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

LAND APPEAL
CASE No. 97/23 SC/LNDA

IN THE MATTER OF: **An appeal from a decision of the Efate Island Court in Land Case No. 09 of 1984**

AND:

IN THE MATTER OF: **Customary Land known as ERUITY and EPUEN on Efate**

AND: **JOHN KALTAPAU**
Appellant

AND: **JIMMY KAS KOLOU**
First Respondent

AND: **JOHNNY KALSONG**
Second Respondent

AND: **KALOTUK ROGOTAL**
Third Respondent

Before: ***Justice D .V Fatiaki***

Assessors: ***(1) Daniel Frank***
(2) Metoloa Silou Poilapa

Counsels: ***Mr Wilson Iauma for the Appellant***
Mr Less Napuati for the First Respondent
Ms Jane Bani for the Second Respondent
No appearance for the Third Respondent

JUDGMENT

Background

1. In the interest of brevity, the parties and counsels are referred to the earlier interlocutory rulings of this Court setting out a brief chronology of relevant events in the history and court management of the case from start to the trial *see:* **Kaltapau v**

Kolou (2016) VUSC 56. Further reference may be made to a later unreported Ruling delivered on 13 September, 2017 in which the Court dismissed an opposed joinder application by Felix Kaltamat Akau who was a witness of the First Respondent before the Efate Island Court , on the basis that it was *"... misconceived and time-barred ".*

2. On 26 September, 2016 after several unsuccessful attempts to agree the names of the individuals who would assist as "*assessors"* in the present appeal, a consent order was entered between counsels representing the parties agreeing to the appointment of Island Court Justices Daniel Frank and Metoloa Silou Poilapa as "*assessors*" to sit on the appeal.

3. Although Section 22 of the Island Courts Act does not expressly require the appointment of Island Court Justices as "*assessors*" to sit on any land appeal under the Act, the fact that the persons appointed to assist the Court on an appeal must be "*... knowledgeable in custom*", which is also the qualification required of persons appointed as Island Court Justices [***see***: Section 3(1)], means, that Justices of the Island Court are a logical and ready source of "*assessors*" provided they did not sit on the Island Court whose decision is being appealed (***see:*** Section 26).

4. It needs also to be said, to clear up any possible misunderstandings, that the statutory duty and power to appoint "*assessors*" to sit on a land appeal is exclusively vested in "*the court hearing an appeal"*, and, nowhere in subsection (2), is there a requirement to consult with the parties to an appeal before any appointment is made **or** to obtain the parties unanimous agreement, to the "*assessors*" appointed by the court. That prior consultations about the *"assessors"* has been the normal practice, is a courtesy, and should not be seen as a means to obstruct and frustrate the setting down and hearing of an appeal.

5. By way of further observation, Section 22(2) as drafted, appears to draw a distinction between "*the court hearing the appeal*" and the "*assessors*" who "*sit with the court*" and are appointed by it. Additionally, unlike with section 3(4), the court hearing a land appeal, is not expressly said to be "*properly constituted*" only when, two or more assessors appointed by the court, are sitting with it.

6. Be that as it may, at the commencement of the hearing of the appeal, in the absence of any appearance by or for the Third Respondent (**Kalotuk Rogotal**), who was

represented by Mr. Gregory Takau in July 2017, Counsel for the appellant orally advised the Court that the Third Respondent who was personally served and advised of the trial dates on 19 July 2018, was *"... not interested in the land ..."* as confirmed in his lawyer's written submissions filed on 26 July 2017.

7. That submission by the Third Respondent's counsel, responds directly to the appellant's earlier grounds of appeal dated 19 May 2011, and written submissions. It denies that the EIC was biased in its decision **viz.** *"... that the Efate Island Court was not bias when it declare the First Respondent* (**Kas Kolou**) *to be the custom owner of Eruiti Island."* The submission also correctly states that the EIC was "*... convened to hear and determine the custom land owner of Eruiti Island as well as the boundaries* (of where EPUEN land ends) *between, Rentapao River and/or Enam Bay".* The ownership of Epuen land was not an issue for determination.

8. However, of greater relevance to apparent *"lack of interest"* in the land, is the sworn statement of the Third Respondent (**Kalotuk Rogotal**) himself, filed days after his counsel's submission referred to above, wherein the Third Respondent confirms that the EIC's decision *"... was not made in his favour "*, and more importantly, for present purposes , he also deposes:

"... I have not file any appeal to challenge the decision of the Efate Island Court". In light of the foregoing, we do not propose in this appeal, to make any orders in the Third Respondent's favour.

The Island Court Judgment

9. The decision of the Efate Island Court (**EIC**) is dated 02 June 1989. In it, the EIC sets out the land boundaries advanced by the various claimants which were not identical, as might be expected. Notwithstanding, the EIC without identifying any particular boundary on the Eruiti mainland, proceeds to clarify the two elements or aspects of its determination, in the following terms (in English):

> *"Regarding the boundaries that each party showed on the map, the Court wishes to make it clear to the four parties that its decisions is simply* **(1)** *to determine who is the rightful custom owner of the land where ERUETI islands are located and* **(2)** *what are the actual custom*

boundaries of EPUEN, whether the Rentapau river or Enam Bay in relation to the claimants claim.

The Court has not visited some of the areas within the area claimed under counter claim 2 and by the Defendant because they were outside the area claimed by the claimant".

(our numbering)

10. It is clear from the above, that the EIC decided that, given the variations in the land areas that were submitted for its determination by the claimants, it would confine itself to the claims of the primary claimant, Chief Jimmy Kas Kolou, without the distraction of dealing with other areas submitted by the other counter-claimants, including colonial title numbers which are contained within Epuen custom boundary.

11. We agree and cannot over-emphasize the importance of an Island Court confining itself strictly to the advertised claim and **not** entertaining land areas outside the advertised area. This is because the public advertisement of a land ownership claim calls for competing claims to the advertised land, and, if the advertised land area is later allowed to be expanded to include other lands and/or questions, it is very likely that the original claimant will have no interest in the expanded areas but, even more disconcerting, is that other persons with genuine competing claims to the expanded land areas, might well be denied the opportunity to lodge their competing claims because of a lack of any advertisement of the expanded areas calling for competing claims.

12. As was said by the Court of Appeal in Raupepe v Raupepe [2000] VUCA 6 in setting aside the registration of a transfer of a lease:

"It is a fundamental procedural requirement in Court proceedings concerning the ownership of land that all people who claim an interest in the land or are likely to claim an interest in the land be before the Court. There are two reasons for that. The first, is the natural justice reason to ensure that those whose rights might be affected have the opportunity to be heard ... and to put whatever information they want to put to support their position or against somebody else's position. The second reason is, because the judgment of the Court ... determines for the world at large who owns the land, (it) must be one that binds all those people who might have an interest in the land. A judgment would not bind those people unless they are before the Court as parties".

13. The EIC judgment is seven (7) typed pages long and includes a map which is not explained or clarified in the judgment and is, therefore, of limited assistance albeit that it shows the Rentapau River, Eruiti Island, and Ermasine. The judgment begins by

setting out the nature of the particular dispute(s) that the EIC was deciding as noted above.

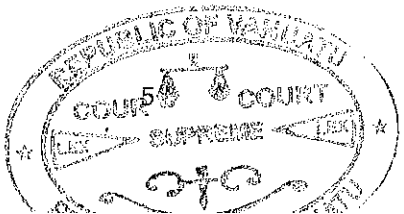
14. The judgment then sets out seven (7) "***poin***" (points) or issues which the EIC deals with and determines separately. Under each "*poin*" is set out, the respective claims and supporting evidence of each of the claimants including **John Kaltapau** of **Erakor Village** who is described as the "*defendant*", in contrast to the other parties, who are designated: "*claimant*" and "*counter-claimant*", respectively.

15. We propose in this judgment, when dealing with each "***Poin***", to discuss and dispose of the appellant's arguments and submissions as relevant.

16. The first "*poin*" entitled: **"KLEIM BLONG BAONDRI"** (The Boundary Claim) sets out the physical parameters of each competing claim according to natural land features (***eg.*** rivers and a bay); numbered colonial titles (***eg.*** Title No. 3117 and Title No. 170/157); man-made features (***eg.*** white chicken factory; McKenzie road and La Cressionière); **and** indigenous place names (***eg.*** Elaknolimal; Emautul and Ermasine).

17. Amongst the claims, only the primary claimant, Chief Jimmy Kas Kolou describes the land he claims by its customary name: "**EPUEN**" with a somewhat vague east/west boundary that "*... start from Rentabau riva mo go finis long Pangpang river*" without any reference to other natural land formations and/or man-made features as is the norm. For their part, the other claimants refer, to numbered colonial land titles which do not bear traditional custom names or boundary marks, and to specific place names within Epuen custom boundary.

18. Given the EIC's, clear indication that some of the areas "*... claimed under counter claim No 2 and by the defendant are outside the area claimed by the claimant",* it was incumbent on the EIC to make it clear both in its judgment and in the map attached to it, exactly what area of land and boundary(ies) it was determining and/or declaring the ownership of, beyond a bare reference to Epuen land ending at: *"... the Rentapao river and the custom name is METENPAK and not ENAM bay ...*", especially, when the signed and stamped map attached to the EIC's judgment makes no mention whatsoever of either name and does not clearly delineate the northern-most or southern boundary of Epuen land. This is a serious lacuna even if it isn't clearly disputed.



19. Similarly, the EIC judgment whilst recognizing the relationship (**not** ownership) of the MOTOUKAS family (the Second Respondent) and "***ERMASINE land***" and its general location within the custom boundary of EPUEN, fails, to diagrammatically locate it on the EIC's map, or, to describe its boundaries with any precision. This omission is not material however, as the EIC's judgment does not purport to determine the custom ownership or boundaries of Ermasine land. Indeed, in our view, this was an *"expanded area"* that could or should have been avoided by the EIC.

20. The second "*poin*" refers to the evidential basis and thinking behind each party's claim, namely, **STAMBA TINGTING BLONG KLEIM**. In this regard the EIC noted that the primary claimant (Chief Jimmy Kas Kolou) traced his unbroken patrilineal bloodline for eight (8) generations to ancestral high chiefs who first settled EPUEN, in the dark ages before the arrival of the Gospel up till the present day.

21. Similarly, Makal Kalsong (the Second Respondent), claimed ERMASINE land through a direct bloodline extending for five (5) generations to an early forebear, High Chief Motoukas. The Second Respondent accepts that ERMASINE is located within the bigger EPUEN boundary, and, is clear that he does not claim EPUEN and has not appealed the EIC's decision which recognized Kas Kolou's traditional chiefly authority (not ownership) over all lands and peoples within his chiefly custom boundary.

22. Kalotuk Rogotal (the Third Respondent) and the Appellant may be conveniently dealt with together, in so far as their claims are based on their claimed adoption by a common adoptive father, "**Abu KAII**" who "*... come aot long eria we claimant i kleim long em*" (whatever that means). Both also claim to represent (unnamed) family members who live at Eton and Eratap villages and Ifira Island, including unidentified long-deceased relatives who once lived at (some non-specific) "*Rentapau area*" but later moved to Erakor village because of sickness and following the Gospel.

23. In its discussion of "*poin 2*", the EIC accepted that the primary claimant and counterclaimants 1 and 2 had called supporting witnesses, but not, the defendant (appellant) as he should have. The EIC made clear that it could not accept a bald claim of representation in the absence of supporting evidence from the person(s) who are being represented. It also rejected Kalotuk Rogotal's claim of representing some (unidentified) people living at Eton village, when the existing Paramount Chief of Eton

who is the primary claimant, makes a similar claim of representing all Eton villagers who are living under his control and protection. We agree with both rejections.

24. We gain support from a prior Island Court judgment in Family Sope Imere (Mele village) v Mala [1994] VUIC 2 where the EIC said of the nature of a chief's authority over custom land and his people, as follows:

> *"According to the system of customary land tenure, the chief is the custom owner of the whole boundary and like his people he owns small portion of land within the whole boundary".*

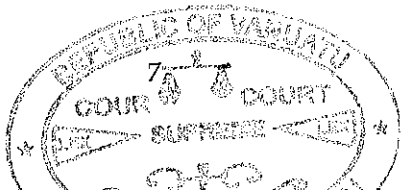
Earlier the EIC said:

> *"Every person under the authority of the custom chief has an interest or right, which is a perpetual right of occupying and using land which is owned by the custom chief".*

25. We are satisfied from the fore-going that **all** persons who live within the custom boundary of a High or Paramount chief are his subjects *de jure*, and, are people whose interests and welfare the chief is entitled and obliged under custom, to represent, protect, and promote, irrespective of any blood ties. (*see also*: Japta 4.1 of the Vaturisu Kastomari Land Loa).

26. Finally, the EIC rhetorically and correctly in our view, asks: "*... wanem Mr Kalotuk mo Mr Kaltapau, wan olfala nomo (KAII) i adoptem tufala be tufala ino stap long wan pati, baontri blong tufala ino semak mo tu historic blong tufala ino semak*" (why and how can two individuals who were adopted by the same person, represent different parties who are claiming different boundaries, and have and relate dissimilar family histories?). We agree that the existence of such an unexplained inconsistent *"state of affairs"*, critically undermines the genuineness of the Third Respondent and Appellant's claims.

27. **Point No. 3**: FAMILI TRI BLONG EACH PARTI refers to the "*family trees*" advanced by each party in support of his claim. In respect of the primary claimant and Counterclaimant (1), the EIC accepted that their genuine family trees emanated from and follows the paternal bloodline of a named traditional high chief or chiefs for several generations. In particular, the EIC recognized that the primary claimant and the families he represents *"... originate from Epuen"*. In similar vein, the EIC recognized



the first counterclaimant originates "*... from ERMASINE (*which*) is within EPUEN*" and which, in turn, is controlled by Kas Kolou.

28. Concerning Counterclaimant (2) and the defendant, the EIC correctly noted in our view, that each derived "*... his right not through bloodline but through adoption*" albeit that no direct evidence supporting his adoption was led by either claimant. The defendant does admit however in his statement filed before the EIC: *"... MI BORN LONG No. 3 DECEMBA 1925 MO OLFALA (KAAI) YA NAO I GIVEM NEM YA LONG MI (KALTAPAU) WE MI MI KAREM I STAP TEDE"* (*see*: **Exhibit No.1** at pp 163 & 174 of Appeal Book behind **Tab D**).

29. Notwithstanding the above, the EIC did **not** accept, that an adopted person could claim the significant and vast boundaries, some jointly, claimed by Counterclaimant 2 and by the defendant, which extended to several thousand hectares and included several colonial titles that their adoptive father ("**Abu KAII**") had nothing to do with selling or leasing.

30. **Poin 4**: HISTRI EACH PARTI I PRESENTEM relates to the particular "*family history*" presented by each of the claimants to the EIC. Once again, the EIC accepted the second counter-claimant's history which "*... comes from his grandparents, three of whom are still alive*". Whereas the defendant's history, according to the primary claimant, was "*... picked up from the old people of Eton during the 10 years that* (the defendant) *lived there while working at Forari*".

31. In this latter regard, despite the defendant's denials, the EIC agreed with the primary claimant. The EIC also rejected the way in which the defendant and his witness had inappropriately adopted the Erakor language in naming various places that were highlighted in the claimant's claim and which are named differently in the language of Eton.

The Adoption of the Appellant

32. The fifth point is entitled: KASTOM ADOPTION. In this regard, the EIC notes that while it is possible to acquire land ownership rights through customary adoption, in the case of the second counter–claimant and the defendant, who both claim to have been

adopted by the same adoptive father, **Abu KAII**, the EIC ***"... finds there is no proof thereof and further... if Abu Kall had adopted them, then they should look upon each other as brothers***", and presumably, would have a joint claim or similar, if not, identical claims, histories, and family trees, instead of the competing and divergent claims each advanced in support of his separate claim to Epuen. We agree that these claims cannot be sustained.

33. As for proving an adoption, **Japta 5** of the Vaturisu Kastomari Land Loa relevantly provides:

> *"5.1 Adopsen blong wan boe or gel hemi pat blong kastom blong Efate. Sapos wan Big Jif, Smol Jif, o Hed blong family hemi wantem adoptem wan pikinini, hemi mas mekem wan Kastom seremoni long Farea blong evri pipol blong vilej oli witnessem, mo hemi mas adoptem wan pikinini nomo we hemi bladlaen blong em, tru brata o sista blong hem.*
>
> *5.2 Long Farea, Jif o eniwan we I mekem adopsen, bae hemi mekem kastom igo long papa mama blong pikinini ia we igo long adopsen, olsem kompensesen blong hem igo long tufala".*

34. Plainly, there is a traditional ceremony to be publicly performed in a custom adoption involving the entire community and Chiefs including, compensating the parents of the adopted child. Whatsmore, the child must be a close blood relative, either a niece or nephew of the adoptive father. Absence of evidence fulfilling either requirement renders the adoption non-compliant with custom, and, in our view, is incapable of creating or vesting customary land rights and entitlements in the adopted child. Ground 3 of the appeal grounds is accordingly dismissed.

35. Point 6: the reason for and existence of the title RILEISENSIP BLONG EACH PARTI is unclear, but, the EIC found that the parties involved in the dispute over Epuen, originate from three (3) male ancestors: **KAII, MANSIL,** and **KALTAPAU – KARA** (whatever its relevance may be). The EIC also found that long before and until independence, there had been good co-operation between the Chiefs and peoples of Eton and Eratap, but, with and since the disposition of Eruiti Island, disputes arose which spoiled their relations and co-operation.

36. In this latter regard, the EIC does not refer to the relevant Deed of Lease of Eruiti Islands dated 31 July, 1970 (***see***: pp 83 to 87 of the Appeal Book behind **Tab D**) between Mr. John Kaldabau (Kaltapau) of Erakor, Efate Island and Mr. Jean Joseph Cassart and Mrs. Germaine Tetoe of Port Vila. Significantly, the Deed was witnessed by Charley Kalmet Chief of Erakor and Kaltong Chief of Eton who also jointly "*... certified that John Kaldabau is indeed the one and only owner of the islands hereby sold under the customary rules having statutory effect in the area where the leased property is located*".

37. Even accepting that such a certification might constitute a declaration against the declarant's property interests, we do not consider it constitutes conclusive evidence of or a declaration of ownership, either in law and/or in custom. Furthermore, the Deed is not protected by a JCNH judgment and in our view, would not have survived the Constitution.

38. Point 7, as its sub-heading: FASIN BLONG SALEM MO LEASEM KRAON INSAED EPUEN BAONTRI makes clear, is concerned with the selling and leasing of (unidentified) lands within EPUEN during colonial times. In this regard, the judgment of the EIC does not identify any particular Deed of Sale by date, or leasehold by title number, or, refer to any judicial processes undertaken before the Condominium Courts to verify the genuineness of such transactions and, if approved, surveying and registering the land within the joint legislative provisions that existed at the time.

39. Having said that, the EIC does mention land sales by a **Mr. Abel NARR** of **Erakor Village**, of (unidentified) plots of land within Epuen to (unidentified) purchasers, where *"... kot I luk se fasin ia ino stret follem kastom blong Epuen"*. This so-called indigenous vendor is specifically mentioned in a document prepared by "*Pastor Kalangis*", tracing the early history of the bringing of the Gospel to Eton village in 1879 by a Presbyterian evangelist from Erakor by the name *"Naar (malit) Abel"* amongst others. It requires little imagination to conclude that such an "*outsider*" can have no authority whatsoever, to sell customary land.

40. Having said that it is no surprise that the said document contains an entry to the effect that: "*KRAON WE ABEL NAAR (MALIT) I SALEM ENAM/SAUMABAL – METNAMEL SOLWOTA KO ANTAP LO BUS HEMI FASEN BLONG STIL...*" (The named grounds

that Abel Naarmalit sold extending from the sea up to the bush, were stolen) ***see***: Annexure "**JJK 5**" in the sworn statement of Jimmy Kas Kolou dated 11 August, 2017.

41. Returning to the above-mentioned omissions. They are unfortunate because the EIC appears to have summarily dismissed, **all** sales and leases of plots of land within Epuen customary land boundary during colonial times, as either fraudulent and/or non-genuine for various reasons including – that the land was sold by (unidentified) indigenous persons who were "*... oli no stret Kastom ona long kraon ia*" (**not** the true custom owners of the land); other (unidentified) land was handed over free to (unidentified) French companies "*... from frait long musket. ...*" (for fear of firearms); "... *ino stret follem kastom blong Epuen*" and further (unidentified) lands were taken by (unidentified) *Frenchmen* "*... follem olsem fasin olsem, DRONK, BRAEBERI, TABAKO, WINE, WHISKY mo plante more ...*" being wholly improper means and worthless or inadequate consideration for the vast land areas purchased thereby.

42. In this latter regard, reference may be made to Article 22 (5) of **THE 1914 PROTOCOL** entered between the English and French Condominium Governments, which relevantly provides:

> *"When the claim to a property is founded on a title deed alone* (establishing the sale or grant of the land in question), *... this title – deed can only be rendered void if it is proved:*
>
> *(A) That the agreement is not signed by the vendor or grantor ...;*
> *(B) That the vendor or grantor did not understand the effect of the agreement;*
> *(C) That the agreement was obtained by fraud, violence, or other improper means;*
> *(D) ...;*
> *(E) That the immovable granted or sold was not the land of the vendor or grantor or of his tribe;"*

43. Plainly, even during colonial times, the Condominium Government recognized the vulnerability and inequality of "*literacy, power, and arms*" between *"natives"* (vendor/lessors) and "*non-natives*" (buyer/lessees) as evidenced by transactions involving the use of "*fraud*" or "*improper means*", which would "*void*" such sales or leases. It is also clear from the above provision that there must be acceptable evidence or proof produced ("*... it is proved*") by the native caveator/challenger, in support of the ground(s) relied upon, in order to void a written land transaction.

44. The EIC also says the defendant's forefather who spoke French fluently, enabled the French Government to lease the mainland at Erueti. *How*? this was done, is not described in detail, but, in any event, the EIC says the actual lease was properly signed between the French Government and the primary claimant's forefathers namely, the Chiefs of Eton and of Eratap villages respectively, who are the rightful custom owners of the leased land as opposed to the defendant's ancestor.

45. In light of the foregoing, the EIC declared that it was:

> *"... convinced that the rightful and true custom ownership of ERUETI Island belongs to the High Chief Kolou of Eton Village and every family that he represents and are also under his control. The Court is also convinced that the correct boundary where Epuen ends is Rentapao river and the custom name is METENPAK and not ENAM bay.*
> *Finally, the Court recognizes and is convinced that the family of Chief MOTOUKAS come from ERMASINE and that Ermasine is located within the boundaries of EPUEN which is controlled by Chief KOLOU".*

46. Significantly, Chief KOLOU's ownership of EPUEN is clearly stated to be in a representative capacity and **not** personally, as has been incorrectly assumed. Whatsmore, the start or beginning of the boundary of EPUEN, as opposed to its ending, is unfortunately, undefined and remains unclear in the judgment.

The Grounds of Appeal & the Parties Submissions

47. The grounds of appeal have been through several transformations, some of which were ordered by the Court in the interests of brevity and clarity, during the management of the appeal over the years and culminating in a document filed on 10 September 2018 after the commencement of the hearing of the appeal entitled: "FINAL GROUNDS OF APPEAL OF APPELLANT" (as amended) as follows:

> *"1. The Efate Island Court in its findings had failed to give recognition to the Appellant's claim made in respect of Deed of Sale dated 29 October 1882 which Deed is the subject matter of a New Hebrides Joint Court Judgments dated 21 August 1931, 15 September 1931 and 13 December 1932.*
>
> *2. The Efate Island Court failed to give weight to the Appellant's claim made in respect of grave yard and place of birth which are crucial evidence and as a result failed to declare the Appellant the custom owner of the land in question.*

3. *The Efate Island Court declared the Appellant's claim was through adoption without evidence.*

4. *The Efate Island Court in it's findings had erred in fact and mix law when it declared the First Respondent* (owner) *when the First Respondent's father had already gone to* (an unidentified) *Court for the same land in question.*

5. *The Efate Island Court misunderstood and misapplied* (unidentified) *rules of customary land tenure that are relevant to the claim of the appellant."*

48. At the hearing of the appeal, appellant's counsel confirmed the appellant's appeal was limited to the above five (5) grounds and there was *"... no need for the Court to consider the 31 pages of appeal grounds in the Appeal Book between pages 19 and 50"*.

The Application to Adduce Fresh Evidence

49. Appellant's Counsel also made an application to adduce additional evidence in the appeal by way of four (4) sworn statements with annexures from:

(a) ***John kennedy Kaltapau*** *the son of the original defendant;*

(b) ***Samuel Kaltapang Kaltak*** *relating to the gravesite of the great grandfather of the appellant John Kaltapau at Eruiti Island;*

(c) ***Phillip Wanemut*** *who attached a typewritten copy of a statement of Andes Carlot the Vice Chairman of the Erakor Land Trust Council, in support of John Kaltapau's claim before the EIC;*

(d) ***Willie Wanemut*** *dated 07 Feb, 2017 which annexed four (4) identical maps showing the respective areas claimed by each party before the EIC, shaded in different colours with some overlapping and, all within Epuen land boundary.*

50. Only the sworn statements of John Kennedy Kaltapau and Phillip Wanemut were included in the appeal papers. Additionally, a copy of a photograph of a grave-site annexed to the sworn statement of Samuel Kaltapang Kaltak, was objected to by counsel for the First Respondent who doubted its authenticity, and together with

counsel for the Second Respondent, objected to all the sworn statements on the principal ground that there was no legal or evidential basis to support their admission or acceptance.

51. At the hearing of the application, appellant's counsel withdrew the sworn statement of Phillip Wanemut which sought to produce a further copy of the statement of Andes Carlot which had already been filed before the EIC in support of the appellant's claim.

52. After hearing counsels, the court allowed the application to adduce copies of three (3) relevant Joint Court of the New Hebrides (**JCNH**) judgments namely: **No. 134** – dated 21 August, 1931; **No. 156** – dated 15 September, 1931; and **No. 201** – dated 13 December, 1932. On the other hand, the court refused leave for the production of the three (3) sworn statements which did not contain evidence that could not have been produced before the EIC with a little effort and diligence on the appellant's part. At the time of the court's preliminary ruling the sworn statements, fuller reasons were indicated and are now provided.

53. The JCNH judgments are allowed on the basis that they are judicially noticed public documents that may give rise to a *prima facie* inference of custom ownership of Epuen land. The court judgments are also *inter-partes* determinations after trial, are final, and continues to be binding on the parties to the judgment. Furthermore, the JCNH judgments were not provided to the EIC at the trial and are now admitted to complete the appellant's case.

54. In Kalotiti v Kaltapang [2007] VUCA 25 the Court of Appeal in upholding the continuity and binding effect of a pre-independence determination of custom ownership by a New Hebrides Native Court (**NHNC**) said *inter alia*:

> *"In our view it is beyond doubt that decisions of Native Courts that were binding on indigenous custom owners of land immediately before independence became binding on them after independence by virtue of Article 95(2) of the Constitution...*
>
> *The jurisdiction given to the Native Courts by the Joint Regulations was not incompatible with the Constitutional requirements of Articles 73, 74 and 75. On the contrary, the Native Courts sought to ensure that the rules of custom were the basis of ownership. The exercise of jurisdiction of the Native Courts, and the decisions made by them, are not incompatible with the independent status of Vanuatu, and, in particular, with the fundamental principles of ownership of custom land established by the Constitution.*

The argument that at independence, a vacuum arose where all the rights and liabilities established under the former regime disappeared defies common sense, and is contrary to what happened in law and in fact immediately following independence ... In law, the new Supreme Court established under the Constitution held that the decisions made by the Joint Court and by other courts established under the Anglo-French Protocol of 1914 had continuing force and effect ... See: ... Picardie Holdings (NH) Limited and Johnson v Société Jean Ratard and others [1980] 1 Van L R 5 ...".

and later, the Court of Appeal said:

"In our opinion the respective rights and interests of the parties as custom owners derive from the 1972 NHNC decision. The conclusion accords with the finding of the trial judge that the 1972 NHNC decision remains in force ...".

55. Although the Court of Appeal refers to decisions of the NHNC, in the hierarchy of Courts during the Condominium times, the JCNH heard appeals from decisions of the NHNC and JCNH's decisions were final and binding **see**: Articles 12(5) and 15 of THE 1914 PROTOCOL.

56. *A fortiori*, and despite Respondent Counsels valiant attempts to distinguish the two Courts, we are of the view that decisions of the Joint Court would be similarly continued under Article 95 of the Constitution. (***see also***: Kauten v Sip [2003] VUSC 79 where the Supreme Court struck out a purported appeal in the absence of an Island Court determination, and, where the dispute over "***Imeaorone land"*** on Tanna between the same parties, had been determined by the Native Court at first instance and later upheld on appeal by the Joint Court during Condominium times: ***see*** in this latter regard: Yarris Apayou v Noclam Sip [1973] VUTM 11 reported in *paclii* at Vol 9 of **Vanuatu Unreported Judgments 1911 – 1994**.

57. Turning to the sworn statements sought to be adduced by the appellant in this appeal, the Court of Appeal in Vita v Castelli No.2 [2000] VUCA 4 which was relied upon by appellant's counsel, quoted with approval the *"special circumstances"* which, when established, would allow for the leading of additional evidence on an appeal as enumerated in the leading textbook of Phipson on Evidence (12th Edn) at para 1703 as follows:

"... the evidence:
(a) could not have been obtained at the trial with reasonable diligence;

(b) *would or might, if believed, have a very important effect on the decision of the court; and*

(c) *is of a sort which inherently is not improbable ...".*

58. In light of the above, and as earlier determined, the sworn statements that the appellant sought to adduce in the appeal contained evidence that was plainly available at the time of the trial and, there was no real explanation advanced for the appellant's failure to produce them at the trial beyond the claim that the appellant's father was "*... not legally educated ...* (and) *... not represented by a lawyer*". In this latter regard, Section 27 of the Island Court Act makes clear that "... ***no legal practitioner shall be entitled to take part in the proceedings of an island court***".

59. Plainly, being legally unrepresented is a feature common to all litigants before the Island Court and is therefore, not a proper excuse, nor does it prevent litigants from obtaining legal advice outside the trial. In light of the foregoing, the Court was constrained to refuse the application to produce the sworn statements and annexures in the appeal.

60. Respondent counsels while objecting to the appellant's application and accepting that some of the evidence is new, nevertheless, referred to the non-conclusive nature of the evidence in the sworn statements. In particular, the evidence (*incl.* a photograph) concerning the alleged burial place of the late John Kaltapau (the appellant) on Eruiti Island.

The "BOUFFA" Deed of Sale

61. The appellant also relied on a Deed of Sale dated 29 October, 1882 and a map of "**Bouffa**" which clearly shows that the land sold under the Deed extends on both sides of the Rentapau River to the East and to the West. Respondents' counsels submit that the Deed, at best, gives rise to a rebuttable inference of ownership on the part of the indigenous vendor(s), of the underlying custom land that was sold or leased under the Deed.

62. In the present case, however, such an inference would be necessarily limited to the land extending eastward from the Rentapau river, which, the EIC has determined

is where the boundary of Epuen land " *... igo finis long em hemi Rentapao riva ...*" (where Epuen ends is Rentapao river). In other words, Epuen land does **not** extend beyond the Rentapau River towards Teouma or Eratap and formed no part of the EIC's decision.

63. Furthermore, the ownership of the land between the Teouma and Rentapau rivers was judicially determined in favour of **Family Kalmet** by the EIC in Land Case No.08 of 1993 dealing with: "*Teouma/Rentapau land*" in which the present appellant Family Kaltapau, was also an unsuccessful claimant. The EIC decision is reported in *paclii* as: Kalmet v Kalpong [2006] VUICB 6.

64. Although that decision is subject to a pending appeal in Supreme Court Land Appeal Case No. 71 of 2006, the EIC decision remains extant and is relevantly referred to by the Court of Appeal in Kalmet v Kalmermer [2014] VUCA11 and, more recently, by the Supreme Court in Kalmermer v Kaltatak [2016] VUSC77 where both Courts concluded that the decisions of the Eratap Customary Land Tribunal in Land Case Nos. 01 of 2003 & 01 of 2004 concerning lands to the West of the Teouma river in the Eratap area, "... *are final and binding*" in favour of Family Kalmet.

65. In this appeal, the relevant customary lands were sold under 4 separate Deeds to: "*Compagnie Calédonienne des Nouvelle –Hébrides*". They are: ***Aroutap (Eratap?)*** with an area of 10,000 Hectares, which straddles the mouth of the Teouma river; ***Malepote*** (12,000Hectares) which is a triangular-shaped land beside Aroutap extending from the coast to a point inland close to the origin of Rentapau river; ***Routia*** (10,000 Hectares) which straddles the Rentapau river from its estuary on the coast and all the way inland stretching for almost it's entire length; and lastly, ***Saoulapale & Salouteguel*** (8,000 Hectares) which lands are immediately adjacent to Routia and extending eastwards following the coastline all the way to Eton village and Le Cressionière.

66. We say at once that the ascribed areas in whole thousands of hectares, means that they are rough estimates and, in the case of Saoulapale & Salouteguel lands, the ascribed area of 8,000 hectares is patently incorrect, when viewed on the composite map. In the words of one author: *"...* they have*)* ***a surface area greater than the other three lands put together. Eight thousand hectares therefore exceed thirty two thousand in acreage.***"

67. Furthermore, all four (4) custom lands are collected under one colonial title bearing the name: "**BOUFFA**". In our respectful view, the combining of four (4) separate sales, of four (4) different custom lands (even if sold to the same buyer), into a single title document **No. 170** may be convenient for the purchaser and for administrative and registration purposes, but, under no circumstances, can such a super-imposition erase or extinguish the identities of the indigenous vendors. In other words, despite the single title, there remains at least four (4) different custom owners involved in the sale of the said lands.

68. Accordingly, even if the EIC had been minded to accept the appellant's claim to ownership of "*BOUFFA*", it could not have declared him the custom owner of *"BOUFFA"* (as opposed to the western boundary of Routia extending from the Rentapau river ***see***: shaded map at p.59 of Appeal Book behind **Tab D**), since it is a western surveyed boundary without custom sign-posts and man – made features, and is comprised of several custom lands each with its own custom boundary and indigenous owner. On that score alone, the appellant's claim and appeal cannot succeed.

The JCNH Judgments

69. Having said that, we accept the submission of appellant's counsel, that the additional evidence of the Joint Court judgments and Deeds of Sale provides a historical narrative of colonial actions and determinations that upholds the sale of *"Routia"* by the appellant's ancestor: "*Caletabao* (Kaltapau?) *Chief of the Routia tribe in the Sandwich Islands"*. Unfortunately, the ownership of "*Routia"* was **not** a matter before the EIC for determination, nor for that matter, was "*BOUFFA*" and, neither land boundary is fully contained within Epuen custom boundary.

70. Be that as it may, we set out an extract of how the above-mentioned land sales occurred, as described in a preliminary assessment of the caveats of the Chiefs of Eratap and Eton to the registration of "*BOUFFA*" in the purchaser's name, where the unknown author writes:

"At the end of the month of October 1882, Messrs VIDAL, STUART and GASPARD, together with two (unidentified) *Chiefs from Vila Island, toured around the coasts of Efate Island on board their ship "Le Calédonien" with a view to purchasing land for the Compagnie Calédonienne des Nouvelles-Hébrides.*

*They managed to make contact with some (*unidentified) *natives at four* (undisclosed*) spots on the coast and purchased four plots of land ... There are four documents in the file of S.F.N.H of which the* (unidentified) *natives are not disputing the authenticity as to the signatures nor as to the fact* (as opposed to the authority) *of the sale. However, it is impossible to admit that the parties, communicating through interpreters more or less familiar with the different languages, or often without interpreters even, and communicating by signs, could actually understand each other regarding the boundaries and the expanse of the plots of land. How can you expect the buyers to take measurements, however approximate, of thousands of hectares of uncleared land within a day, when it is dangerous to make any landing because of the hostile tribes?*

(***see***: CONCLUSIONS document at p.66 of Appeal Book behind **Tab. D**)

then, after identifying several "*defects*" in each Deeds including – uncertainty of the boundaries sold and the authority of the native vendors to sell the disputed lands, the author writes (at p. 68 *op. cit*):

"It is admissible that a sea-going captain such as Mr Vidal could have made such a glaring mistake (in estimating the area of land purchased), *unless he purchased lands from natives who did not know them either and consequently without knowing if he was purchasing them from the true landowners."*

The above extracts are revealing and could well have led the EIC to generalize as it did in "*poin 7*". It certainly justified an independent enquiry and investigation, which is what occurred in respect of the four (4) sales.

71. The four (4) sales combined, are the subject matter of Application No.78 of the Société Française des Nouvelles Hébrides (**SFNH**) to the Joint Court for an order that it be registered as owner of the said lands under the collective name *"BOUFFA".* The basis for the claim are four (4) Deeds of Sale registered on 7 November 1882 at Nouméa, as follows:

1. Deed of Sale – 28 October 1882 of a parcel of land of 10,000 hectare between **"Calamate"** (kalmet?) Chief of the tribe of *"Aroutap"* (Eratap?) and representatives of Compagnie Calédonienne Des Nouvelles Hebrides (**CCNH**), for a total consideration of 1190 francs;

2. Deed of Sale – 28 October 1882 of a parcel of land of about 12,000 hectares between **"Calaboum and Maritabou"** Chiefs of the **"***Malepate tribe***"** and CCNH, for a total consideration of 1123 francs;

3. **Deed of Sale – 29 October 1882** of a parcel of land of 10,000 hectares between **"Caletabao"** (Kaltapau?) Chief of the "*tribe of Routia"* and CCNH, for a total consideration of 1330 francs which included, 75 francs; 100 kg of tobacco and 6 bottles of brandy (***see***: **p.60** of the Appeal Book behind **Tab. D**);

4. Deed of Sale – 31 October 1882 of a parcel of land of 8,000 hectares between **"Ebel"** Chief of "*Saoumapal tribe"* and CCNH, for a total consideration of 1312 francs.

The consideration in all four (4) sales comprised a small cash payment of less than 150 francs and unspecified "*articles of trade"* and /or "*merchandise"* including cartridges, dynamite, caps & wicks, calico, beads, tobacco, liquor, pipes and axes.

72. Additionally, the Joint Court in its **Judgment No. 134**, in rejecting **Native Caveat No. 103** lodged on behalf of the Chiefs of Eratap and Eton against **Application No. 78** of SFNH for the registration of "*BOUFFA*" in its name, said *inter alia*:

> *"Whereas the Native Advocate had the duty as caveator to make the necessary proof to invalidate the titles of the SFNH.*
>
> *Whereas the Native Advocate presents as proof only a presumption, namely the impossibility of the purchasers, and the vendors to state the boundaries of the land sold and a proof by all legal means should be ordered by the court.*
>
> *Whereas presumption more or less logical cannot constitute a precise fact which is admissible as proof.*
>
> *Whereas it falls on the Native Advocate to make the proof himself and he appears to have charged the court with making this proof, furthermore he has had sufficient time to do it and to state the facts at the public hearing on which his caveat is based.*
>
> *Whereas it results that the Native Advocate, who is charged with proving this case, has failed to do so, and consequently this caveat must be rejected.*
>
> *Now therefore IT IS THIS DAY ADJUDGED:*

That caveat No.103 against Application No 78 is invalid and be rejected."

From the foregoing, it is clear that despite it being found to be valid and "... *must be declared admissible on to its form",* the caveat of the Chiefs of Eratap and Eton was ultimately dismissed, not after a full hearing on the merits, with witnesses called by both sides, instead, it was dismissed essentially for failure by the native caveators to discharge their legal burden of proof.

73. In our view, such a decision does **not** constitute a positive declaration or determination that the native vendor(s) is, in fact and in law, the custom owner of the disputed land(s). In other words, the failure of the caveators does not mean that the non-native purchaser has positively established the converse, namely, the identity, ownership and/or authority of the native vendor(s). It can raise **no** "*res Judicata*" in this appeal where the contesting parties and the land being determined, are different.

74. In this latter regard, we are reminded of the observations of Howard Van Trease in his authoritative work "History of Land Alienation: Land Tenure in Vanuatu" where the learned author wrote critically about the treatment of native caveats during condominium times, at p.24:

> *"When a caveat was filed on behalf of Ni-Vanuatu, there was little chance of success because the Court required written documentation and Ni-Vanuatu challenges were almost always based on oral accounts of local residents. Throughout the history of the Joint Court's operation, only one native caveat succeeded in stopping the registration of the land – a caveat filed in 1968 on behalf of the people of Mavea Island near Santo. All the others were rejected".*

75. Be that as it may, we do not consider that the judgments of the JCNH is either conclusive or final, as to the custom ownership of the purchased lands. Indeed, using a similar argument against the purchaser's assertion that ownership of land may be presumed from a signature on a document is, to adopt the JCNH's dictum: *"... presumption more or less logical cannot constitute a precise fact which is admissible as proof ...".*

Ground (1) of the Appellant's grounds of appeal is without merit and is accordingly dismissed.

76. We are also fortified by the judgment of ***Cooke. CJ*** in Manie v Kilman [1988] VULaw Rp 10 where his lordship said, in rejecting evidence of a colonial lease in that case:

> *"The fact that a lease of a portion of land in dispute was signed by Saulei and* (by 2 named individuals) *on behalf of the respondent* ***does not prove in any way, either are custom owners*** **(of the leased land)**. *It proves in my opinion, that the persons who dealt with them accepted them as persons who were on the land for a long period and were accepted by people as the owners but not necessarily the custom owners when the leases were made. It is clear to me that the custom of Malekula is that the person who first arrived on the land and built a nasara there, even though they moved later, for some reason or other, to somewhere else, they are the true customary owners of the land".*
>
> (our highlighting)

The Burial Site

77. Concerning the claimed burial – site of the appellant's forefather on Eruiti Island, respondents counsel submitted that ownership of Eruiti Island had already been determined by the Supreme Court in its judgment in Kolou v Trinh [2017] VUSC 20 and was subsequently upheld by the Court of Appeal in [2017] VUCA 30.

78. In the Supreme Court judgment, counsel for the First Respondent relies on the following obiter reference to the EIC judgment in this appeal, where the court said (at **para 81 ibid**):

> *"In Efate Island Court case No. 09 of 1984, the Court referred to the rightful custom owner of Eruiti Island as being Kas Kolou. Although there is a lack of clarity around the exact boundaries of the land which is the subject of dispute in Case 09 of 1984 the evidence in this case establishes a clear right on the part of Kas Kolou to claim custom ownership. It is not for this Court to determine the issue of custom ownership, however, the standing of the claimants in this case cannot, in my assessment, be disputed ..."*

79. The citation is not helpful. It merely repeats the EIC's decision that Kas Kolou is the "*rightful custom owner of Eruiti Island*" and notes his "... *clear right to claim custom ownership*" of EPUEN land. The Supreme Court was careful however, to disavow any power *"... to determine the issue of custom ownership"*. Both decisions of the EIC are not final, and are the particular concerns of the present appeal before this Court.

80. In similar vein and equally unhelpful, is counsel's reference to a more recent decision of the EIC made on 16 October, 2009 concerning the custom ownership of **KARNGO land – Title 1940**. In the last paragraph of the EIC's judgment concerning Karngo land,

it refers to its earlier decision in Case No. 09 of 1984 declaring High Chief Kas Kolou of Eton Village as the true custom owner and controller of EPUEN land.

81. The obiter reference in the Karngo case was made by the EIC, to support the well-established customary principle that, there cannot be two (2) Paramount Chiefs controlling the same area or custom boundary as affirmed in Manlaewia v Maripongi [2018] VUSC 257 esp. paras 36/37. In other words, the EIC's reference was **not** an independent affirmation based on evidence, of its earlier decision concerning the ownership of EPUEN land which, in any event, had nothing to do with the subject matter of its decision concerning Karngo land.

82. Be that as it may, appellant's counsel submits, *"... that in Melanesian cultures and societies, the place of birth and grave-yard reveals the origin and home-ground of a man or woman in question ..."*. Even assuming the accuracy of such a bald generalization, a person's birthplace and burial site merely connects the said person and/or his parents with the land without any ownership implications.

83. In our view, in the absence of an unbroken family genealogy and paternal bloodline traceable back several generations directly to a male ancestor who first settled on the land and coupled with clear indicia of lengthy occupation and settlement such as a built "*nasara*" or "*nakamal*"; special ceremonial sites; dwelling houses; domestic gardens; and fruit tree-plantings, birth and death locations *per se* are inconclusive evidence of ownership if at all.

84. We are satisfied that the relevant and applicable customary land tenure principles are set out in the Karngo Title 1940 case (op. cit) where the EIC said:

> *"Long kastom blong Efate,* ***raet blong onem wan land hemi pass followem bladlaen blong man or patrilineal ...***
>
> *... Dispute ia hemi involvem olketa following aspects blong* ***onaship blong land long kastom blong Sout Efate, olsem:***
>
> *A.* ***Kastomeri land onaship hem based generally long patrilineal system*** *;*
> *B. Exception long rule blong patrilineal. Woman isave tekem right sapos inomo gat bladlaen blong man istap;*
> *C. Occupation mo use of land. Hemi minim man we istap long kraon for longfalla generation, mo olketa we oli leavem land for a long period of time.*

KASTOMERI LAND TENURE

a) Bigfala Jif hemi controllem, managem mo protectem olketa interest over lands blong olketa people wea oli stap under long jurisdiction blong hem ..."

(our highlighting)

(***see also*** : the "*general considerations*" enumerated by the EIC in Family Sope Imere (Mele Village) v Mala [1994] VUIC 2; and **Japta 4.1** of Efate Vaturisu Kastomeri Land Loa passed by the Vaturisu Council of Chiefs at Imere Village in February 2007).

85. After careful consideration of the competing submissions, we are satisfied that the burial site of John Kaltapau on Eruiti Island (if true), does not assist the appellant, in so far as, in the custom of South Efate, ownership and succession to land follows the patrilineal bloodline which is a matter of parentage, and family genealogy, irrespective of the physical location of one's birthplace or burial site. Ground (2) of the appeal is accordingly dismissed.

86. In light of the foregoing, the appeal having failed on each ground is dismissed with costs of VT50,000 each ordered in favour of the First and Second respondents to be paid within 14 days of delivery of this judgment. For completeness we record that Ground (4) of the appeal grounds was abandoned during the hearing of the appeal.

DATED at Port Vila, Efate this 28th day of April, 2020.

.....
JUDGE

.....
ASSESSOR (1)

.....
ASSESSOR (2)