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

Civil Appeal
Case No. 23/29 COA/CIVA

IN THE MATTER OF: **AN APPEAL FROM THE SUPREME COURT OF THE REPUBLIC OF VANUATU**

BETWEEN: **NOEL RAF KARAE, Chairman of Matairan Area Council of Chiefs (Big Bay Inland)**
Appellant

AND: **TASLAMANE AREA LAND TRIBUNAL (Big Bay Coast)**
First Respondent

AND: **CUSTOMARY LAND MANAGEMENT OFFICE**
Second Respondent

AND: **SOLOMON TAVUE & JOB THOMAS**
Third Respondents

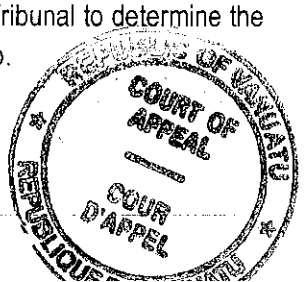
Date of Hearing:	***11 May 2023***
Coram:	***Hon. Chief Justice V Lunabek*** ***Hon. Justice J Mansfield*** ***Hon. Justice R Young*** ***Hon. Justice D Aru*** ***Hon. Justice VM Trief*** ***Hon. Justice EP Goldsbrough***
Date of Judgment:	***19 May 2023***

JUDGMENT OF THE COURT

A. Introduction

1. There is an unfortunate history underlying this appeal.

2. As the submissions on appeal identified, the real subject of the appeal is the decision of the Custom Land Officer ('CLO') of 10 September 2020 under subsection 34(1) of the *Custom Land Management Act* No. 13 of 2013 (the 'CLM Act') to refer what is called the Nampuel Land Case to the Chairman of the Big Bay Coast Council of Chiefs so that the Chairman should proceed to constitute a Custom Area Land Tribunal to determine the custom owners of Nampuel land which is custom land on Santo.



3. The Appellant Noel Raf Karae, chairman of the Matairan Area Council of Chiefs (Big Bay Inland) says that the referral is invalid because Nampuel land is within, or (as the position formally adopted) is partly within, the custom area of the Big Bay Inland Council of Chiefs (sometimes called the Big Bay Bush Council of Chiefs) and partly within the area of the Big Bay Coast Council of Chiefs.

4. Consequently, he says, the referral should have been made under subsection 34(5) of the CLM Act because there is a dispute about custom ownership over land which is within the area of both Councils.

5. If that had been apparent to the CLO, the proposition would be correct to the extent that the CLO was required to refer the dispute to not one chairperson but to the chairpersons of the two relevant custom area councils of chiefs. Section 34 is clear. It is then for those councils of chiefs to set up either a single custom area land tribunal (subsection 34(5)) or a joint custom area land tribunal (subsection 34(5)). The CLO must act on the information properly provided. If there is a dispute about that, the proper avenue for resolution is in section 41 of the CLM Act.

6. Sections 34 and 41 of the CLM Act provide, relevantly, as follows:

> *34. (1) If a custom land officer becomes aware that it has not been possible to resolve a dispute in a nakamal, he or she must inform the chairperson of the custom area council of chiefs.*
>
> *(2) The chairperson of the custom area council of chiefs must, as soon as possible after becoming aware of the situation in subsection (1), convene a meeting of the custom area council of chiefs to establish a custom area land tribunal to determine the dispute by customary processes in accordance with the custom of the custom area in which the land is located.*
>
> *(3) A decision of the custom area land tribunal is to be made according to the rules of custom.*
>
> *(4) If a land dispute related to land which is situated within one custom area, a single custom area land tribunal is to be established to consider the dispute.*
>
> *(5) If a dispute relates to a land which is situated within two or more custom areas, a joint custom area land tribunal is to be established to consider the dispute.*
>
> ...
>
> *(8) A decision of the custom area land tribunal is final.*
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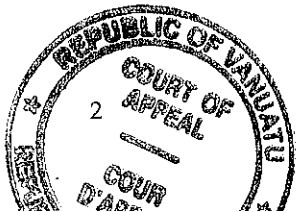
> ...
>
> *41. (1) If it is alleged by a person that a decision of a custom area land tribunal made to determine the custom owners:*



(a) *has been made by a custom area land tribunal that was not constituted according to section 35 or 36; or*

(b) *has been made in breach of the process specified under this Part; or*

(c) *has been procured by fraud,*

the person must report the allegation to the custom land officer, or to the National Coordinator or directly to the Registrar of the Island Court (Land), and provide evidence to support the allegation.

(2) *If an Island Court (Land) is satisfied that t a decision was made by a custom area land tribunal under any of the circumstances set out in subsection (1), the Island Court (Land) is to set aside the decision of the custom area land tribunal, and refer the matter back to the custom area land tribunal with such directions as it considers appropriate.*

B. Background

7. On 27 August 2020, the Nampuel Nakamal sat to determine the land dispute over Nampuel custom land. Elizabeth Wanemay, the CLO for Sanma Province and an officer of the Second Respondent Custom Land Management Office ('CLMO'), attended the nakamal meeting. Minutes were prepared. A Nakamal Decision Form was also completed which stated that the nakamal meeting ended with no consensus.

8. On 10 September 2020, the CLO Ms Wanemay referred the Nampuel custom land dispute to the Chairman of the First Respondent Taslamane Area Land Tribunal (Big Bay Coast) stating that there was no consensus at the nakamal meeting for Nampuel land.

9. In October 2021, the Taslamane Area Land Tribunal issued a notice of hearing of the Nampuel land dispute.

10. Previously, in 2017, the CLO had referred two other disputes, over Pakakara and Puelvunsupe custom lands, also to the Taslamane Area Land Tribunal, which has made its determinations in respect of both lands (decisions dated 16 December 2019 and 9 February 2021).

11. Both decisions are currently pending review by the Island Court (Land).

12. On 28 October 2021, Mr Karae filed the Claim in Judicial Review Case No. 3553 of 2021 challenging the CLO's referral of 10 September 2020 in respect of Nampuel land as having been made to the wrong Chairperson of the wrong custom area council of chiefs.

13. The defendants in the judicial review proceeding were the Taslamane Area Land Tribunal as First Defendant and the Custom Land Management Office ('CLMO') as Second Defendant.

14. Mr Solomon Tavue applied to be joined as a party and was joined as an Interested Party.

15. On 21 June 2022, the Supreme Court issued its decision following the Rule 17.8 conference. It held that Mr Karae did not have an arguable case and that there had been substantial delays to file his claim for judicial review therefore declined to hear the claim and struck it out.

16. On 24 June 2022, Mr Karae as First Claimant and Amy Garae and Wycliff Garae as Second Claimants filed the Claim in Civil Case No. 1529 of 2022 ('CC 22/1529'), seeking the following orders:

    a) *An order that the referral of the Nampuel/Vulovulo land dispute made by the custom land officer of the First Defendant to the Second Defendant is invalid and contrary to section 34(1) of the CLMA.*

    b) *An order directing the custom land officer of the First Defendant to refer the Nampuel/Vulovulo land dispute to the relevant area council of the BBI.*

    c) *An order directing the First Defendant to utilize the map of the Sanma Province for the time being, to determine the different area land tribunals pursuant to section 4 of the CLMA until the formal demarcations of the area tribunals are established by the Malvatumauri Council of Chiefs.*

    d) *An order that the Second Defendant be restrained from hearing land claims outside its territory as demarcated by the map of the Sanma Province.*

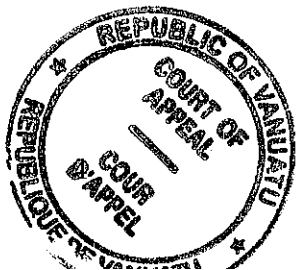
    e) *Such orders deemed necessary and just.*

    f) *Costs.*

17. The defendants in CC 22/1529 were the Republic of Vanuatu as First Defendant and the Taslamane Area Land Tribunal as Second Defendant.

18. Solomon Tavue and Family and Job Thomas and Family applied to be joined as parties and were joined as Third Defendants. Subsequently, they filed an urgent application to strike out the Claim.

19. By Decision dated 14 December 2022, the Judge in CC 22/1529 allowed the strike-out application for reasons including that the proper avenue to challenge a CLO's referral was by way of judicial review not a civil claim therefore the proceeding was an abuse of process; the dismissal of the judicial review proceeding was a final decision therefore the claimants were estopped from bringing CC 22/1529; and the claimants were vexatious litigants. The Claim and proceeding were struck out and indemnity costs ordered.



C. The Proceedings

20. The nature of the Claim in CC 22/1529 was a civil claim. The Court should not decide issues of fact about custom land, but it should ensure that those properly involved in such a process do so lawfully. The judicial review procedure is appropriate for such an issue. A civil claim is not appropriate as the Court may have to decide issues of fact about the status of custom law and in relation to custom land, and that is not appropriate.

21. Whilst the form of action should not dictate the proper resolution of disputes, counsel for the Appellant accepted that the criteria for a judicial review proceeding applied and that was the proper course to test the validity of the CLO's referral. We approach this appeal as if the criteria for judicial review applied.

22. A judicial review Claim had, of course, previously been filed and it was struck out after the Supreme Court considered the matters that it was required to at a Rule 17.8 conference.

23. For the reasons which follow, we have reached the view that even if the judicial review Claim had proceeded to a consideration on the merits, it would have been dismissed as the CLO's referral at the time that it was made was valid.

D. Validity of Referral

24. The material in respect of the Nampuel Nakamal meeting included the Nakamal Decision Form dated 27 August 2020 and the minute of the nakamal meeting held on 27 August 2020.

25. On the information recorded in the Nakamal Decision Form, Nampuel land was within the area of Big Bay Coast. There is no record in either of these documents that there was a question as to whether Nampuel land was within the area of Big Bay Inland or Big Bay Bush.

26. According to the Nakamal Decision Form, the nakamal meeting on 27 August 2020 ended with no consensus. This meant that it had not been possible to resolve the Nampuel land dispute at the nakamal meeting.

27. The CLO Ms Wanemay acted on that information and informed the Chairman of the Big Bay Coast Council of Chiefs. Accordingly, the CLO's referral was made in accordance with subsection 34(1) of the CLM Act and is valid. No error has been demonstrated in respect of the CLO's referral as there was no indication of that claim extending into the Big Bay Inland area.

28. Even though the referral is valid, it is now agreed on behalf of the Taslamane Area Land Tribunal and the CLMO and Appellant's counsel that there is a dispute as to whether Nampuel land is located within Big Bay Coast or extends into the Big Bay Inland area. If

that had been known at the time of the CLO's referral, then the referral should have been made to the Chairpersons of the two relevant Councils of Chiefs so that a joint custom area land tribunal would be established to consider the dispute pursuant to subsection 34(5) of the CLM Act. As it is now known, the chief who received the referral and his council of chiefs may constitute a joint custom area land tribunal unless the Tribunal has already been established.

29. It is another possible option for the Second Respondent the CLMO to determine whether it is appropriate to withdraw the referral, and make a fresh referral under subsection 34(1) to the Chairpersons of the Big Bay Coast and the Big Bay Inland Councils of Chiefs. It may now be inappropriate to do that. If so, then the Appellant's next course after the Land Tribunal decision would be to appeal to the Island Court (Land) pursuant to section 41 of the CLM Act. It has done that in relation to the Pakakara and Puelvunsupe custom lands.

E. Orders

30. A civil proceeding, such as Civil Case No. 1529 of 2022 was, is not appropriate for any orders in relation to the validity of a custom land officer's referral. In any event, this Court has found that the referral at the time that it was made was valid.

31. In these circumstances, obviously, the Court below properly dismissed the Claim, so its order should not be set aside, even though its decision was based on procedural grounds. The Third Respondents filed strike-out applications both in the Supreme Court and in this Court. There is no utility in a strike-out application on appeal as the Court hears submissions as to the merits of an appeal before it makes its decision. It is much better, if possible, to use the time and expense towards resolution of the appeal on the merits, or if there is a procedural objection, on that basis.

32. As the appeal is to be dismissed, the Appellant should pay the costs of the First and Second Respondents, and separately of the Third Respondents, fixed at VT50,000 each. There was no submission as to the costs order made by the primary Judge, so that order also stands.

33. The appeal is dismissed.

DATED at Port Vila this 19th day of May 2023

BY THE COURT

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Hon. Chief Justice V Lunabek

REPUBLIC OF VANUATU COURT OF APPEAL COUR D'APPEL REPUBLIQUE DE VANUATU