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

Civil Appeal
Case No. 19/1600 CoA/CIVA

BETWEEN: Remy Kunuan
Appellant

AND: Humphrey Tamata
First Respondent

AND: Republic of Vanuatu
Second Respondent

Coram: ***Hon. Chief Justice V. Lunabek***
Hon. Justice J.W Hansen
Hon. Justice R. C. White
Hon. Justice D. Aru
Hon Justice G. A. Andrée Wiltens
Hon. Justice V. M. Trief

Counsel: *Mr. R. Kunuan Appellant in person with Mark Stafford as a friend of the Court*
Mr. L. Huri for the First and Second Respondents

Date of Hearing: *13th February 2020*

Date of Judgment: *20th February 2020*

JUDGMENT

Introduction

1. This is an appeal against a judgment of the Court below dismissing the appellant's judicial review claim.

Background

2. The appellant is from Port Resolution on Tanna. He claims that his family, Family Kunuan, are the declared custom owners of Enkahi custom land where Port Resolution is located. He relies on a judgment of the Joint Court of the New Hebrides in 1934 recognising a Deed of Sale concerning land within the area he now claims and a number of Tanna Council of Chiefs decisions,

namely, the Area Council of Chiefs decision of 11 August 1987 and the South East Tanna Council of Chiefs decision of 28 November 1993.

3. On 27 April 2009 upon receiving this information from the appellant about his claim, Mr Alicta Vuti Kwirinavanua of the Customary Land Tribunal Office informed the appellant that the decisions were legally binding unless a competent Court says otherwise. Following the information, a couple of leases were created and issued over parts of the land with the appellant as the lessor.

4. When the Customary Land Tribunal Act [CAP 271] was repealed and replaced by the Custom Land Management Act No 33 of 2013 which came into force on 20 February 2014, the appellant was then informed by Mr Kwirinavanua on 7 March 2015 that he could not be recognised as a custom owner of the area claimed.

5. The appellant then filed two separate proceedings namely:-

   - JR 608/2016 Remy Kunuan v Republic of Vanuatu
   - JR 2051/2018 Remy Kunuan v Humphrey Tamata & Or

6. JR 608/16 was struck out by Sey J on 7 December 2016 and JR 2051/18 was discontinued by notice of discontinuance filed on 18 October 2018. Both proceedings sought orders directing the defendant to issue a certificate of recorded interest to the claimant over the disputed land.

7. On 3 May 2018 the first respondent who is the National Coordinator again informed the appellant that he could not be issued a certificate of recorded interest as the issue of custom ownership of the land remains in dispute.

8. In the current proceedings, the appellant in the court below sought two orders, namely an order quashing the decisions of 7 March 2015 and 3 May 2018 and an order directing the respondents to declare that he has a recorded interest over the area where Port Resolution is located.

9. When the proceedings were instituted, the respondents on 30 January 2019 applied to have the matter struck out on the basis that it was an attempt to revive a claim which had been discontinued and the Enkahi land was still in dispute.

Decision

10. The primary Judge when dismissing the claim, found that the decisions relied upon by the appellant were, first, not declarations of custom ownership of land and, second, even if they were, the decisions were not made by competent

tribunals vested with jurisdiction to deal with disputes over custom ownership of land. He said that:-

> *"Prior to 2013 Parliament had enacted the Island Courts Act to deal with customary land disputes as to custom land ownership. Later Parliament enacted the Customary Land Tribunal Act in 2001. This Act was repealed in 2013 and replaced by the current Custom Land Management Act. This is the only Act in which Parliament has formalised the recognition of appropriate customary institutions or procedures to resolve land ownership or any disputes over custom land."*

Appeal

11. The appeal is pursued on two grounds. First that the appellant was recognised as the custom owner of Enkahi land pursuant to s 6 of the Customary Land Tribunal Act and the primary judge was wrong to find that the decision was without basis.

12. The second ground is a challenge to the order for costs against him. The appellant says that costs should have been ordered against the respondents for continuously changing the laws and causing the appellant to suffer delays and additional costs.

Discussions

13. The starting point is the Constitution of the Republic of Vanuatu. Article 78 as amended recognises that only institutions formalised by law passed by Parliament can resolve disputes over ownership of custom land. We agree with the primary judge that decisions relied on by the appellant were not decisions made by institutions established pursuant to the Custom Land Management Act. They are also not decisions of a court or land tribunal determining custom ownership of land. (see Valele family v Touru [2002] VUCA 3).

14. Therefore they are not capable of creating a recorded interest in land either under s 19, s 57 or s 58 of the Act.

15. Similarly we reject the appellant's submission that section 6 of the Customary Land Tribunals Act applies to the council of chiefs decisions of 1987 and 1993. There is insufficient evidence to show that all persons having an interest in Enkahi land have agreed to resolve their dispute in accordance with the rules of custom.

16. Secondly, in his evidence, Mr Crimson Bani, the acting Principal Lands Officer of the Custom Land Management Office confirms that there is a pending dispute over Enkahi land and the Custom Land Management Office is processing the claim for hearing in accordance with the Act. One of the claimants being Family latek lara led by a Raymond Nasse as their spokesman.

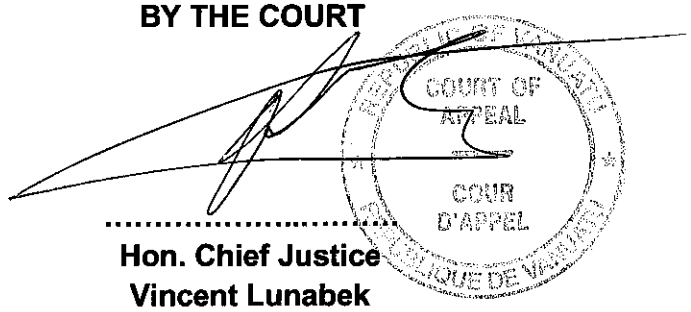
17. On the second ground of appeal in relation to the awarding of costs against the appellant, it was entirely within the primary Judge's discretion whether or not to award costs. The respondents were successful on their application to strike out the claim and so were awarded costs to be agreed or taxed as is usually the case. There was no basis to award costs against the respondents for the continuous changes in the laws.

Result

18. The appeal is dismissed. On the question of costs, the respondents have sought costs in the sum of VT50,000. Being the successful party in this appeal we award costs accordingly.

DATED at Port Vila this 20th day of February, 2020

BY THE COURT



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Hon. Chief Justice
Vincent Lunabek