

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

**Civil Appeal
Case No. 19/814 CIVA**

BETWEEN: Chief Ringiau Nasse lakewei Mafe
Appellant

AND: Paramount Chief Ringiau Komi
Respondent

Date of Hearing: 17 April 2020
Before: Justice G.A. Andrée Wiltens
Counsel: Mr M. Hurley for the Appellant
Mr E. Molbaleh for Respondent
Date of Decision: 28 April 2020

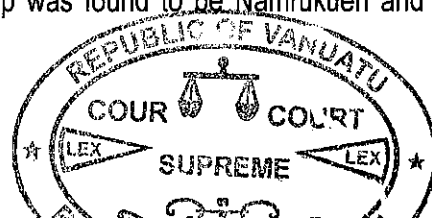
JUDGMENT

A. Introduction

1. This case involves a dispute as to Chiefly title.
2. The Respondent was initially declared to be the rightful custom owner of the name Ringiau in the Island Court, and that was later upheld on appeal in the Magistrate's Court.
3. Those decisions were challenged by way of a final appeal to the Supreme Court. This is the result of that appeal.

B. Background

4. The Tanna Island Kot at Isangel, sitting with 3 Justices, determined on 19 July 2013, after a hearing occupying 8 sitting days, that Chief Ringiau Komi is the rightful custom owner of the name Ringiau and the chiefly title leni Nigo. His ship was found to be Namrukuen and his nakamal is lenimakel.



5. Chief Ringiau Nasse lakewei Mafe appealed that decision in the Magistrate's Court. The appeal was heard by the presiding Senior Magistrate of Tanna, together with two agreed assessors. On 11 March 2019, the Court upheld the Island Court findings.

C. Appeal Grounds

6. Mr Hurley advanced no fewer than 7 grounds of appeal. Only the first ground needs to be addressed, as that over-arches several of the other grounds; and is ultimately determinative of the result.
7. Mr Hurley submitted that there were numerous substantial errors in the Island Court, which were not corrected in the Magistrate's Court. There was accordingly said to be a grave risk of a miscarriage of justice if the errors remained uncorrected. Mr Hurley complained of breaches of the Rules and of procedural fairness in not following correct evidential principles. He submitted there was clear evidence of fundamental procedural unfairness.

8. In particular, Mr Hurley pointed to the following:

- The Island Court accepted evidence in the form of sworn statements, but two of the Respondent's deponents, namely Obed Poida and Kuki Faronga, were not presented to the Court for the purpose of cross-examination. The only evidence the Island Court had and took into consideration was their evidence-in-chief;
- The Island Court permitted Pascal Ringiau to be the spokesman for Paramount Chief Ringiau Komi, and John Roby Takane was also permitted to question witness on his behalf;
- Pascal Ringiau was permitted to give evidence in support of Paramount Chief Ringiau Komi's case without first filing a sworn statement, and also without presenting himself to be cross-examined. His evidence came as a surprise, and only his evidence-in-chief was taken into account; and
- Paramount Chief Ringiau Komi did not give any evidence in support of his case. He claimed to be the custom owner of the title, but did not permit his claim to be challenged by way of cross-examination.

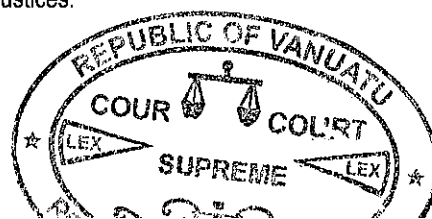
9. The Island Courts (Civil Procedure) Rules 2005 sets out clearly that a claimant is to provide evidence in support of the claim. Rule 6(6)(b) then states:

"After the claimant has given evidence, he or she may be questioned by the defendant and the justices."

10. Rule 6(6)(c) then reads:

"After the witnesses for the claimant have completed giving evidence, the defendant may give evidence against the claim, and then may be questioned by the claimant and the justices.

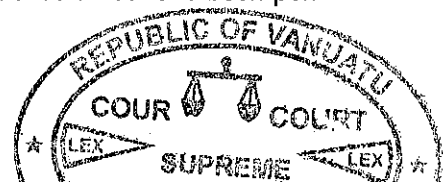
The defendant may call witnesses to give evidence in opposition to the claim, and each witness, after giving evidence, may be questioned by the claimant and by the justices."



11. Mr Hurley stressed the unfairness of evidence being presented in the form of written statements without the ability to test what is said therein by way of cross-examination. In that situation Mr Hurley submitted that the written evidence should not be given any weight. Further, Mr Hurley, on the basis of the authorities of *Barrett & Sinclair v McCormack* [1999] VUCA 11 and *Iririki Holdings Ltd v Trident Holdings Ltd* [2016] VUCA 2, submitted that the available adverse inference to be drawn from not calling a supposedly supportive witness due to concerns about such evidence actually harming one's case, should have been drawn and both Courts erred in not doing so.
12. Mr Hurley also pointed to the gross unfairness of Pascal Ringiau being permitted to give evidence without first presenting a sworn statement as to what he would say and the prejudicial effect of surprise in that situation, which was exacerbated by the appellant being completely denied the opportunity to cross-examine him. Mr Hurley also challenged whether spokespersons were appropriate.
13. Mr Molbaleh tendered lengthy written submissions which he relied on. The majority of those submissions dealt with the other points of appeal raise by Mr Hurley, not the main point of present concern.
14. Mr Molbaleh sought refuge in repetition, stressing that Paramount Chief Ringiau Komi had twice been declared to be the rightful custom owner of the name. He submitted there was no rule to prevent spokespersons being involved, especially where related to one of the parties.
15. Much of Mr Molbaleh's submissions dealt with propositions of evidence, rather than addressing the alleged short-comings of the decisions in the Courts below. Submissions along those lines were of little assistance.
16. Mr Molbaleh's main point in rebuttal to the issue of concern is that Paramount Chief Ringiau Komi was able to determine for himself who to call as a witness, and that Chief Ringiau Nasse lakewei Mafe was in a position to influence that in any way.

D. Discussion

17. The Island Courts (Civil Procedure) Rules 2005 are premised on a fair procedure being adopted for all. If a witness is to be called, the other side must have the opportunity of being able to cross-examine that witness; and if necessary, be given time to prepare so as to remove the prejudice of being caught by surprise.
18. It cannot be fair to rely solely on evidence-in-chief, unless the right to cross-examine is waived. It is equally unfair to call witnesses by surprise. In such circumstance, time is to be afforded to remove the prejudice. These elementary principles were not adopted in the Island Court, nor corrected in the Magistrate's Court.
19. Given the circumstances of this case, the available adverse inference referred to earlier could and should have been drawn. The factors leading to that conclusion include the fact that Paramount Chief Ringiau Komi did not give any evidence, which resulted in no opportunity for Chief Ringiau Nasse lakewei Mafe to cross-examine him or even Paramount Chief Ringiau Komi's spokesperson. As well, the provision of sworn statements by Obed Poida and Kuki Faronga without presenting them for cross-examination, is highly questionable conduct in terms of a party attempting a Court to establish primary facts. That should not have been permitted.



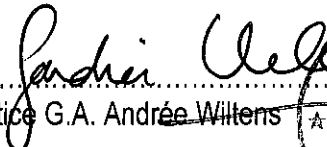
Those statements should have been excluded from the Court's consideration. The fact they were not therefore adds weight in favour of the adverse inference being drawn.

20. The Island Court must determine whether spokespersons are permitted in that jurisdiction, and what their roles are to be. Provided the same rules apply to both sides, it is difficult to see what prejudice could arise from that.
21. In conclusion, in this particular case, fairness of process and overall justice have not been given due weight in both the Island Court and the Magistrate's Court.

E. Result

22. The appeal is allowed.
23. The Magistrate's Court 11 March 2019 decision is set aside *in toto*.
24. The Appeal from the Island Court's 19 July 2013 decision is remitted back for hearing *de novo* by a differently constituted Magistrate's Court.
25. Costs are to follow the event. The Respondent is accordingly to pay the Appellant's costs of and incidental to this appeal. If they cannot be agreed between counsel, they are to be taxed. Once settled, the costs are to be paid within 21 days.

**Dated at Port Vila this 28th day of April 2020
BY THE COURT**


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Justice G.A. Andrée Wiltens

