IN THE COURT OF APPEAL OF THE REPUBLIC OF VANUATU
(Civil Appellate Jurisdiction)

CIVIL APPEAL CASE No. 21 OF 2014

BETWEEN: **JAMES ARU**
Appellant

AND **JIMMY VIRA**
First Respondent

AND **REPUBLIC OF VANUATU**
Second Respondent

Coram: *Hon. Chief Justice Vincent Lunabek*
Hon. Justice Bruce Robertson
Hon. Justice Daniel Fatiaki
Hon. Justice John Mansfield
Hon. Justice Dudley Aru
Hon. Justice Stephen Harrop

Counsel: *Mrs Marisan Vire for the appellant*
Mr George Boar for the first respondent
Mr Kent Tari for the second respondent

Date of Hearing: *11 November 2014*
Date of Judgment: *14 November 2014*

JUDGMENT

Introduction

1. Belpura is an area of custom land in the southern part of the island of Santo. The former custodian of Belpura was Molisale Tavuironleo *("MT")*. He had no blood sons of his own but James Aru *("JA")* claimed that he was by custom MT's adopted son. Jimmy Vira *("JV")* on the other hand claimed that he was a child of the blood line of MT. As was confirmed by counsel at the hearing, there is no longer a dispute about these matters but there is a dispute about the consequences of both JA and JV being within the custom land-owning family.

2. The presence of significant funds derived from land lease premia and rental payments has led to a protracted dispute since at least 2008 through various tribunal and Court hearings.

3. The Republic currently holds in its custom owners' trust account the sum of Vt 13,302,756. Both JA and JV on behalf of those whom they represent claim a share of these funds. As we understood counsel at the hearing, each side accepts the other has an entitlement to a share of the funds but the parties have not been able to agree on what is the appropriate share. We observe at the outset that Courts, and even customary land tribunals, are not the best places to resolve this kind of dispute.

This Appeal

2. The matter comes before this Court by way of an appeal by JA from a judgment of Justice Saksak on 17 June 2014 which made findings in JV's favour. The Republic, as holder of the disputed funds, abides the decision of the Court.

3. The latest incarnation of the claim by JV in Civil Case No. 35 of 2011 was his amended claim of 21 October 2013. The claim relies on the validity of the Mavunlevu Village Land Tribunal decision of 21 September 2012 which declared JV as representative of MT and as custom land owner of the Belpura land by way of blood relationship.

4. The claim sought an order that the second defendant release the sum being held to JV's solicitor's trust account.

5. On 25 April 2014, JA applied, among other things to strike out the amended claim. According to the judgment, this application was neither heard nor determined; it appears that the parties and the judge decided to proceed instead by determining certain agreed issues.

6. On 28 April 2014 the Court made consent orders which included as paragraph 2:

"The facts not being in dispute, counsel for the claimants and the first defendant be required to file and serve written submissions on the following legal issues:

a. *Whether the decision of the Mavunlevu Village Land Tribunal dated 21 September 2012 is valid and binding?*

b. *Whether the decision of the Santo Island Land Tribunal dated 17 May 2010 is valid and binding?*

c. *Whether the decisions of the Vaturani Island Council of Chiefs dated 9th September 2008 is* (sic) *valid and binding?*

d. *Whether the decision of the Area Land Tribunal dated 4 October 2013 is valid and binding?*

e. *Whether [JA] has been validly adopted in custom by [MT]?*

f. *Whether, as adopted son of [MT], [JA] has equal rights to property or land of [MT]?*

g. *What is the legal effect of the customary adoption of [JA] by [MT]?"*

7. We have some sympathy with Justice Saksak whose decision on the issues he was asked to decide is now challenged by JA on the basis that, essentially, he had no jurisdiction to decide them. Along with the other counsel, his counsel has to take a share of the blame for the manner in which the case was argued and decided in the Supreme Court.

8. That said, a Supreme Court Judge, however much the parties may wish it otherwise, can only deal with matters he/she has jurisdiction to deal with. The parties cannot agree to vest the Court with jurisdiction which it does not have.

9. With the benefit of hindsight perhaps, it is unfortunate that the striking out application was not dealt with. Although we have not seen the application among the appeal book documents, we infer from Mrs Vire's submissions that it was based on the point that JV's claim was untenable because the Village Land Tribunal decision on which it depended had been successfully appealed to the relevant Area Land Tribunal, and there had been no appeal from its decision by JV to the Island Land Tribunal.

10. Had that application been heard then, in our view, it ought to have been granted. The decision of the Mavunlevu Village Land Tribunal of 21 September 2012 was appealed to the Canal Fanafo Area Land Tribunal *("the ALT")*. After some delays because JV did not turn up for hearings, the ALT decided to proceed in his absence on 4 October 2013. It noted that he had been "*absent over (3) three times without any good reason.*"

11. The ALT declared JA as the custom owner. In reaching that conclusion, it took into account both the validity of his custom adoption and the fact that in 1989 MT had gone to the trouble of making a Will in the presence of a Senior Magistrate declaring that the Belpura land should go to JA. While this may not have been legally effective it was a clear statement of his intention as to who the custom owner should be on his death. The Area Land Tribunal certainly regarded it as having weight.

12. The ALT decision was issued on 7 October 2013. Under the Customary Land Tribunal Act any party, including obviously JV, had a right to appeal against its decision to an Island Land Tribunal. Any such appeal had to be lodged within 21 days after the announcement of the decision, so an appeal had to be lodged by 28 October 2013. There was no such appeal and there is no power to extend the time for appealing.

11. The result is that in the absence of a *"process"* challenge in respect of the ALT hearing lodged with the Supreme Court under section 39 that is the end of the matter as between JA and JV in relation to the issues dealt with by the ALT. Nobody can now challenge the substance of the ALT decision which declared JA to be the custom owner except perhaps by the indirect route of the Supreme Court upholding a process challenge under section 39 and ordering that the Area Land Tribunal rehear the case.

12. JV, if dissatisfied with the ALT decision, had an express opportunity to do something about it by way of appeal between 7 and 28 October 2013 but he did not take that opportunity.

13. Accordingly in our view what the Supreme Court ought to have done, either on application such as was made by Mrs Vire on 25 April 2014, or of its own motion in its inherent jurisdiction, is to have struck out JV's claim under Civil Case No. 35 of 2011 because the essential foundation of it had been removed by the successful appeal to the Area Land Tribunal, whose decision had not itself been challenged, by appeal or otherwise.

14. In any event, the Court should not have been addressing, let alone deciding, any of the seven matters which counsel asked it to decide because they were all matters properly

determined not by the Supreme Court but by customary processes, including by customary land tribunals.

15. On this basis the judgment of the Supreme Court on all issues was therefore wrong as being without jurisdiction and as being made on the basis of a claim which was untenable because its factual underpinning had disappeared with the successful appeal to the ALT.

17. In particular, the Supreme Court could not properly have concluded, as it did, that the ALT decision was invalid because there had been no appeal against that decision, nor any application to the Supreme Court under section 39 challenging the process associated with that decision. Without that, there was no jurisdiction for the Supreme Court to consider or determine substantively the validity of the ALT decision. Accordingly, and contrary to the Supreme Court judgment, the ALT decision was and remains undoubtedly valid. It is the last word, among many words.

18. The appeal must therefore be allowed. As to costs, even though JA has succeeded, he must accept a share of responsibility for the way matters were argued and determined in the Supreme Court. She should have insisted on the striking out application being dealt with first and should not have allowed Justice Saksak to believe that it was appropriate for him to deliver a judgment responding to the seven identified issues when, in truth, Mrs Vire's position was that he had no jurisdiction to deal with them. Costs will therefore lie where they have fallen.

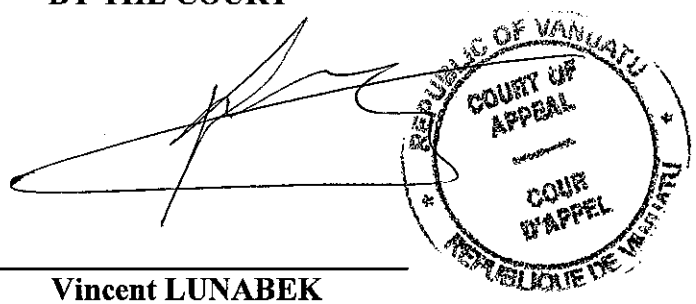
19. Finally, we urge these parties, who are members of the same family and who both have a legitimate and strong interest in the Belpura custom land to put aside their longstanding and entrenched differences. It is in the interests of all family members that some agreement is reached as soon as possible about their respective roles in relation to the land and as to how the funds held by the Republic may be divided.

20. We have real concern that if there are any more applications or Court proceedings the funds will become so depleted that the primary beneficiaries will be the lawyers and not the family whose money it is. In long-running disputes there is a tendency for parties to prefer to pay their lawyers rather than to see the other side receive funds. That kind of thinking needs to be abandoned and recognition given to the reality that these parties and all family members need to live and deal with each other amicably, both now and in

succeeding generations. If the parties are unable to resolve matters themselves, we suggest they might agree on the appointment of a mutually-respected person as a form of mediator.

DATED at Port Vila this 14th day of November 2014

BY THE COURT



Vincent LUNABEK
Chief Justice