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

Land Appeal Case No. 076 of 2007

IN THE MATTER OF: **CUSTOM LAND KNOWN AS "*AMELPREV*" AT RANO MAINLAND COAST, NORTH EAST MALEKULA**

AND

IN THE MATTER OF: **AN APPEAL AGAINST THE DECISION OF THE MALEKULA ISLAND COURT IN LAND CASE NO. 10 OF 1984**

BETWEEN: **DADDEE LAPENMAL**
First Appellant

AND: **FAMILY UTISSETS**
Second Appellant

AND: **FAMILY KILETEIR**
Third Appellant

AND: **TOLSIE AWOP and FAMILY**
First Respondent

AND: **CERILO LAPENMAL**
Second Respondent

AND: **FAMILY LOLINMAL**
Third Respondent

AND: **MARCEL SARONGNEE**
Fourth Respondent

AND: **JEAN CLAUDE MULUANE**
Fifth Respondent

AND: **JOSHUA KEN**
Sixth Respondent

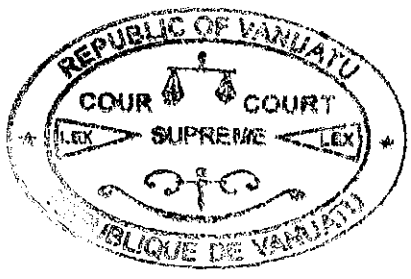
AND: **FAMILY LESINES**
Seventh Respondent

AND: **FAMILY BAIPA**
Eighth Respondent

Coram: *Justice D. V. Fatiaki*

Assessors: *Kalman Hapsai*
Shem Tasvailie

Counsel: *Mr. C. Leo for Daddee Lapenmal*
Mr. S. Stephen for Utissets
Mrs. M. G. Nari for Tolsie Awop



JUDGMENT

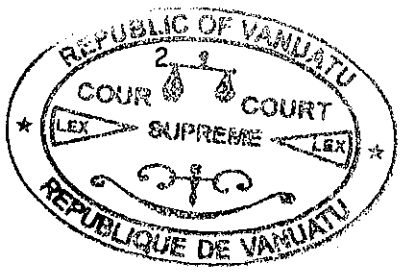
1. This is an appeal against the judgment of the Malekula Island Court delivered on 15 October 2007 in Land Case No. 10 of 1984 concerning a customary land known as "*Amelprev*" situated on the Rano mainland coast at North East, Malekula.

2. The original eleven (11) claimants before the Malekula Island Court and their respective spokesmen were:

   (1) Tolsie Awop & Family – Elsiem Utissets;
   (2) Daddee Lapenmal – Ulrick Lapenmal;
   (3) Family Utissets – Roy Buktan;
   (4) Cerilo Lapenmal – Ferno Lapenmal;
   (5) Family Lolinmal – Louis Ureleless;
   (6) Marcel Sarongnee – Timothy Maltock;
   (7) Jean Claude Muluane – (in person);
   (8) Family Baipa – Collin Taur;
   (9) Joshua Ken – Gratien Maltape;
   (10) Family Lesines – Hillaire Lesines;
   (11) Family Kileteir – Jeffrey Kileteir.

3. From the above list it is clear that the competing claimants included families and individuals even related individuals, such as Daddee Lapenmal and Cerilo Lapenmal and likewise the spokesman for the First Respondent Family is a close relation of the Utissets Family. This unsatisfactory situation had arisen because of internal differences within the Lapenmal and Utissets families. It should not have been entertained or allowed and indeed gave rise to a great deal of irrelevant inconsistent and conflicting evidence including family trees before the Island Court and in the appeal. In our view both families should have been required to settle their internal differences before filing only one claim before the Island Court from the very outset. Be that as it may the Malekula Island Court was presided over by Magistrate Edwin Macreveth and justices Lorna Bongvivi, Douglas Vardal and Robert Niptik. The Land Case was heard over 18 days in August 2007 at the Orap school compound.

4. The carefully reasoned judgment of the Island Court is 31 pages long and concludes with the following declaration:



"*In light of the foregoing deliberations, it is hereby this day adjudged in the following words:*

1. ***That Tolsie David and family be the custom owner of the land of Amelprev as advertised therein;***

2. *That the claim by Jean Claude Muluane is dismissed;*

3. ***That all other parties to the case have the right to use the land.*** *Such granted right is given effect (in) light of the fact that claimants to the land have for many years caused development to it. It is for that reason, that they will continue to maintain their existing properties but are subject to the authority of the declared owners of the land;*

For ease of clarity, it is noted that some parties have no property in their claimed land. The conferred rights will not mean that they are now given the mandate to use such land save in consultation with the owners.

All costs necessitated by this proceeding will fall as found.

Any aggrieved party wishing to appeal this decision must do so within a period of 30 days from date."

5. On 12 November 2007 **Family Utissets** filed a notice and grounds of appeal. Likewise **Family Kileteir** filed a Notice of Appeal on 12 November 2007 and their grounds of appeal on 15 November 2007. On the other hand **Daddee Lapenmal** filed a Notice of Appeal within time on 14 November 2007, but did not provide any grounds of appeal until 9 December 2008 a year later. No other appeals were filed against the Island Court decision and, other than the first Respondent family, all other parties were removed or struck off during the management of the appeal.

6. We record that after an abortive hearing on the "*apprehended bias*" ground for which the Court delivered a ruling on 9 December 2011, the appeal was finally reheard at the Malekula Magistrate Court at Lakatoro between 26 to 30 March 2012. The Court was ably assisted by two (2) assessors **Chief Kalman Hapsai** of Brenwei, North West Malekula and **Chief Shem Tasvailie** of Taremb, South East Malekula.

7. Although the appeal grounds were numerous several were withdrawn or dismissed during the hearing of the appeal and so it is possible to reduce the remaining grounds of appeal into the following convenient common headings for the purposes of this appeal:

   (1) Apprehended Bias;
   (2) Matrilineal vs. Patrilineal rights;

(3) Pre-independence decisions;
(4) Site visit;
(5) Against the weight of the evidence.

APPREHENDED BIAS

8. As far as ground (1) is concerned given the nature of the complaint which should have been but was never raised before the Island Court, the parties were permitted in the appeal, to adduce fresh evidence by way of sworn statements to support the allegation(s) made. All deponents were also called and cross-examined during the hearing of the appeal. They were:

(1) Daddee Lapenmal for the First Appellant;
(2) Wilfred Utissets for the Second Appellant; and
(3) Fernard Lapenmal and Steve Utissets for the first Respondent.

After carefully considering the evidence and counsel's submissions on "*apprehended bias*" the Court reached the unanimous conclusion during the appeal hearing that this ground should be dismissed for reasons to be provided in the judgment. The following are the Court's reasons.

9. Included in the allegation of apprehended bias are five (5) distinct complaints:

(a) The presiding Magistrate slept at Orap village in the same location as the spokesman for the first Respondent family;

(b) The presiding Magistrate was given an "*umbrella*" by the spokesman of the first Respondent during the Island Court's visit to the disputed land;

(c) The spokesman of the first Respondent was seen building a "*victory shelter*" a few days before the Island Court delivered its decision;

(d) A son of the spokesman of the first Respondent was overheard claiming success at a nakamal a few days before judgment was delivered by the Island Court; and

(e) The presiding Magistrate had a close "*family relationship*" by marriage with Eli Masiv;

10. Before dealing with the specific complaints the some general observations may be made. Firstly, the complaints were almost entirely focused on the presiding Magistrate with no similar allegations being made against the 3

justices who were also members of the Island Court. Secondly, the complaint is not one of actual or proven bias against the presiding Magistrate but rather the equally important aspect that: "*... justice must be seen to be done*". In other words there was an: "*... apprehension of bias*"; and Thirdly the allegations do not refer to any actions or utterances by members of the successful Respondent Family.

11. Any discussion of "*apprehended bias*" against a Magistrate or justice of the Island Court must begin with the disqualification provisions set out in Section 21 of the Judicial Services and Courts Act 2000 and Section 26 of the Island Courts Act [CAP. 167] which states:

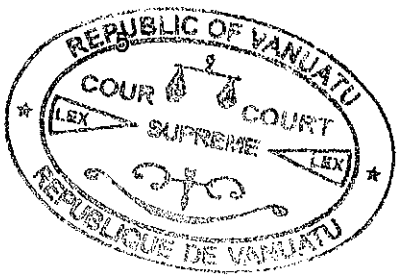
"*If a justice or an assessor has any personal interest or bias in any proceedings he shall be disqualified from hearing the same*".

12. **Section 21** of the **Judicial Services and Courts Act** No. 54 of 2000 which deals with the disqualification of Magistrates is in identical terms to Section 38 which deals with the disqualification of judges. Accordingly what the Court of Appeal said about Section 38 in Matarave v. Talivo [2010] VUCA 3 is equally relevant in construing section 21 where it said:

"Section 38 (1) recognizes that actual interest or bias or an apprehension of bias by a judge is an absolute disqualification. A judge in all circumstances must disqualify himself or herself from hearing the proceedings, and direct that the proceedings be heard by another judge. The requirement is mandatory. ... ***In the ordinary case it can be expected that a judge who has an interest will be aware of that fact. However, in the case of bias, particularly apprehended bias, a judge might not realize that particular circumstances constitute bias or give rise to the apprehension of bias.*** *Hence s.38 (2) provides for a party to make application to a judge, thereby bringing the circumstances said to give rise to the bias or apprehension of bias to the attention of the judge.* ***Moreover this section anticipates that the procedure under this section will occur before the judge brings down a decision disposing off the matter before the Court.*** *Once judgment is entered the function of the judge is complete, and the time when the judge can withdraw and arrange for another judge to hear the matter has passed. ....*

.... In the case of an administrative tribunal the decision is, as a general rule, considered void if a tribunal member has a direct interest, or is affected by bias. ***However in the case of a court decision, the general rule is that a decision infected with error of this kind remains valid as part of the public record unless and until a court declares it to be invalid.*** *In this sense the decision is voidable but not void until so declared.*

The decision is voidable because the tribunal was not validly constituted, and therefore was not in a position to legally carry out the function which it was otherwise empowered to exercise.



In the present case, even though the allegation of disqualification for apprehended bias on the part of the judge and the assessors is now raised after the delivery of judgment, we consider that if the ground for disqualification against one or other of the judge or assessors is established, that renders the decision of the Supreme Court voidable. ..."

(our highlighting)

13. Later in discussing "*apprehended bias*" the Court of Appeal said:

"It must be stressed that it is not alleged that the judge had any direct interest in the proceedings or that he was actually biased. The allegation against him is based only on there being, objectively assessed, an apprehension of bias."

14. Then after considering R v. Gough [1993] AC 646 (UK); Antoun v. R [2006] HCA 2 (Aust); Saxmere Company Ltd. v. Attorney General [2002] VUSC 90 (NZ) the Court of Appeal set out the relevant test for "*apprehended bias*" as follows:

"The test we apply is whether a fair minded lay observer might reasonably apprehend that the judge might not bring an impartial mind to the resolution of the questions which the Court was required to decide. In the case of the assessors the test is the same."

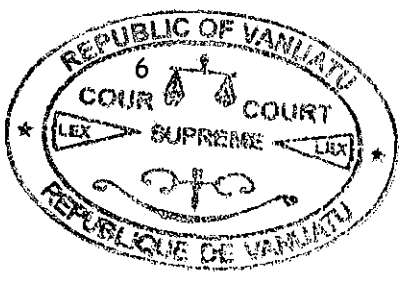
15. In this regard we do not accept that the parties sleeping in the same locality as the Island Court members is a disqualifying circumstance without more. As was said by the Court of Appeal in the Matarave case (ibid):

"It is not uncommon in the day to day relationships of parties in a community that a decision maker will come into the same place as a party in a current case. Casual meetings may unexpectedly occur, for example in shopping centres, churches or other meeting places. Sometimes there are public functions to which the decision maker and the parties are invited, and at which they are all expected to attend. A fair minded observer would not apprehend bias just from contacts of this kind."

(***see also:*** Tula v. Weul and Others [2010] VUCA 42)

16. So much for the applicable law. We turn our attention next to the evidence led by the appellants who bear the burden of satisfying the Court that the decision of the Island Court should be quashed by reason of "*apprehended bias*" on the part of the presiding Magistrate only.

17. The first complaint is to the effect that the presiding Magistrate and justices of the Island Court had stayed at Orap village as well as Elseim Utissets the spokesman of the Respondent family in defiance of a court directive that all claimants in the case should not stay in the same area as members of the Island Court.



18. In the absence of any record in the Island Court proceedings of such a "*directive*" which strictly does not refer to a non-claimant spokesman, and in the face of the sworn denials that members of the Island Court stayed in the same house or locality as the spokesman of the Respondent family namely, Elseim Utissets, coupled with the evidence of Fernard Lapenmal a son of the third claimant (Cerilo Lapenmal) and nephew of Daddee Lapenmal who vigorously disputed the allegations, we were not satisfied that this complaint had been established.

19. The appellant's evidence taken at its highest, was that the members of the Island Court and the spokesman for the First Respondent family slept in different houses albeit in the same locality.

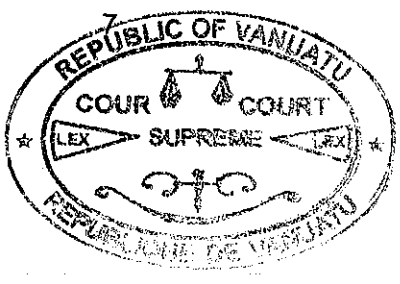
20. Likewise the appellant's evidence (which did not come from **Eli Masiv** as it should have) that the presiding Magistrate was closely related to him through marriage does not establish a disqualifying interest because it is accepted that Eli Masiv was the financial backer of the Utissets Family claim and indeed, it is common ground that he is a member of **Family Lesines** (the 10th claimant) who were unsuccessful in the Island Court and who have not appealed the Island Court's decision. We also note that this objection was never taken before the Island Court or brought to the attention of the presiding Magistrate as it should have been.

21. Even if it was clearly established that the presiding Magistrate was related by marriage to Eli Masiv (as opposed to Elseim Utissets) we are, nevertheless, satisfied that that distant non-blood relationship (which remains unclear) had no influence whatsoever on the decision of the Island Court in the first Respondent's favour.

22. We are also not satisfied that the giving of an "*umbrella*" to the presiding Magistrate only when it started to rain during the Island Court's visit to the disputed land was anything other than a gesture of common courtesy and hospitality. This ground of complaint is dismissed as baseless and frivolous.

23. The evidence of the erection of a "*victory shed*" by the first Respondent's spokesman and of a claim of victory uttered at a nakamal by the First Respondent spokesman's son before the Island Court delivered its decision was vigorously denied and although the deponents especially Steve Utissets (the utterer), were closely cross-examined, they remained firm in their denials answering all questions directly and without embellishment.

24. We observe that the spokesman of the respondent family Elseim Utissets gained nothing from the Island Court's decision. Indeed the Family of the



Respondents' spokesman namely, Family Utissets was an unsuccessful claimant before the Island Court. We accept that Elseim Utissets had no prior knowledge or reason to celebrate the success of the first Respondent family and further that the shelter was built for the purpose of holding a religious healing ceremony.

MATRILINEAL V. PATRILINEAL

25. This ground of appeal is best illustrated by the first 2 grounds of the First Appellant which reads:

> "*(1) The learned justices erred in custom law and fact in finding for the First Respondent Tolsie David who is a woman contrary to normal Patrilineal hereditary rights to land by succession only through the male generational line.*
>
> *(2) The learned justice erred in custom law and fact in finding for the First Respondent Tolsie David who is by marriage can only claim properties belonging to her husband and not in respect of any property in Rano Malekula especially where there are existing* (unidentified) *male family members living*".

26. The most relevant passages in the judgment of the Island Court dealing with this issue may be found in the following extracts in the Island Court's discussion on: "*THE LAW CUSTOM AND HISTORY*", namely:

> *"Land is traditionally transferred or inherited patrilinealy from the chief or original ancestor to the eldest son who would normally bear the responsibility for providing equal distribution of the deceased father's land to other siblings, relatives and kinships. This is a male predominated system which is twinned with the land tenure system handed down from generation to generation.*
>
> ***The only exceptional condition to the general principle of land ownership is that in the situation where there are no more surviving male heirs to the land then, ownership will pass on to the matrilineal offspring. This is typically seen where a woman's children having bloodline to the extinct patrilineal line are given land acquisition.***
>
> *Conversely and by custom, the matrilineal descendants cannot claim land ownership if, there are surviving male descendants. Any claim following the matrilineal lineage would be culturally limited to a claim of right to utilize the land. Conditions are normally attached to that right of use as well. Example, such a claimant is duty bound to perform a customary rite of recognition to the uncles in exchange, prior to any use of the land".*
>
> (our highlighting)

27. The First appellant's submission is that customary law is part and parcel of the Constitution and it was wrong of the Island Court to declare the First Respondent as custom owner to simply recognize the equal rights of men and women [**see**: Nathan v. Albert and Reuben Land Appeal Case No. 4 of 1993 (unreported)].

28. The Second appellant submits that Tolsie Awop is a woman from Wala Island many miles from "*Amelprev*" who did not know her "*family tree*" and "*nakamal*" and whatsmore there are (unidentified) surviving blood males related to the said "*Amelprev land*" living at Rano Island and Rano mainland where the disputed land is situated.

29. The Third appellant baldly submits that (in custom) "*... women cannot own land*". Furthermore Tolsie Awop derives from "*Melnaus*" nakamal which is not the principal chiefly nakamal within the customary boundary of "*Amelprev land*" which is "*Monder nakamal*" from which the third appellant family originates.

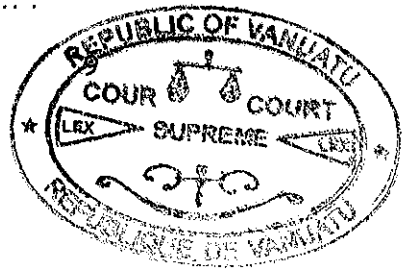
30. The respondents submission seeks to uphold the decision of the Island Court on the basis of the customary law principles declared and applied by the Island Court which was not disputed, and reliance is placed on dicta in Noel v. Toto [1995] VUSC 3 which discusses the principle of equality in Article 5 of the Constitution.

31. We begin our consideration of this complaint by referring to Section 10 of the Island Courts Act which expressly provides:

> "*Subject to the provisions of this Act an Island Court shall administer the customary law prevailing within the territorial jurisdiction of the court* ***so far as the same is not in conflict with any written law and is not contrary to justice, morality and good order***".
>
> (our highlighting)

Accordingly, if customary law "(is) *in conflict with any written law*" or is "*contrary to justice, morality or good order*" then the Island Court is not obliged to follow or apply such customary law.

32. The Constitution of Vanuatu is a "*written law*" which by Article 2 is declared to be the supreme law of the Republic of Vanuatu. It also contains Article 5 which secures for all persons certain "*fundamental rights and freedoms of the individual without discrimination on the grounds of ... sex*" including the right to "*protection of the law*" and "*equal treatment under the law ... except* (where the law) *makes provision for the special benefit, welfare, protection or advancement of females ...*".



33. Plainly the Constitution prohibits discrimination against females not only on the basis of their "*sex*" but it also requires females to be given "*equal treatment under the law*". In this regard also the Courts are duty-bound to consider the provisions of the Convention on the Elimination of all Forms of Discrimination Against Women **(CEDAW)** which was ratified as "*binding on the Republic of Vanuatu*" by Act No. 3 of 1995, another "*written law*.

34. For present purposes reference may be made to Article 2 of **CEDAW** which requires Vanuatu inter alia:

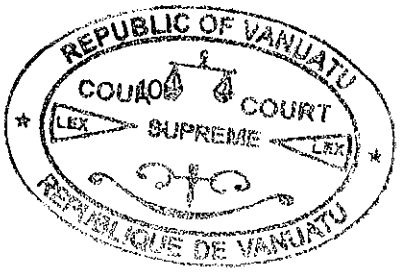
> "*(d) To refrain from engaging in any act or practice of discrimination against women ...; and*
>
> *(f)* ***To take all appropriate measures ... to modify or abolish existing*** *laws, regulations,* ***customs and practices which constitute discrimination against women***".
>
> (our highlighting)

35. There appears to be an argument that the provisions of Articles 73 and 74 are somehow in conflict with or superior to Article 5. We cannot agree. Article 73 declares that "*all land* (in Vanuatu) *belongs to the indigenous custom owners and their descendants*" and Article 74 states that: "*the rules of custom shall form the basis of ownership and use of land*".

36. Nowhere in the above Articles is any suggestion or provision made that subjects Article 5 to Articles 73 and 74 or vica versa. Furthermore nowhere in Article 73 does it state that "*indigenous custom owners*" are confined or restricted to male members only or that the expression "*descendants*" excludes female members. We accept that the (unspecified) "*rules of custom*" in Article 74 may include the traditional patrilineal system of land ownership and succession, but in implementing Article 74, Parliament has passed several "*written law(s)*" including the Island Courts Act which contains Section 10 (referred to above) and ratified **CEDAW**.

37. We are fortified in our view by the observations of the Supreme Court in Noel v. Toto [ibid] where the Court observed:

> *"There is a further factor which will most likely give rise to interesting problems in the future.* ***In the evidence that I have heard, there is evidence which indicates that custom differentiates between male and female.*** *Although I have not heard argument about it, I think that it is necessary for me to consider the effect of Article 5 of the Constitution. .....*



It is clear that it was the intention of the Constitution to guarantee equal rights for women. A law which discriminates against women would be in conflict with this aim. Equal treatment under the law is a fundamental right. So also is protection of the law. *... The Constitution gives the rights referred to ".....without discrimination on the grounds of ..... sex ..."*

A law which gives a lesser right to a woman, because of her sex is inconsistent with the guarantee of protection of the law, ... and is inconsistent with the right to equal treatment under the law.

And later the Court said:

"A difficulty is encountered however, when one considers Article 74. This is the provision which states that rules of custom shall form the basis of ownership and use of land in Vanuatu.

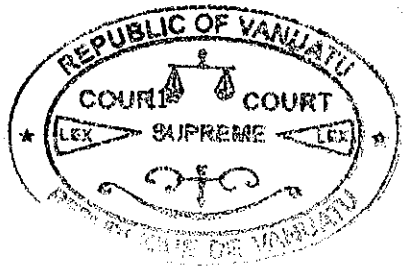
Does this mean that if custom discriminates with respect to land rights of women the fundamental rights which are recognised in Article 5, do not apply? I do not think that this can be so. It is clear, as I have stated that ***the Constitution aims to give equal rights to women. It permits a law which discriminates in favour of women. By not specifically permitting discrimination with respect to land rights, it must be that such discrimination cannot be allowed.***

Recently the Parliament has adopted Human Rights Charters with respect to women's rights. ... the Parliament is recognising rights of women as guaranteed under the Constitution. ***It would be entirely inconsistent with the Constitution and the attitude of the Parliament to rule that women have less rights with respect to land than men.***

This may mean that in determining land rights in future, there will be a change in the basis of determining land ownership. This does not mean that ownership will be decided otherwise than in accordance with custom. ***Custom law must provide the basis for determining ownership, but subject to the limitation that any rule of custom which discriminates against women cannot be applied.*** *General principles of land ownership will not be changed. In interpreting the Constitution, it must be presumed that when the Constitution was adopted, it was known that custom law discriminated against women with respect to land ownership. This being so, if it was intended to make an exception from the prohibition against discrimination upon the ground of sex, the exception would have been specifically referred to. This was not done.* ***Therefore I have no difficulty in ruling that when the Constitution provides for the rules of custom being used as the basis of ownership of land, this must be subject to the fundamental rights recognised in Article 5".***

(our underlining and highlighting)

38. In the present case the Island Court accepted the evidence produced by the First Respondent family and made 3 specific findings in favour of the First Respondent as follows:



"*(1) ... **There is undisputed evidence showing that Mulon Bursiw is the paramount chief of Amelprev having Jidwopati as his original nasara.** This chief and his relations have perpetually lived the land for centuries*";

"*(2) ... the land belonged to David (Telvanu) being the last survivor of the land of Amelprev. **We are satisfied that his daughter Tolsie Awop is the only surviving descrendant of Chief Bursiw from the matrilineal lineage***"; and

"*(3) **The starting point is that this court is convinced as pronounced that Tolsie is the only surviving blood line of the original ancestor, Malbursiw.** It is justifiable in the sense that, if there is no more surviving male descendants of the original ancestor, then, of course the female descendants would automatically inherent the right of ownership over the land. The Biblical text from **Numbers 27 at verse 8** ("*... in case any man should die without having a son, you must then cause inheritance to his daughter*") also sheds some light on this code of practice*".

(our highlighting)

39. Having considered the evidence and competing submissions we are satisfied that the Island Court was correct in its determination of the applicable customary law which included an exceptional right of succession which vests in surviving daughters in the absence of any surviving sons. Furthermore the appellants have not established that the Island Court's decision on this aspect was unavailable or unsupported by the law or the evidence that was accepted by the Island Court.

40. Accordingly this ground of appeal is dismissed.

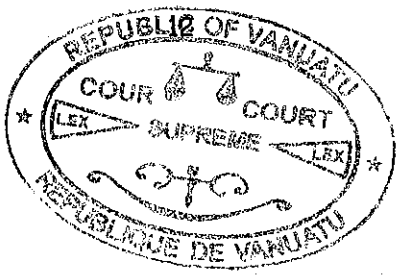
PRE-INDEPENDENCE DECISIONS

41. In this regard the First Appellant's complaint is that the Island Court erred in not accepting the Declaration of the then British District Agent **D. K. Wilkins** dated 15 October 1975 that the customary lands of "*LOLNAMBU*" belongs to the Lapenmal Family. The Declaration was later refined and clarified in a further Declaration dated 24 January 1978 by **J. S. R. Marston** and subsequently affirmed in a letter signed by the "*Rano Council of Chiefs*" dated 24 February 2006 and again endorsed on 9 June 2006 by a letter of the "*Malmetanvanu Council of Chiefs*" to the Acting Coordinator of the Land Tribunals Office.

42. The 1975 Declaration reads as follows:

"*Declaration made this 15th day of October 1975* ***D. K. Wilkins*** *B.D.A Lakatoro.*

In the matter of an dispute over land called Amelperip and including various parcels of land called:-



Model, Fakmen, Melious, ***Lolonbo*** *and* ***Lolnambu****, and following an examination of the dispute by the British and Fench District Agents Messrs Wilkins & Leouyer on 2nd March 1973 and a subsequent reconciliation made before Assessors Petro, Constanta, Desire, Remo, Kami, Seppa, Rion, David, Apia, Ken, Seman and Joel it is hereby declared and witnessed by the parties concerned and by the witnesses all or whose signatures appeal below that* ***all that parcel of land known as LOLNAMBU (as indicated in the rough sketch plan attached) is the property of Raphael, Pascal, Thanndeo, Serilo, Albert, Emil, Cyriac, Filioimo, Francis, Leimakel, Hilda, Ruth, Gladys, Alone Marie, and Nonutto.***

It is further declared that Raphael, Pascal Serilo, and Aleo are the joint authority for this parcel of land.

It is further declared that those parcels of land within Lolnambu now occupied by the following persons, that is Kaitano, Petro, Louis Marie Dominio, Yuan, Andre, Manuel, Robert, Dick, Timothy and Willie remain the properties of these persons, their heirs and successors with the sole proviso that they shall not encroach beyond the present limits of these parcels without the authority of the land authority that is Raphael, Pascal, Serilo, and Aleo.

Signed and witnessed this 15th day of October 1975.

(Lichlich) .....Rion
(Rano Isl) .....Petro
(Wala island) .....Anaelne
(Atchin) .....Ken
(Vao) .....Remo
(Lakarepet) .....Joel
(Rano island) .....Constance
(Vao island) .....Desire
(Wala island) ....
(Rano island) .....Louis Marie".

(our highlighting)

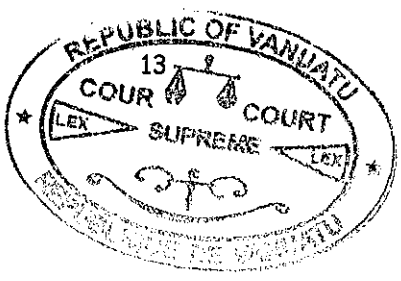
From the content nothing is known about the exact nature of the "*dispute*" or what other parties or claimants (if any) were involved other than the enumerated members of the "*Lapenmal Family*".

43. The 1978 clarification Declaration provides as follows:

"*In the matter of the land judgment made by various assessors on 15th October 1975 concerning "Amelperip", and specifically* ***Lolnambu*** *and* ***Lolombo***

It is further stated by those hereunder named that:

1. *This judgment is valid in every respect, and allows that* ***Lolnambu*** *and* ***Lolombo****, adjacent and communal parcels of land, are the exclusive subjects of the judgment, and cannot be further divided for the purposes of ownership.*



2. *The land authorities,* ***Pascal, Serito, Raphael*** *and* ***Alec****, must honour and respect the legal occupation of areas of these lands by those landowners named in the judgment of October 1975 i.e. Alick, Robert, Andre, Willie.*

3. *All damages and spoilage committed by <u>any</u> party in this recent dispute <u>must</u> be compensated in full by the people responsible.*

<u>Signed</u> *Alec (Rano island)*
Louis Marie (Rano island)
Seppa (Rano island)
Constanta (Rano island)
Honore (Rano island)
Rion (Lichlich)
David (Teoutou)
Remy (Matte)
Sakon (Ouripiv)

Before ***J. B. R. Marston***
BD CD2".

44. Having considered the contents of the above-mentioned <u>Declarations</u> and letters we are satisfied that the Island Court was conscious of and indeed accepted that:

"(Daddee Lapenmal) *had elicited sufficient information concluding that he is from the nakamal of Lolombo and Lolnambu*".

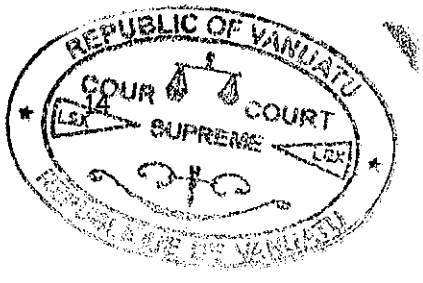
And later, in discussing the competing claim of Cerilo Lapenmal the Island Court said:

"*It is accepted that the nakamals of Lolombo and Lolnambu belonged to Family Lapenmal having descended from Chief Malrowsi*".

Plainly there is no substance to this complaint that the Island Court did not recognize or accept the First Appellant's <u>Declarations</u>.

45. Having said that we are satisfied that the Island Court was nevertheless, obliged and correct, in the face of that acceptance, to question whether the First appellant had "*... any customary right to claim the land of these nakamals*" and to then state:

"*The answer is in the negative. By tradition, it is only the paramount chief who has control and authority over the land boundary ... incoming tribes like the* (Lapenmal Family) *being a smol faea can only claim rights to use the land*".



46. We also note that the First appellant's supporting Declarations are limited to "***Lolombo and Lolnambu***" and appears to record the result of a traditional settlement of an internal dispute within the Lapenmal Family which was still continuing in 1978.

47. We acknoweldge that the Island Court also accepted a Report of Arbitration made jointly by the French and British District Agents on 5 May 1963 concerning: "*... land named Amelperip situated on the mainland opposite Rano and immediately South of Warkip creek*" where the the following decision is recorded:

"*Having heard all of the evidence put forward by interested parties it appears to the District Agents that* ***this land belonged to David of Rano, he being the last survivor of the original owners of the Amelperip land****. David granted to the people or Chinamomon, Malever ..... on Rano Island the right to garden on Amelperip. Ulas was given the right by David to plant coconuts on the Amelperip land on the understanding that they would return to David on the latter's death, David having no children. David also sold three parcels of land as follows –*

- *Forturu to Alphonse*
- *Ginatitoh to Kelip*
- *Malnowas to Salengra*

David upon the death left the unoccupied land of Amelperip to his two daughters Tolsi (now married to Kasi of Wala) and Gladys (now married to Jes of Wala*. David also left a parcel of land known as Malnaus to his daughter Mary married to Pana of Atchin Island.*

The District Agents recognize the above named owners of the parcels of land purchased or bequested as above. ***They also recognize the right of Gladys and Tolsi to the undeveloped Amelperip land****, but in view of the importance of this land is the entire population of Rano Island, they are agreed that the distribution and occupation of this undeveloped land should be decided upon by Gladys and Tolsi in consultation with Thompson as Chief of Rano.*

J. Fabre
French District Agent
French District Agent No. 2

D. K. Wilkins
British District Agent
Central District No. 2".

48. Unlike in the First Appellant's Declarations, this dispute clearly involved other "*interested parties*" and clearly identifies "***David*** (Telvanu)" as the last (male) survivor of the original owners and father of "***Tolsi*** (Awop)". It also refers only to undeveloped "*Amelperip land*" and makes no mention of "*Lolombo*" or "*Lolnambo*".

49. We are not unmindful of the judgment of the judgment of the Court of Appeal in Valele Family v. Toura [2002] VUCA 3 where the Court said in

construing the provisions of Articles 78, 52 and 73 of the Constitution and in rejecting the determination of an "*Area Land Committee*" and a "*Council of Chiefs*" as follows:

*"The argument that the Utulamba Committee and its associated "Area Land Court" or Area Land Committee, and the council of chiefs which met at Deproma in 1988 had lawful authority to resolve disputed ownership, and to make a determination binding on all claimants rests on the proposition that these bodies were "**appropriate customary institutions or procedures to resolve disputes concerning the ownership of custom land**" within the meaning of Article 78 (2) of the Constitution of the Republic of Vanuatu, and gain their lawful authority to finally resolve ownership disputes from that Article....*

Article 78 must be read as a whole, and in light of all the other provisions of the Constitution. In particular, Article 78 (2) must be read subject to Article 78 (1). ... and Article 78 (2) spells out what the Government is to do whilst it holds the land. The Government must arrange to have the dispute resolved by 'the appropriate customary institution or procedures'....

***As the Constitution expressly provides that Parliament will establish courts including village or island courts with jurisdiction over customary matters, the reference in Article 78 (2) should be interpreted as meaning institutions and procedures established within the constitutional court system ...**"*

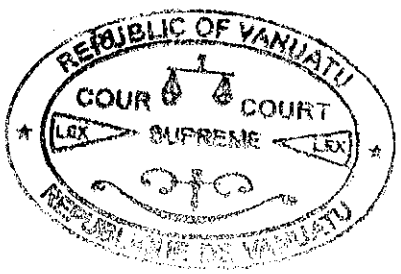
And later:

"*Pursuant to the direction in Article 52 of the Constitution, Parliament has provided for the establishment of island courts in the Island Courts Act [CAP. 167]. By s. 8 of that Act, island courts have a civil jurisdiction relating to land. Section 3 (4) requires that where the matter before an island court concerns disputes as to ownership of land, the court shall be constituted by a magistrate nominated by the Chief Justice under s. 2A and three justices appointed by the President of the Republic who are knowledgeable in custom. ...*

*Where a dispute over custom ownership of land arises it is to be expected that those involved will do their best to reach an agreement to settle the dispute, with such assistance as is possible from customary procedures and meetings of chiefs. However, **it is clear from the Constitution and from the Island Courts Act that unless everyone who at any time claims an interest in the land is prepared to accept a settlement, the only bodies that have lawful jurisdiction and power to make a determination that binds everyone are the Courts, in the first instance the local Island Court, and if there is an appeal, the Supreme Court ...**"*

And finally:

"*... Article 73 of the Constitution provides that all land in Vanuatu belongs to the indigenous custom owners and their descendants. **Unless an ownership dispute is determined through the Court system, in the manner provided for in the Constitution, a descendant of a party to an ownership dispute that has been "settled" outside the Court system may reopen the dispute by claiming a***



custom entitlement under Article 73. *This kind of difficulty is not unknown in the law. ...*

It follows that neither the Utalamba Committee and its associated "Area Land Court" or Committee (which was in no sense a court established under the Constitution) nor the council of chiefs that sat at Deproma had any jurisdiction or authority to make a determination of custom ownership which bound claimants who disagreed with their ruling."

(our highlighting)

50. Having set out the above extracts we note that the Court of Appeal in the Valele case (ibid) was considering the decisions of an "*Area Land Committee*" and a "*Council of Chiefs*". The Court did not express any views on a determination or decision of a District Agent or by Joint District Agents during Condominium times. Indeed, the Court of Appeal has accepted in a later decision namely, Kalotiti v. Kaltapang [2007] VUCA 25 that land determinations made by the Native Court set up under the Joint Regulations which bound indigenous custom owners immediately before independence continued to bind them after independence by virtue of Article 95(2) of the Constitution.

51. Although not argued before us and although District Agents are not a "*court of law*", their decisions had, in our view, the same force and effect as a court judgment in their respective Districts during condominium times. In this we are fortified by the provisions of the **Joint (Validity of Legislation) Regulation No. 27 of 1964** which was made by the French and British High Commissioners for the New Hebrides pursuant to Article 7 of the Anglo-French Protocol of 1914 on 30 October 1964 and which expressly provides:

> "*1.* ***Notwithstanding anything to the contrary all*** *Joint Regulations, Rules,* ***Decisions****, Instructions and Standing Orders* ***made and published heretofore are hereby approved*** *and, insofar as it is necessary re-enacted,* ***and declared to be of full force and effect.***
>
> *2. This Regulation may be cited as the Joint (Validity of Legislation) Regulation No. 27 of 1964 and shall come into force on the date of its publication in the Condominium Gazette*".
>
> (our highlighting)

52. In light of the foregoing neither the First Appellant's Declarations or the First Respondent's Report are conclusive as to the customary ownership of "*Amelprev land*" in so far as they are not the decision(s) of a duly established court of law. That does not mean however, that such pre-Island Court decisions are inadmissible and cannot be considered by the Island Court in determining who are the true custom owners of "*Amelprev land*" as

the Court of Appeal clearly recognized in its judgment in the Valele Family case (ibid) when it said:

"However, it does not follow from this conclusion that all the evidence put forward by Mr. Touru is totally irrelevant in determining who are the true custom owners of the Natinae land. Our decision only establishes that the processes and decisions which have occurred in the past have not finally determined who are the custom owners. ***Much of the evidence adduced by Mr. Touru would be admissible in the Island Court.***

It would be for the Island Court to decide whether in the circumstances of the case the alleged inactivity ... during the processes which occurred in the 1980's indicates that he and his family do not truly have interests as custom owners, or whether there is some other explanation for their inactivity."

53. In this latter regard the Island Court in its judgment makes the following relevant observations about the first respondent's Report:

"... there is a valid arbitration report in place being issued on the 5th of May, 1963 over the land of Amelprev chaired by both the French and British Districts Agents No 2, Mr J. Fabre and D.K. Wilkins. ***This meeting concluded that the land belonged to David being the last survivor of the land of Amelprev. We are satisfied that his daughter Tolsie Awop is the only surviving descendant of chief Bursiw from the matrilineal lineage.***

... All parties have agreed that such event did occurred at Amelvet in 1963. Even some of the claimant's fathers have witnessed this meeting. Upon perusal of the tendered paper, our reading shows that very prominent customary chiefs knowledgeable in custom such as Thompson a relative of CC8, CC10 and others like Toby and Louis had been part of this panel discussion. ....

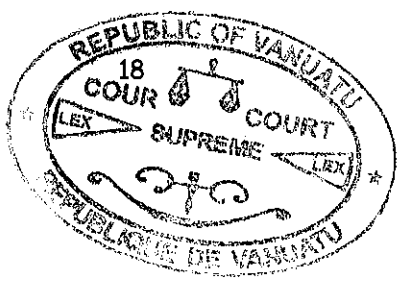
In addition, the above decision remained unchallenged ever since up to 1984 when he initiated this claim at the Island Court. ...."

This ground of complaint is dismissed.

SITE VISIT

54. The Second Appellant who directly raised this ground complained that: "*the Court failed to undertake a site visit to the whole boundary of the disputed land as required under Rules of the Island Court*". The Third Appellant complained that its request for the Court to inspect certain areas "*... forming part of Amelprev boundary in Rano Island was declined*".

55. The relevant Island Court rule is **Rule 10** which provides:



"***Land to be visited***

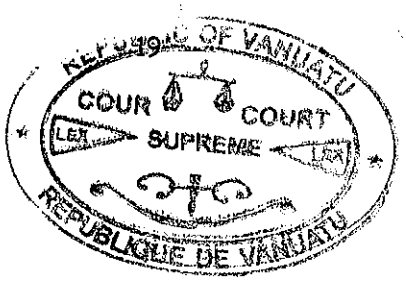
If a claim is in respect of ownership or boundary of customary land, the Court must visit the land and inspect the boundaries before making judgment".

56. In our view **Rule 10** is clear in its requirements, namely, "*to visit the land*" and "*inspect the boundaries*". Strictly speaking there is no requirement that the claimants must be present or accompany the Court during its visit to the disputed land nor is the requirement expressed in terms of "*walking*" the entire boundary which is a more defined activity than visiting. Common sense and fairness dictates however, that if the Court's visit is to be of any real assistance in its deliberations and decision, then, the claimants spokesmen, at least, should accompany the court during its visit in order to point out land features and other traditional sites of significance as well as any visible boundary marks.

57. In the present case it is common ground that the Island Court did "*visit*" the disputed land and viewed various customary sites. Indeed there are numerous references to the visit in the Island Court's judgment (**see for eg:** bottom paras. of p. 6 and 8; para. 2 at p.9 and 11; the penultimate para in p.12; last line of para. 3 on p.13; the top para of p.17 and bottom paragraph of page 18). There is further confirmation in the original Island Court file which contains a 6 page hand written record (with drawings) of the Court's visit to the disputed land. Furthermore the Island Court's decision includes a fairly detailed description of the boundary of the disputed land (at p.2) and as depicted in the First Respondent's sketch map.

58. As for the Third Appellant's invitation for the Court to visit "*Rano Island*", that was beyond the boundary of "*Amelprev*" that was outlined by the Island Court which is confined to the mainland and was therefore rightly refused. In this regard the Court of Appeal relevantly observed in the Matarave case (ibid):

"... 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 be 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."*

59. We are satisfied that there is no merit in this ground of appeal which is also dismissed.

AGAINST THE WEIGHT OF THE EVIDENCE

60. This is a difficult ground to establish under the best of circumstances and requires a close and detailed analysis of the whole of the evidence led before the Island Court. We note the complaint is not one where the appellant has clearly identified some item(s) of evidence that the Island Court has overlooked or failed to consider. Indeed the First and Second Appellant's relevant ground of appeal is a bare assertion:

"(that the Island Court) *... failed to give proper consideration and any weight to the Appellant's evidence and submissions made in court*".

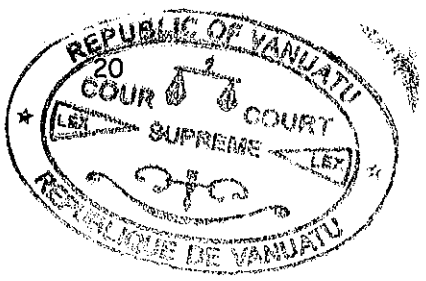
No details or particulars or item(s) of ignored evidence are identified either in the ground of appeal or in counsel's submissions to the Island Court or before this Court as there should have been provided.

61. There is a complaint however of the First Respondent's spokesman "*stealing*" the First Appellant's "*family tree*". This is a common complaint which is not easy to understand especially when one is dealing with related claimants who claim under different branches of a common ancestral tree.

62. In this regard the First Respondent's spokesman Elseim Utissets is the half-brother of Tolsi Awop as well as being a senior member of the Second Appellant family. He was therefore ideally suited and qualified to represent the First Respondent family's claim and no complaint can be made on that score.

63. Conversely, the Second Appellant family Utissets relied upon two (2) unrelated third parties to present and support their claim. In the absence of any direct evidence from members of the Second Appellant family we are not satisfied that the Island Court erred when it said:

"*We refuse to award (the Second Appellant) party the right of ownership. (They) would only be entitled to a right to use the land*".



64. In so far as the First Appellant's claim is concerned we note that the Island Court having seen and heard Cerilo Lapenmal (the third counter claimant) who was also a close relative of the First Appellant, preferred Cerilo's evidence and criticisms of the First Appellant's claim including his "*family tree*" which the Court "*ruled out as fabricated*". The Court also noted "*... that the differences in statements and other related documents as shown in the claim is a direct result of the chiefly dispute between* (sic) *this family*".

65. The Island Court in rejecting the First Appellant's claim made a finding of fact that:

"*Daddee Lapenmal and Cerilo Lapenmal belonged to one family unit and of course beyond reasonable doubt must have the same family tree*".

And later:

"*... their family tree only begin with Malrowsi and not Velvel. They could only claim the land by way of matrilineal lineage of Lecter Mawi of Amelprev wife of Lapenmal of Rano*".

66. In the face of such clear findings based on the Island Court's assessment of the evidence and its preference for the evidence of Cerilo Lapenmal and his spokesman Ferno Lapenmal, and in the absence of any specific ground of appeal against the above findings, we can find no error in the Island Court's rejection of the First Appellant's claim to ownership of "*Amelprev*". Having said that, we confirm the Island Court's decision that the Lapenmal Family has a right to use the lands surrounding the nakamals of **Lolombo** and **Lolhambu** "*subject to the authority of the declared owners of Amelprev*".

67. The Third Appellant (**Family Kileteir**) in the absence of their counsel, relied upon the written submissions filed. Their relevant ground of appeal is:

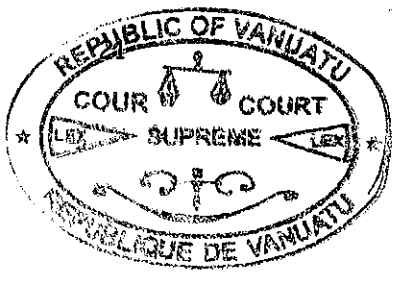
"*The magistrate erred in facts and law and misdirected himself as follows:*

(i) In failing to consider relevant parts of the Appellant's submission who claimed through a patriarchal society;

(ii) In failing to consider the custom and the practice of the land which constitutes a patriarchal society;

(iii) In wrongly considering the First Respondent's submission whose claim is based on a matrimonial (sic) *system which is contrary to the custom and the practice of the land;*

(iv) In taking into account irrelevant considerations and failing to deal properly with the evidence before it, particularly:



1. *In considering the First Respondent's status and history which have nothing whatsoever to do with Amelprev Land;*

2. *In considering the First Respondent's status and history to grant the chiefly title to the Respondent;*

3. *In considering the First Respondent's family tree which is no different from the family tree presented by the Third Respondent/Counter-claimant No.2;"*

68. The submissions in support of this ground however without any reference to the evidence led by the Third Appellant before the Island Court, is entirely directed at matters of credibility as follows:

"*3.2.1 The learned magistrate failed to consider the submissions of the parties.*

3.2.1.1 The learned magistrate questioned the Respondent Tolsie Awop if she knew which 'nakamal' she was comes from and response was in the negative. The Respondent, Tolsie Awop, did not seem to be familiar with the custom names and tabus of Amelprev land.

Sworn statement of Jean Andre Pascal

3.2.1.2 During the course of the hearing before the Island Court, it was clear that two families had produced the same family tree, particularly the Appellant Family Utissets and the Respondent Tolsie Awop. Yet, this was not taken into account in the final decision.

Sworn statement of Jacques Andre Pascal

3.2.1.3 During the course of the hearing, the magistrate failed to consider Family Kileteir's request for an inspection of some areas forming part of Amelprev boundary in Rano Island which was denied.

Sworn statement of Teophile Kileteir"

69. The Island Court dealt with the Third Appellant's claim in the same manner as all other claimants, by first setting out the evidence led in support of the claim (**at pages 15 and 16**) and then later analyzing it separately (**at pages 29 and 30**). In particular, the Island Court noted that the Third Appellant claimed that **Tarenmal** was the original ancestor of the land "*Amelprev*" and his descendant was **Malkelkali** a high chief of Amelprev through whom the Third Appellant traced his lineage to the nasara's of "*Monder*" and "*Amelvet*".

70. In its rejection of the Third Appellant's claim the Island Court Firstly, observed, the apparent conflict in the Third Appellant's evidence and that

led by two (2) other counterclaimants who also traced their lineages through Malkelkali and who denied that he was a paramount chief. Secondly the Court noted inconsistencies in the names of persons listed in the family trees provided where competing claimants claimed a relative by the name of "*Tomsen*" or "*Thompson*" and Thirdly, the authenticity of the supporting certification document provided by the Third Appellant was seriously doubted as it bore no official Lands Department stamp.

71. In the absence of any ground(s) of appeal or submissions directly challenging the above-mentioned findings of the Island Court, we are not satisfied that the Third Appellant has established any error in the Island Courts refusal of its claim which was "*... stranded* (sic) *with uncertainty*".

72. For the foregoing reasons this last ground of appeal is dismissed.

73. Having dismissed all grounds of appeal we uphold the decision of the Island Court in its entirety and we award the First Respondent only costs of this appeal which are summarily assessed at VT150,000 to be paid in equal shares of VT50,000 by each of the unsuccessful appellants within 30 days from the date of delivery of this judgment.

DATED at Port Vila, this 8th day of July, 2016.

BY THE COURT

.....	.....	.....
Kalman Hapsai	**D. V. FATIAKI**	**Shem Tasvailie**
Assessor	**Judge**	**Assessor**

REPUBLIC OF VANUATU COUR SUPREME COURT LEX LEX 23