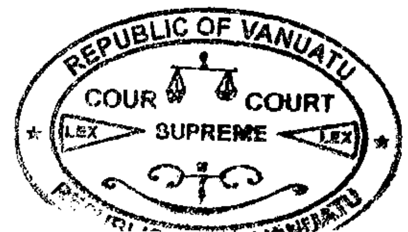
Court noted that the witnesses of all parties had been of much less assistance to the Court than it had hoped. The Court observed that most of the witnesses had caused too much confusion to the Court and had destroyed the presentations made by each party's spokesperson. There were too many "I don't know" answers and some witnesses refused to answer questions. The Court emphasised that in reaching its decisions only two factors were considered: where each party originated from and whether they based their claim on their patrilineal lineage.

13. Based on everything it had recorded in the judgment, and on consideration of each party's presentation and the evidence put before the Court, the following declarations were made:

*"Declaration*

*Based on these grounds, the Court declares that:*

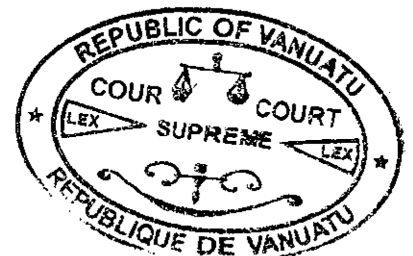
1. *The Sopuso Family and the Lakelotaua and the Mariki Langa Ni-Vatelapa families are the rightful custom owners of the Malawora land;*
2. *The Maasai Family and Thesa Anatu Family also have a right to the Malawora land, but the Maasai Family is under the Sopuso Family and the Thesa Anatu Family is under the Mariki Langa Family. The Lakelopoi Family must follow the Maasai Family as the family came to Mele through the Masaai Family;*
3. *The Sobuso Family and the Lakelotaua Family are customary owners of the following land titles: 93, 771, 1890, 1891, 96, 372, 64, 1395, 936, 82 and extending to 62, 3784, 1812 and part of Title No. 122, which is in the Mele Golf Club and extending to Vaatapesu area of which the Mariki Langa Ni-Vatelapa are custom owners.*



4. *The Mariki Langa Ni-Vatelapa Family are custom owners of the land with the title number: 66, 371, 97, 65, 69, 95, 3745, and part of 122 which starts at the Vaatapesu area, Elopo, Warakairiki, Warakailapa and extends to the nasara of the two villages called Tapusu and Tapusu-iriki and down to and adjoining Title 371;*
5. *There is a part of the land which carries the Title No. 164 which is located near Mele Village. Many people are using this land for gardening. On these grounds, the Court will leave it as it is and not make any decision on it;*

*Order*

1. *Anyone who wishes to enter the Malawora land of which the Sobuso and the Lakelotaoa families are customary owners, must first consult these families;*
2. *Anyone who is already in the areas where the Sobuso and Lakelotaoa families are customary owners, must consult these families if they wish to continue living in these areas;*
3. *Anyone who wishes to enter the part of Malawora Land of which the Mariki Langa Ni-Vatelapa is customary owner, must first consult these families;*
4. *Anyone who is already in the areas where the Mariki Langa Ni-Vatelapa is the customary owner, must consult these families if you wish to continue living in these areas;*
5. *Anyone who wishes to carry out any development within the Malawora Land, should first consult these customary owners;*
6. *In accordance with Section 22(1) (a) of the Island Court Act CAP 167, the parties have 30 days to appeal if they are not satisfied with this Court decision."*



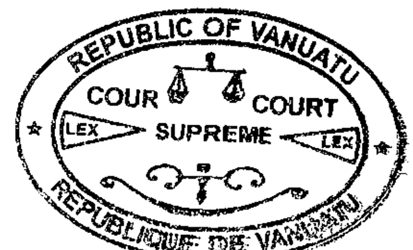
**The Court's delay in issuing its judgment**

14. The appellants argue that the delay of about 13 months between the close of hearings and delivery of judgment in itself constitutes an error of law. They express further concern that it apparently took around eight months to correct an error in the judgment which was going to be delivered on 26 November 2010.

15. Counsel contend that the delay was not only unacceptably long but that the absence of explanation for it and for why the correction of the error took so long exacerbates the fact of the overall delay. The combination of these factors cased anxiety and suspicion in the minds of the appellants as to the reasons for the delay and their perception of the legitimacy of the judgment preparation process was tainted accordingly.

16. The respondents submit that while the delay may have been longer than ideal, there was nothing justifying confusion or suspicion. The delay was not of such a magnitude as to give rise to concern about the correctness of the decision ultimately issued.

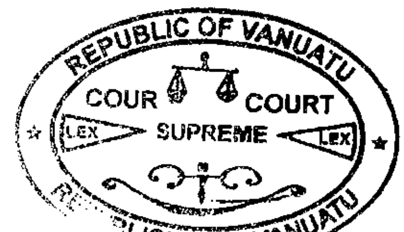
17. The relevant period is arguably one of approximately 11 months because until the site visits had occurred in late August, it would not have been possible for the Court to finalise and issue its decision. I accept however that a period of 11 months to deliver the written judgment was longer than one would expect and that it would have been prudent and indeed courteous to the parties for the Court to have explained its delay when finally issuing judgment. An explanation of why the correction of error took about 8 months would also have been desirable.



18. The appellants submitted that the Court had fallen foul of rule 13.2 (2) of the Civil Procedure Rules which states that: *"The judgment must be in writing and be written down as soon as practicable."* They noted that rule 13.2 (3) states: *"In the Magistrate's Court, the Magistrate must as far as practicable give judgment at the end of the trial and fix the amount of costs at the same time."* The appellants submitted that these subrules applied equally to Island Courts.

19. I do not accept that submission. Section 29 of the Island Courts Act permits the Chief Justice to make rules governing the procedure and practice of Island Courts and in 2005 the Island Courts (Civil Procedure) Rules 2005 were enacted. These contain rule 7, which deals with the judgment of the Court. There is no provision stipulating the time within which judgment should or must be given. Rule 7 (2) only says that the judgment of a Court may be given orally or in writing but if the claim is a difficult one or relates to ownership or boundary of custom land, the judgment must be given in writing.

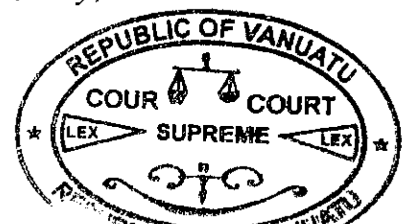
20. Judgments in customary land cases are, as rule 7 (2) implies, among the most significant judgments issued by Island Courts. A period of reflection and careful consideration of everything put before the Court (in this case on several different dates) is to be expected. Furthermore, the judgment of the Court must be given after thorough discussion and consideration by the four members of the Court. Rule 7 (1) says that after the hearing of the evidence and statements of the parties is completed, the Justices must discuss what should be the judgment of the Court. Such discussions may take place at the Court table, but if the case is difficult, the chairperson should adjourn the Court so that the discussions can be held in private in another place. It is not known how



many such discussions occurred in this case but this is clearly a significant case relating to a substantial area of land with numerous parties. It would hardly be surprising if several discussions between the Justices were required before a decision could be reached and a draft decision approved by all of them.

21. Undoubtedly a delay in issuing judgment may give rise to a loss of confidence both by the parties and by an appellate Court in the quality of the findings. This point was made by the Court of Appeal of New South Wales in a case cited by Mr Livo: *Monie v. Commonwealth of Australia* [2005] NSWCA 25: 2005 63 NSWLR 729 at 743-744/43-44 :

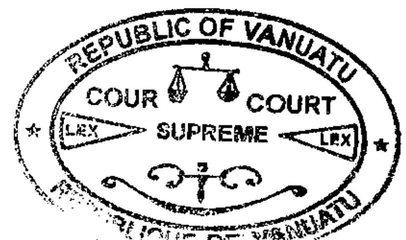
> *"(5) But the trial Judge's advantage does weaken with time. Where there is a significant delay between hearing and seeing the witnesses and the delivery of judgment, the trial Judge is obliged to give specific reasons for accepting or rejecting the evidence of those witnesses whose evidence plays an important part in the factual finding made. If, for example, the Judge is able to explain in the judgment given that contemporaneous notes had been made of the impressions formed of the evidence given by the relevant witnesses, confidence in the decision given would no doubt be maintained despite the delay.*
>
> *(6) If, after such delay, the trial Judge has not given specific and satisfactory reasons in relation to accepting or rejecting evidence which is of importance in the appeal, and where there does not exist any indication in the transcript or the evidence which clearly explains the Judge's findings, the appellate Court is obliged to give careful scrutiny and consideration to those findings. Where there has been significant delay, there can be no*



*assumptions that statements of a general assertive character made by the Judge are based on a sufficient consideration of the evidence, or that evidence relevant to a particular finding not considered in the judgment has not been overlooked by the Judge in making that finding where that evidence, if accepted, could have supported a different finding."*

22. Later in the judgment however the further important point was made: *"It must, however, be emphasised that delay between taking evidence and the delivery of judgment does not, in itself, justify upholding an appeal against the judgment given. Error must still be established on the part of the trial Judge warranting either a reversal of the judgment or the grant of a new trial. Delay may assist an appellant in establishing such error because, as the approach identified by the full federal court demonstrates, the inference will more readily be drawn that a trial Judge's failure to deal in a significantly delayed judgment with particular matters on which the appellant relied in contradiction of the findings made in that judgment resulted from those matters being overlooked by the Judge – either because of the time which has passed or because of the pressure on the Judge in the end to complete the judgment. In Boodhoo v. Attorney General of Trinidad and Tobago* [2004] UKPC 17: [2004] 1WLR1689 at [11], t*he Privy Council acknowledged that the delay in giving the decision may adversely affect its quality to such an extent that it cannot be allowed to stand. That is what must be shown in order to demonstrate error resulting from delay which was warrants either a reversal of a new trial."*

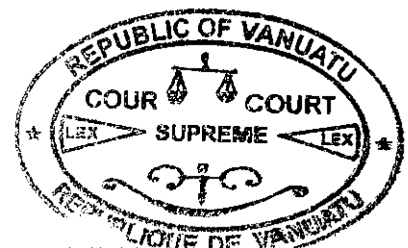
23. More recently, again in relation to an appeal from the Trinidad and Tobago Court of Appeal the Privy Council said in *Ramnarine v.*



*Ramnarine* [2013] UKPC 27 that even extreme and entirely unacceptable delay is not necessarily indicative of error in the judgment issued. That was a case where a judgment was issued four years after the hearing. The Privy Council cited one of the its earlier judgments, *Cobham v. Frett* [2001] 1WLR1775 at 1783, 1784 where Lord Scott said: *"In their Lordship's opinion, if excessive delay, and they agree that 12 months would normally justify that description, is to be relied on in attacking a judgment, a fair case must be shown for believing that the judgment contains errors that are probably, or even possibly, attributable to the delay. The appellate Court must be satisfied that the judgment is not safe and that to allow it to stand would be to be unfair to the complainant."*

24. In the *Ramnarine* case the Privy Council concluded: *"...gross though was the Judge's delay in its delivery, the Board fails to find consequential error in the reasoning of his judgment."*

25. In this case the appellants have focused their submissions entirely on the fact and extent of the delay. Neither Mr Yawha nor Mr Livo were able to point to errors which were probably or even possibly attributable to that delay. My assessment of the Island Court judgment is that it is a thorough recording and a sufficiently thorough assessment of the issues put before it. I do not know what notes were taken at the hearing and subsequently used as the basis for the judgment but there must surely have been reasonable records kept by at least the Senior Magistrate because otherwise it would have been impossible for her to draft the judgment with the level of detail which she did. While as will be discussed later in this judgment there are some criticisms of findings as having been made without sufficient evidential basis, I am not satisfied

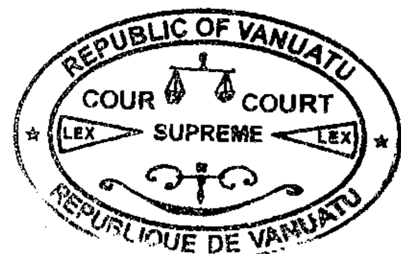


that there is a causative link between the delay in issuing judgment and any such possible errors, nor did Mr Yawha or Mr Livo make any submissions asserting, let alone tending to establish, such a link.

26. For these reasons I reject the first ground of appeal.

**Addition of new parties during rehearing**

27. When this case was first heard and determined by the Efate Island Court in April 2004 there were only five parties to the case, namely Narewo Kaltolu Lulu, Pierre Nikara, Lakelo Taua Manawora, Masaai and Mariki Langa Ni-Vatelapa. Family Thesa Anatu and family Lakelopoi were not parties. As noted above, these families made application to be joined in June and August 2010 respectively and over the objection of other parties the Island Court granted their applications. The Court said in respect of the application by the Thesa Anatu Family (and it later said the same reasoning apply to the Lakelopoi Family): *"After hearing everyone, the Court found that the basis of the application made by Kalchirau Lal Thesa Anatu was in order 6 rule 8 which allowed him to become a party in such a case. Under this rule, the Court clerk must advertise the date of the hearing and give 30 days to anyone with an interest in the land in question to join as a plaintiff or defendant in the case. The clerk had not advertised the notice for the hearing and therefore the Court cannot refuse this application. Moreover, there has also been a case where the Court had finished and the land visitation had already started, then there was this family who made an application to be a party in the case and the Court had accepted them.*

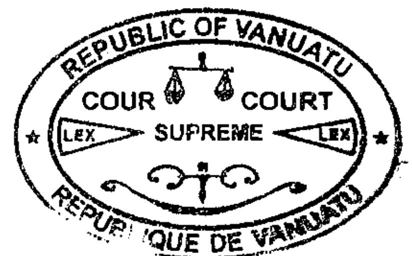


*Therefore, there was basis for this application and there was also practicable basis and therefore the Court accepted the application and ordered that Thesa Anatu Family become a party in this case."*

28. Mr Yawha submitted that when the Supreme Court allowed the appeal and directed a rehearing by a differently-constituted Island Court, that meant only the parties involved in the previous case could be involved. He relied on the natural and ordinary meaning of the word "rehear".

29. I reject the proposition that a rehearing may only include the parties involved in the original hearing. The obligation of the Island Court is to rehear *the case* and if it appears on application by other parties that they ought to be heard then as a matter of common sense (and avoidance of inevitable appeals) they should be given an opportunity to be heard, provided the Court forms the view there is a proper basis for their involvement.

30. The overriding purpose of the Civil Procedure Rules and no doubt by implication the same must apply in the Island Court jurisdiction, is to ensure that the Courts deal with cases justly. In the Supreme Court under rule 3.2 the Court has wide power to join a party to a proceeding *"if the person's presence as a party is necessary to enable the Court to make a decision fairly and effectively in the proceeding"*. It also has wide power to remove a party from a proceeding *"if the person's presence is not necessary to enable the Court to make a decision fairly and effectively in the proceeding"* or *"if for any other reason the Court considers that the person should not be a party to the proceeding"* (rule 3.2 (2)(a) and (b)).

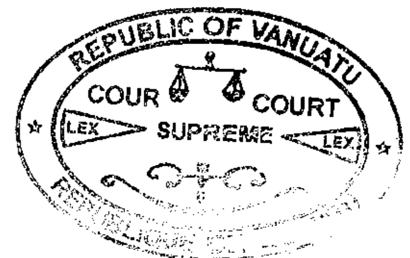


31. If Mr Yawha's strict approach to a rehearing were adopted, there would be a real possibility of injustice. A rehearing allows the parties to present their cases in a different manner than at the earlier hearing and a differently-constituted Court may look at the issues in a different way and call on the parties for submissions on issues which were not aired at the previous hearing. Consistent with this, the Court may decide that other parties should be involved and proactively seek to join them, or that others who were involved no longer should be.

32. In this case, there were express applications made by parties who apparently for good reason had not previously been involved. The Thesa Anatu family said they were unable to join the initial proceedings because they had been unable to afford it. They simply wanted to exercise their constitutional rights as claimed indigenous custom owners to try to prove that they too had some rights under custom to the Malawora land. If in these circumstances the Island Court had declined their application for joinder there would inevitably be an appeal and it would likely have succeeded.

33. In my view, the Court acted entirely properly in adding the other two families who made formal application. The Court considered both the applications and the objections and made a reasoned decision for joining them as parties.

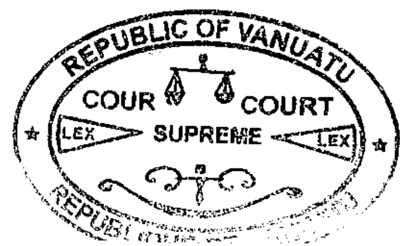
34. In respect of family Lakelopoi, Mr Yawha made a further point that a Supreme Court ruling in *Lakelopoi v. Lulu* [2004] VUSC 90 was a binding authority preventing the Island Court joining that family as it did. With respect, Mr Yawha's submission is based on a misunderstanding of that judgment. The Chief Justice was there dealing



with an application seeking leave of the Supreme Court to appeal against an interlocutory decision of the Efate Island Court in which it refused to add the Lakelopoi Family as a party to Land Case No. 10 of 1993. The Chief Justice declined the application but it is clear that his Lordship's decision depended on the particular circumstances in which the application had been made. Family Lakelopoi had on 4 February 2004 applied to the Presiding Magistrate, the late Nesbeth Wilson, to be joined as a party but she refused the application because the period of 30 days for the filing of land claims had expired. The claim was ready to be heard and the family had not come to the Court within a reasonable time.

35. On 10 February 2004 the Efate Island Court started to hear the land dispute, the Court being presided over by Magistrate Jerry Boe. Four of the parties had completed their evidence by that stage with one more yet to be heard. Family Lakelopoi applied by letter dated 17 February 2004 to Magistrate Boe to be added as a party but he refused the application. That order was not appealed nor was any leave to appeal against it sought. The case then concluded with all the evidence and submissions made and a date for delivery of the judgment was set for 31 March 2004.

36. On 3 March 2004, Family Lakelopoi made the application for leave to the Supreme Court to appeal against Nesbeth Wilson's decision and the matter came before the Chief Justice on 23 March 2004. The applicant had not lodged any land claim nor paid any fees. The Chief Justice noted that the application was filed before the Supreme Court at a difficult stage and it should have been filed earlier.



37. The Chief Justice's judgment may therefore be seen simply as a reaction to a belated challenge to an interlocutory ruling made at a time when the hearing had concluded and delivery of judgment was imminent. That is very different from the Chief Justice saying that this family could not be made a party to the hearing before the Island Court in 2011. Clearly at the time the Lakelopoi family made application to the Island Court on 4 August 2010, the Court considered matters were at a stage where they could properly be accommodated and heard in the process. It was not too late.

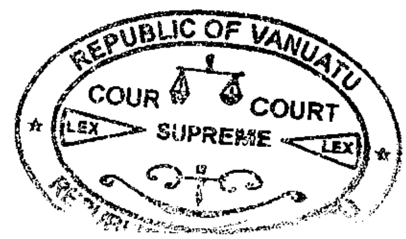
38. I dismiss the second appellant's second ground of appeal.

**Apprehension of bias**

39. Although in part Mr Yawha founded this ground of appeal on the delay in issuing the judgment, his primary contention is that as a result of series of occurrences from April to September 2011 the judgment ought to be set aside on the ground that there is a sufficient basis for apprehension of bias on the part of the presiding Magistrate Nesbeth Wilson. In brief, this is because of information which the appellants received about her conduct from one of the Justices, Justice Eddie Karis, and from the Clerk of the Island Court, Jonah Mesau.

40. The evidence placed before the Court by the appellants is contained in the sworn statements of Kalo Dick Mariki dated 18 October 2013, Kalchirau Lal Thesa Anatu dated 19 May 2014 and John Robintaravaki, also dated 19 May 2014.

41. In his statement Mr Mariki attaches a copy of a letter he wrote to the Minister of Justice on 6 April 2011 expressing concern about the

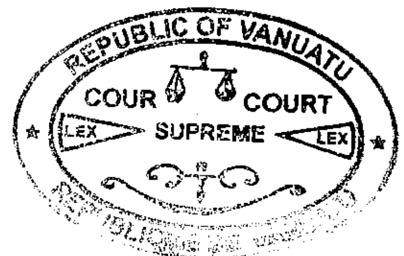


substantial delay in the delivery of judgment and adding that he believed something strange was going on in connection with this delay. He said that he had heard confidentially from one of the justices (presumably Justice Karis although this is unclear) that he was disappointed in the delay in handing down the final judgment which had already been made. He had added that he was unhappy because the presiding Magistrate wanted to change the substance of the decision that had earlier been made collectively.

42. Mr Mariki went on to say that on 27 July 2011 (i.e. five days after the delivery of the judgment) he went to the office of the Efate Island Court to collect some documents and was told by the Clerk that the judgment of 22 July was *"not good because there were irregularities with the decision – making process used by the presiding Magistrate"*. The clerk suggested that Mr Mariki request the Justices who sat with the presiding Magistrate in that case to make sworn statements about the irregularities.

43. On 4 August 2011, the Clerk repeated these comments when Mr Mariki returned to the Court with Mr Anatu.

44. On 27 September 2011, Justice Karis saw Mr Mariki at Seaview Takeaway and he said he wanted to file a sworn statement to complain about the irregular manner in which the presiding magistrate substituted the collective decision of the Court with another made by herself alone. However, he said the Chief Magistrate had persuaded him not to do so saying that he could not swear a statement against the decision of a Court of which he was part. Justice Karis said that as a result of what the presiding Magistrate had done he felt unhappy and restful in his spirit.

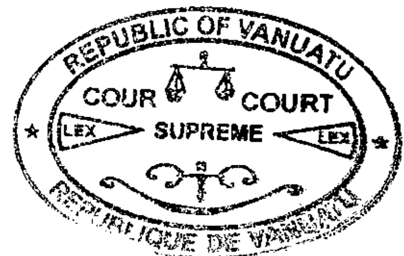


45. Mr Mariki deposes that he and other members of his family have as a result grave concerns about the validity and neutrality of the judgment of the Court and they believe it was biased and procured by undue influences or extrajudicial considerations.

46. Mr Anatu said he and John Robin Taravaki met Justice Eddie Karis at his home at Eton village (he does not say when) and he told them that in the first judgment drafted for delivery on 30 November 2010, the Anatu family was to be declared the custom owner of Malawora land. However the judgment was changed when he was sick and he said he was not at peace because the judgment had been changed. He added that if the Island Court had enough money they would force the Island Court to hear that case again. During the same meeting he went on to say that if something happens to me, my son is my witness. You prepare a letter and bring it back for me and my son to sign.

47. Mr Anata and Mr Taravaki prepared a document and five days later went back to Eton village and gave it to Justice Karis but he said that the Chief Magistrate had since told him that if he signed the letter that would mean the judgments we made were all lies and that if he signed the letter the police would arrest him and lock him up in cell no. 6. He said he would provide a copy of the letter that Mr Simeon Poilapa had written to the Court which had resulted in the change of judgment and the adjournment of the hearing to another date because there was an error.

48. In summary then, the appellants have sought to place before the Court evidence suggestive of a changing of the substance of the decision of the

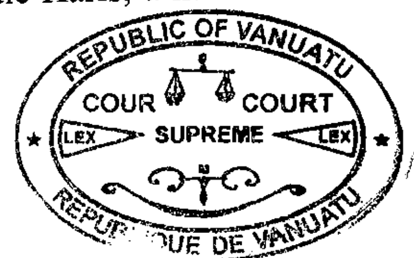


Island Court prior to its final delivery and of the disagreement and dissatisfaction about this by one of the Justices, Justice Karis.

49. The first question is whether this evidence should be admitted for consideration on the appeal. Although it admissibility was not directly challenged by the respondents and therefore there were no submissions on admissibility at the hearing itself, the respondents did object to any weight being given to this evidence. They submitted that the Court had issued only one judgment and that it had been signed by all four Justices including Justice Karis. What happened prior to the issue of the judgment was a matter of speculation and the Court should not place any weight on the evidence because it was hearsay.

50. After reflection, I have come to the clear view that the Court should not admit the evidence of Mr Mariki, Mr Anatu and Mr Robintaravaki on this issue. The reason is that it is evidence following the judgment of the Court seeking to breach the secrecy and confidentiality of the Court's decision making process. The importance of the principle against looking into such matters has been strongly upheld by Courts in various jurisdictions for many years as being necessary to preserve the integrity of the judicial decision-making process.

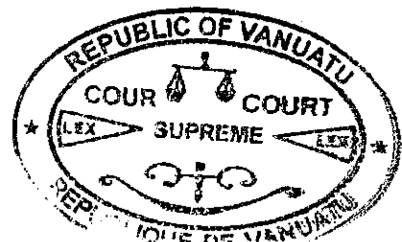
51. A similar issue arose quite recently in Vanuatu, before Justice Fatiaki in *Manlaewia v. Maripopongi* [2015] VUSC 119. In his Lordship's judgment of 31 August 2015, he dealt with an application to lead further evidence at the hearing of the appeal. The further evidence included an audio recording and written transcript of an interview conducted between an employee of a local law firm and, perhaps not coincidentally, Island Court Justice Chief Eddie Karis, a member of the



Efate Island Court whose decision was under appeal. The application was opposed because it was undoubtedly hearsay and was described by the respondents as a wholly improper and contemptible interview conducted with a Justice of the Efate Island Court after the Court had delivered its unanimous judgment and when the Justice who had signed the judgment was clearly *functus officio.*

52. Justice Fatiaki referred to the judgment of the English Court of Appeal in *Ellis v. Deheer* [1922] 2 KB 113. There a new trial was sought, of an action tried before a jury, on the ground that the verdict as delivered by the foreman of the jury was not the verdict of the whole jury. The facts were unusual because when the jury returned with their verdict another jury had been impanelled to try the next case and they were sitting in the jury box. There was insufficient space available in the body of the Court for all of the jury to stand together for the announcement of their verdict so the foreman went into the witness box with other jurors behind him. Not all could hear what the foreman said. It appeared that when some of the jurors found out the decision which had been announced they said it was not the verdict of all of them and provided affidavits accordingly.

53. Bankes LJ said at pages 117 to 118: *"A number of affidavits of jurymen were tendered containing statements not only as to what took place in the Court after the jury had returned but also as to what occurred in the jury room. With regard to the latter class of statements I desire to make it clear that the Court will never admit evidence from jury men of the discussion which they may have had between themselves when considering their verdict or of the reasons for their decision, whether the discussion took place in the jury room after retirement or in the jury box itself. It has for many years been a well accepted rule that when once a*

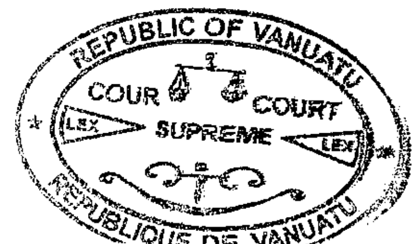


*verdict has been given it ought not to be open to an individual jury-man to challenge it, or to attempt to support it if challenged. I have spoken of this as a rule of law but it has also been generally accepted by the public as a rule of conduct, that what passes in the jury room during the discussion by the jury of what they verdict should be ought to be treated as private and confidential."*

54. Warrington LJ said, at pages 119 to 120: *"I desire to express my concurrence with what Bankes LJ has said as to the grave impropriety of publishing what takes place during the deliberations of the jury after they have retired to consider their verdict."*

55. Atkin LJ said, at pages 121 to 122: *"I wish to express my complete agreement [with Bankes LJ with regard to the general rule that the Court does not admit evidence from a juryman as to what took place in the jury room, either by way of explanation of the grounds upon which the verdict was given, or by way of statement as to what he believed its effect would be. The reason why that evidence is not admitted is twofold, on the one hand it is in order to secure the finality of decisions arrived at by the jury, and on the other to protect the jurymen themselves and to prevent their being exposed to pressure to explain the reasons which actuated them in arriving at their verdict. To my mind it is a principle which is of the highest importance in the interests of justice to maintain, and an infringement of the rule appears to me a very serious inference with the administration of justice."*

56. As Justice Fatiaki also noted, the House of Lords more recently reinforced the importance of this principle in two cases that were heard together *R v. Mirza and R v. Connor and Rollock* [2004] 1 AC 1118. At

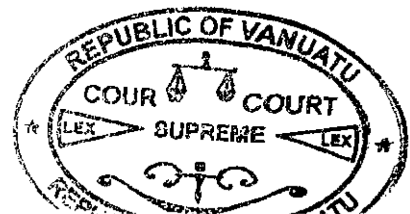


paragraph 142 Lord Hobhouse said: *"The confidentiality of jury deliberation is a well-established principle of both English and Scottish law...the confidentiality is not temporary: it is permanent and not capable of waiver. Thus the duty of the juror to respect that confidentiality continues, indeed it especially applies, after the case is over and the jury has been discharged and dispersed. Nothing could be more destructive of the duty of confidentiality than the juror coming out of the Court and communicating his or her views about the jury's deliberations to the media or persons who are likely to disagree with the verdict which was returned. The rationale of the rule includes the need for finality. A verdict returned in the presence of all of the jurors and on their behalf is not to be open to second thoughts and must, subject to very limited exceptions, e.g. patent inconsistency with another verdict, be accepted by the trial judge."*

57. Justice Fatiaki noted that although both of these cases involved juries, the principle was in his view equally relevant and applicable to a Justice of the Island Court. I respectfully agree. I rule the evidence about the alleged change of decision and irregularities in the decision making process inadmissible.

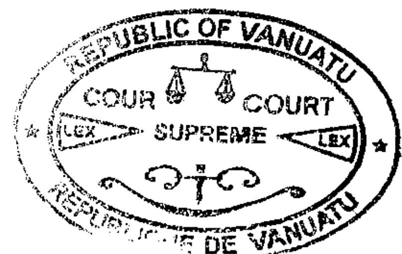
58. The appellants' *"apparent bias"* ground is therefore dismissed because there is no admissible evidence to support it.

59. Because the admissibility of the "bias" evidence was not expressly argued before me (although the weight to be ascribed to it certainly was) I have considered whether natural justice required me to provide an opportunity for the appellants to make further submissions. I have decided that is unnecessary, for two reasons. First, because of the strength of the principle which dictates that such evidence must not be



admitted i.e. there is no reason to think the point is even arguable in these circumstances. Second, I have given consideration to whether this ground of appeal would have been upheld if the evidence had been admitted. For the reasons which follow, I have come to the view that it would still be dismissed.

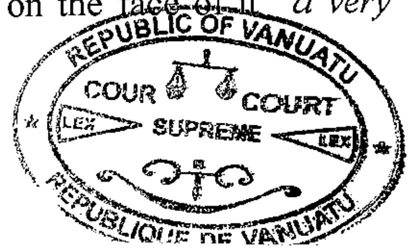
60. I consider the proper description of this ground of appeal to be *"Improper conduct on the part of the presiding Magistrate affecting the substance of the judgment"* rather than *"Apprehension of bias"*. The latter is a well-known basis on which a judicial officer may decide not to sit on a case or be required not to. It is almost always dealt with prior to the Court making a decision. However, that is not always so. Indeed the earlier Supreme Court judgment in this very case, *Masaai Family v. Lulu* [2005] VUSC 124, is an example of a decision retrospectively being overturned because of the appearance of partiality arising from the Magistrate and Justices during the course of the hearing having had lunch with some parties but not others and carrying out site visits in the company of only one of the parties. Also in *Matarave v. Talivo* [2010] VUCA 3 the Court of Appeal overturned a Supreme Court judgment on a similar ground. The rationale for such decisions is that while there is no proof, or even not necessarily any allegation, of *actual* bias on the part of one or more decision-makers, the *appearance* of impartiality is unacceptably impaired by the relevant conduct. This case is different. There is no information in, or to be inferred from, the sworn statements as to why it may have been that the (alleged) original decision was (allegedly) changed by the presiding Magistrate and there is no reason put forward suggesting apparent or actual bias for or against any party.



61. As the respondents submitted, it is a matter of speculation what may have occurred in relation to the alleged change in the judgment and result. There is nothing wrong with the members of a court of several members debating whether a draft initial judgment should be maintained or changed. On the contrary, that may well reflect a thorough and proper process in which competing evidence and submissions are reassessed. We do not have the alleged two versions of the judgment to compare.

62. In the end, the telling point is that all four Justices, including Justice Karis, signed the 22 July 2011 judgment. If Justice Karis really was uncomfortable with the judgment or the process which led to it he would surely not have signed it. I note that there is express provision in rule 7 (7) of the Island Court (Civil Procedure) Rules 2005 for a majority judgment. Justice Karis therefore had the opportunity to decline to be part of the majority and indeed, if he thought fit, to issue a dissenting judgment. He did not do so and one can only conclude that whatever may have occurred before the judgment was issued on 22 July 2011, he was ultimately comfortable, in accordance with his judicial oath, to assent to it by signing it. Once that happened, he had completed his role as a justice in that case and become *functus officio*. The comments he apparently made (and clearly they are before the Court in hearsay form in any event and the learned Presiding Magistrate has since died) cannot be given much if any weight and certainly not enough to justify allowing the appeal.

63. I respectfully endorse the apparent reaction of the Chief Magistrate on hearing that Justice Karis was intending to sign a post-judgment document expressing disagreement with the process and the result: to use the words of Lord Atkin in *Ellis v Deheer*, what Justice Karis apparently told the appellants' witnesses was on the face of it *"a very*



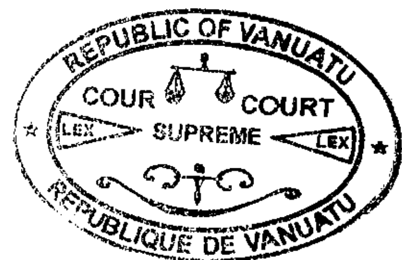
*serious interference with the administration of justice"* and arguably in contempt of the court on which he had sat. That warranted strong disciplinary action.

**Substantive Grounds – Failure to give proper weight and consideration to aspects of the evidence**

64. In ground 3 of the notice of appeal Mr Yawha was critical of the Court's observation at page 30 of its judgment: *"At the beginning of the hearing of this case, the Court clearly instructed the parties to help the Court to help them. Our findings are based on your submissions to the Court. We only gave minor consideration to the witnesses of each party. Most of your witnesses have caused too much confusion to the Court and were destroying the presentations made by each party's spokesman. There were too many "I don't know" answers and some witnesses refused to answer questions."*

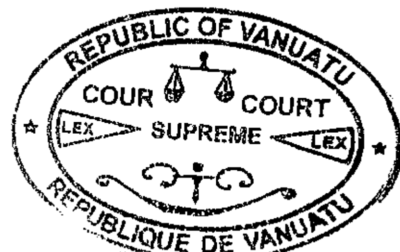
65. Mr Yawha submitted that by largely refusing to base its findings on the testimony of witnesses called by the parties the Court erred in law in that it made decisions on crucial issues without any clear or proper evidential basis to support its findings, orders and declarations.

66. I do not agree. In the passage quoted the Court was simply observing that many of the witnesses did not assist, and in some cases harmed, the cases advanced by the party's spokesman. The Court was entitled to make such an observation and to say as it did that the focus of its decision was then on where each party originated from and whether they based they claim on their patrilineal lineage. In this, the Court will obviously have taken into account the information obtained on the site visits.



67. Like any Court, the Island Court simply had to do the best it could to make a just decision on the information put before it by the parties. The judgment itself gives every indication that that is what the Court did. There is no justification for concluding from the quoted passage that the Court was not justified in making the conclusions it did. All it was saying was that it was not assisted as much as it would have wanted to be, and had asked to be, in making its decisions.

68. A further point made by Mr Yawha (ground 5) was that the Court had erred in declaring customary ownership rights to portions of the land that were defined not by customary descriptions but on the basis of leasehold titles, the boundaries of some of which extend beyond the traditional boundaries of the land. Again, as Mr Loughman submitted, the Court has to do its best with the information available. Undoubtedly the European land title system following surveying has placed an overlay onto this custom land as elsewhere in Vanuatu. Many of the historic markers of customary boundaries will have been destroyed or removed. However, it is clear that during the site visits all parties had the opportunity to and did take the Court to relevant places. The assessment of boundaries was therefore clearly done in a custom way. The Court observed at the end of its decision: *"As we stated at the beginning of the hearing, the parties were required to give the custom name of their boundary, so that we could declare the land according to the custom names. However, the parties did not satisfy the Court with the names, therefore we are making declarations according to the existing titles."* So again the Court has had to, and appears to have done, its best with the information provided to it. Use of the lease titles provides some certainty as to the areas of land which are subject to the



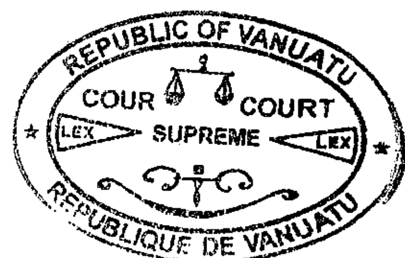
declarations. In any event, the appellants have been found not to be the rightful custom owners of any of the land but rather to have certain rights under other families. Therefore, however the land as described, the result is unaffected.

69. As Mr Kilu pointed out, all the disputing parties can do in cases like this is to get as close as possible to their original boundary marks, some of which may well have been followed by the surveyors when drawing up the leasehold title maps. As he also noted, in accordance with the usual process, the disputed Malawora land boundaries were essentially drawn up by the original claimant, the first respondent Mahit Chilia, who lodged the original claim in the Island Court. There is not much the Court can do about drawing up disputed land boundaries other than following (as a starting point at least) the claimant's original map of the disputed land and that is what occurred here.

**Other substantive grounds**

70. The balance of the points advanced by Mr Yawha relate to alleged errors in relation to findings in connection with particular families. These allege discrepancies between findings and the evidence put before the Court. The respondents reject these grounds and advance their own points in support of their positions.

71. Whilst strictly speaking on an appeal by way of rehearing the appellate court is required to come to its own view about such factual matters, the difficulty facing this Court is that there is no record of what (or at least, not all of what) was put before the Court and of the conclusions drawn during the site visits. The challenges advanced by Mr Yawha allege



insufficient consideration and improper allocation of weight to various aspects of the evidence.

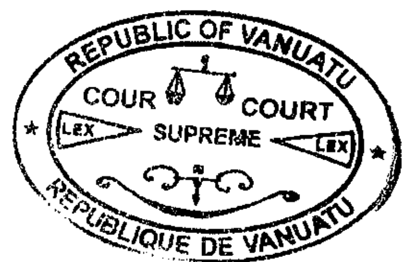
72. The Island Court judgment is thorough and explains, with reference to the evidence and to the site visits, what its findings are, with reasons given. While the appellants no doubt disagree with the conclusions, that does not mean they were not open to the court. It is clear that the Court has made reasoned findings based on the information provided to it. It is impossible for this Court to conclude that in making those findings it did not have a sufficient basis to make them.

73. It needs to be remembered that the Island Court is given wide power to decide in favour of the party whose evidence in the opinion of the Justices is *"more convincing"* (see rule 7. (4)). An appellant therefore has a difficult task persuading an appellate Court, which has not had the advantage of hearing and seeing the witnesses and of going on the site visits, that the Court at first instance was not entitled to find itself convinced in reaching the decisions it did.

74. I therefore dismiss the balance of the appellants' grounds in which they criticise the Island Court's findings as being insufficiently supported by the evidence.

**Result**

75. I am not satisfied that the appellants have discharged the onus on them to show error on the part of the Island Court on any of the balance of the appeal grounds they have raised. Their appeals are accordingly



dismissed and I therefore uphold the Island Court judgment of 22 July 2011 except to the extent set out in my judgment of 13 August 2015.

**Costs**

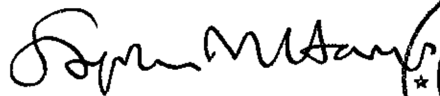
76. At the conclusion of my judgment of 13 August 2015 I reserved costs but noted that in principle the appellants were entitled to costs in respect of their success in appealing against the inclusion of title 69 in the Island Court's declarations. Looking at the matter overall, the appellants succeeded on that preliminary issue but have failed on all the others. They succeeded (at least in establishing a ground of appeal, if not in the consequential order sought) at the first hearing, but have failed at the second.

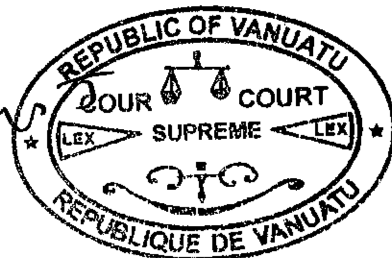
77. In these circumstances, subject to any submissions the parties may wish to make, my preliminary view is that costs should lie where they have fallen.

78. If any party wishes to seek to persuade me otherwise then submissions are to be filed and served **by Friday 4 March 2016.**

**Dated at Port Vila, this 18th day of February, 2016**

**BY THE COURT**






**SM HARROP**
**Judge**