

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

Land Appeal
Case No. 09/3 SC/LNDA

BETWEEN: Walter Jonah
Appellant

AND: Harry Kemuel
First Respondent

AND: Joseph Verlili
Second Respondent

AND: Josiah Tamat
Interested Party

Before: *Justice Aru*

Assessors: *Maxwell Arnabath*
Lona Bongyivi

Counsel: *Mr Colin Leo for Appellant*
Mr. E. Nalyal for the First Respondent
Second Respondent – No appearance
Mr George Boar for Interested Party

Date of hearing: *20 November 2017*

Date of Judgment: *28 November 2018*

JUDGMENT

Introduction

1. Tervaut is an area of land on the island of Malekula. This land is the subject of the dispute between the parties in this case as to who is the rightful custom owner. Kemuel Harry and Tamat Josiah were a single party before the Island Court as they have the same interest in the land: Harry Kemuel was the representative of Family Tamat. On 27 October 2004 the Island Court declared the Kemuel Harry representative of family Tamat as the rightful custom owner of Tervaut. Jonah Walter then appealed to this Court. The appeal was struck out. A further appeal was then made to the Court of Appeal.
2. On 4 May 2012 the Court of Appeal upheld the appeal and returned the matter to this Court to hear the appeal from the Island Court judgment. The hearing of the appeal was delayed



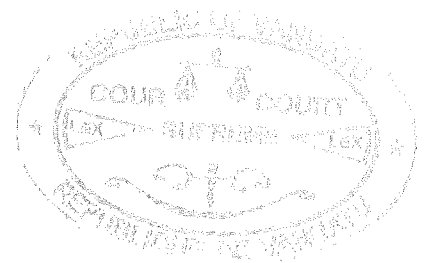
for some time as assessors had to be agreed. A hearing scheduled for Lakatoro on Malekula was deferred as the first respondent was not represented. The appeal was eventually heard in Vila on 20 November 2017. Joseph Verilili did not participate in the hearing.

Background to claims before the Island Court

3. The background to each parties claims before the Island Court could be summarised as follows. Jonah Walter claims through Ninp of Amok. Ninp married Usmaln's sister Arahta Tervaut. They had a son called Sapei. They all lived at Amok. Usmaln was the paramount chief of Tervaut. He had a son as the only child and named him Filfil. Filfil died when his father Usmaln shot him by accident during tribal warfare. Usmaln then fearing retribution fled to Amok to his sister and brother in law Ninp.
4. Before Usmaln died he took his nephew Sapei to Tervaut and showed him his two nasaras and their boundaries. Usmaln gave the land to Sapei. A kava ceremony was held to mark the handing over. After Usmaln died Sapei went back to Tervaut and planted a banana to mark his uncle's death. The appellant claims through the bloodline of Usmaln.
5. Kemuel Harry on the other hand claims through Tamat and Harry. He says that they are the rightful custom owners of Tervaut. Tamat and Harry left the land as a result of tribal wars and sought refuge at Tautu. Tamat later got married and had a son as his only child and named him Daniel. Daniel unfortunately died. Tamat then adopted Harry as his son. Harry looked after Tamat until when he became very old and died. To support his claims he produced the original Tape language manuscript with a map marked CC1A which displays the pre contact movement of Tape language and its people to Tautu.

Basis of Island Court findings

6. The Island Court identified a number of factors as the customary basis of land ownership within that particular area of Malekula where Tervaut is located. Land is communally owned based on common descent within a nasara. A big nasara would have small nasaras but all coming under the jurisdiction of the paramount chief. A tribe or bloodline is identified with the land through their nasara. Custom land ownership follows a patrilineal system. Land is inherited and passed on from father to eldest son. In exceptional circumstances land could only be inherited by a woman if it could be proved that there are no surviving male children or tribal blood line or nasara. It was accepted that custom boundaries existed prior to the movement of tribes due to tribal wars, witchcraft and cannibalism. These pre-existing boundaries were usually indicated by creeks, dense forest hills and other physical appearances on the land. Namangi or pig killing ceremonies were performed by people who were displaced on different lands as a result of movement of the tribes to other parts of Malekula.



Findings by the Island Court

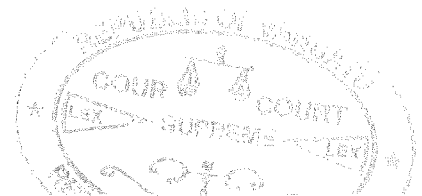
7. In relation to the appellant the Island Court found that the appellant claims through a woman: Usmaln's sister who was married to Amok and her son Sapei. The appellant does not dispute that his ancestors are from Amok and only moved to Unmet in the small nambas in the 1960's. Similarly the Court found that the nasaras of Tervaut were built according to the small nambas style of stone laying which was evident from the way the alters were built with the erection of huge boulders. Something which does not occur in the big nambas.
8. The Court also found that the appellant's claim through the matrilineal line could not succeed as the first respondent was the surviving descendant of the nasaras of Tervaut. The appellant did not dispute the CC1A map indicating the pre contact use of Tape dialect and the movement of its speakers to other parts of Malekula. There was clear and outstanding evidence that the first respondent's ancestors migrated from Tape to Tautu as shown by the CC1A map. None of the other parties challenged this map.
9. The first respondent was the only party speaking the Tape dialect therefore the Court concluded that Tamat's forefathers originated from the nasaras within Tervaut.

Issues

10. The appeal raises four main issues broadly summarised as follows; was custom ownership conveyed by performance of the Namagi or pig killing ceremony? was too much weight placed on the CC1A map tendered by the Kemuel Harry? was the Island Court biased in its decision by having Justice Endy Shem sitting as one of the justices to hear the dispute and last ,was the Island Court wrong in its decision not to have considered or taken into account the decision of the Village Court of 19 March 1993 in favour of the appellant as custom owner.

Submissions

11. The appellants submit that the attainment of chiefly title through performance of the Namangi connects with the ownership of land. It was submitted that the first respondent conceded that Tamat never performed any Namangi ceremony therefore the nasara stones within Tervaut belonged to chief Usmaln who was the paramount chief of Tervaut. It was further submitted that the Island Court could not rely on the use of Tape language alone to determine custom ownership of Tervaut. As there were no living descendants of chief Usmaln, the appellant who is from matrilineal descent should be declared custom owner of Tervaut. On the question of bias, it was submitted that given the close relations between Justice Andy Shem and the first respondent's witness chief John Kid Harry it was probable that there was an apprehension of bias.
12. The first respondent on the hand submitted that Tamat originated from Tervaut as indicated on the CC1A map. The map indicates the movement of speakers of the Tape dialect. The first respondent was the only party speaking the Tape dialect. The interested party submitted that performance of the Namangi or pig killing ceremony did not entitle a person



to custom ownership of land. It was submitted that performance of the Namangi ceremony only applies to chiefly rank and promotion. It was finally submitted that the appellant is from Amok in the big nambas but Tervaut land is within the small nambas.

Discussion

Namangi (Pig killing ceremonies)

13. Grounds 1 a) to g). The Island Court found that people were displaced by tribal wars, witchcraft and cannibalism and as a result moved and settled on other parts of Malekula. Their chiefs were allowed to perform the Namangi ceremony to attain chiefly rank but such ceremonies did not convey custom ownership of land.
14. The appellant has not challenged that finding. His evidence before the Island Court does not contradict this finding nor did he call evidence to prove that performance of the Namangi conveys custom ownership of land. We accept that the Court was entitled to make that finding.

Bloodline and CC1A Map

15. Ground 1 (h) and 2. The appellant concedes that his ancestor is from Amok in the Big Nambas. His own evidence given before the Island confirms that.
16. The Island Court found that land ownership in this part of Malekula follows patrilineal descent and is inherited through father to son. A woman or her descendant can only inherit land if there are no living male descendants. The appellant concedes and accepts that he is claiming through a female descendant, Chief Usmaln's sister and her son Sapei. Chief Usmaln himself had no male heir after he shot his only son and fled to Amok.
17. The Island Court after hearing the evidence found that Tamat is from Tervaut and the last living descendant is the first respondent. He spoke the Tape dialect. The CC1A map showed the areas where people spoke the dialect and their movement to other parts of Malekula.
18. In the first respondent's case, his descendants who spoke the Tape dialect moved to Tautu. It was submitted that the CC1A map covers Tervaut. As the CC1A map was not challenged before the Island Court, we accept that the Island Court was entitled to find that the first respondent originated from Tape and migrated to Tautu. He is the only speaker of the Tape dialect and therefore should be declared the custom owner of Tervaut.

Bias

19. Ground 3. We reject the appellants submissions on this ground. The appellant did not object to Justice Endy Shem sitting before the hearing of the case in the Island Court. The objection is only raised on appeal.



20. The Island Court (Civil Procedure) Rules requires that if a party considers that a justice of the Court is related to one of the parties, he may object to that particular justice sitting on the case and the clerk is required to record the objection. There is no record of any objection to Justice Endy Shem sitting as it was simply never made as provided by the rules.
21. Similarly, the allegation of bias is not because of a relationship with a party as required by the rules, far from it. The allegation is that Justice Shem is the father in law of the younger brother of the first respondent's witness John Kid Harry.

Village Court decision

22. Ground 4. The appellant submits that the Island Court did not take into account or consider the decision of the Village Court of 19 March 1993 when the appellant was declared custom owner. We reject these submissions. At the relevant time, the Island Court was the only court that had jurisdiction to hear and determine disputes over ownership of custom land pursuant to the Constitution of the Republic of Vanuatu and the Island Courts Act [CAP 167]. There is no legal basis for it to consider or take into account any village court decision before it decides a dispute.

Conclusion

23. We have considered the submissions made and we are of the view that the appeal should be dismissed and it is hereby dismissed. The respondents are entitled to costs to be agreed or taxed.

DATED at Port Vila this 28th day of November, 2018

BY THE COURT

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D. Aru
Judge

