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

Civil Appeal
Case No. 24/23 COA/CIVA

BETWEEN: **JACK HARRY KALLON**
First Appellant

AND: **JOSIANA BEN**
Second Appellant

AND: **FAMILY TUFORO MERA represented by Joseph Tuforo Mera, Prima Area**
First Respondent

AND: **THE REPULBIC OF VANUATU**
Second Respondent

AND: **ERAKOR VILLAGE MPAU NATKON**
Third Respondent

Date of Hearing:	***12 February 2024***
Coram:	***Hon. Chief Justice Vincent Lunabek*** ***Hon. Justice Ronald Young*** ***Hon. Justice Richard White*** ***Hon. Justice Oliver A. Saksak*** ***Hon. Justice Edwin P. Goldsbrough*** ***Hon. Justice William K. Hastings***
Counsel:	***S Kalsakau for the Appellants*** ***R Tevi for the First Respondent*** ***JT Wells for the Second Respondent***
Date of Judgment:	***16 February 2024***

JUDGMENT OF THE COURT

Introduction

1. This is an appeal from the decision of the Supreme Court in *Mera v Republic of Vanuatu* [2023] VUSC 248 in which the primary Judge referred Family Mera's claims to be the custom owner of Part Emtenmap custom land and Part Etil custom land to the Erakor Village Mpau Natkon (the Nakamal). The Nakamal had earlier declared the appellants Jack Harry Kallon to be the custom owner of Part Emtenmap land and Josiana Ben to be the custom owner of Part Etil land.

Background

Part Emtenmap land

2. On 10 June 2021, a public notice inviting claims for the custom ownership of Part Emtenmap land was issued.

3. On 1 July 2021, Family Tuforo Mera filed a claim form at the Custom Land Management Office (CLMO) with respect to Part Emtenmap land. The form did not ask for contact details.

4. In a letter dated 13 October 2021 addressed to Mr Mera at a Post Office Box, the Nakamal stated that there would be a meeting (no date, time or place was given) to determine the custom ownership of Part Emtenmap land, and that Mr Mera was to pay a fee, submit his full oral history and family tree, and appoint a spokesperson.

5. In his sworn statement dated 8 August 2023, Daniel Lukai, a Custom Land Officer, deposed that this letter was served on Mr Mera's son. In his sworn statement, Marik Kalopong, the Chairman of the Nakamal, deposed that he served this letter by depositing it in a Post Office Box as advised by the CLMO. Mr Mera denied ever receiving the letter. The primary Judge found that he had not received it.

6. On 29 October 2021, the Nakamal met to consider Mr Kallon's claim. Being unaware of the Nakamal meeting, Mr Mera did not attend. The Nakamal declared in a written decision on that day that Mr Kallon was the custom owner of Part Emtenmap land.

Part Etil land

7. On 4 February 2022, a public notice inviting claims for the custom ownership of Part Etil land was issued.

8. On 4 March 2022, Family Tuforo Mera filed a claim form at the CLMO with respect to Part Etil land. Unlike the earlier claim form, this form had a box in which the claimant could write his phone number and email address. This box was filled in.

9. In a letter dated 23 May 2022 addressed to Mr Mera at the same Post Office Box, the Nakamal stated there would be a meeting at 9am on 27 May 2022 to determine the custom ownership of Part Etil land, and that Mr Mera was to pay a fee, submit his full oral history and family tree, and appoint a spokesperson.

10. In his sworn statement dated 6 September 2023, Nixon Pantutun, a Custom Land Officer, deposed that "on or around 24 May 2022" he had served this letter on the receptionist of the Language Department of the Prime Minister's Office where Junior Mahit, Mr Mera's son, worked. In his sworn statement filed 14 August 2023, Mr Mahit deposed that he received the letter late on 25 May 2022, and had handed it to his father on 26 May 2023, the day before the Nakamal hearing.

11. Mr Mera and his family spokesperson, Mr Lango, worked into the night on 26 May 2023 preparing the family oral history and family tree, and attended at the place of the Nakamal on 27 May 2022. However, no one was present. That seems to be because the Nakamal met at 10am (according to Mr Lukai's note of the meeting) and not 9am as stated in the letter sent to Mr Mera. Mr Mera left, thinking that there was no Nakamal.

12. The Nakamal did consider Mrs Ben's claim at 10am and declared in its written decision dated 8 June 2022 that she was the custom owner of Part Etil land.

The Supreme Court Judgment

13. On 14 December 2022, Mr Mera, on behalf of Family Tuforo Mera, filed a claim in the Supreme Court for judicial review of the two written decisions made by the Nakamal dated 29 October 2021 and 8 June 2022. Mr Mera submitted that he had not been served with notice of the first meeting and was given insufficient notice of the second.

14. The primary Judge made the following findings in respect of the Nakamal meeting on 29 October 2021, which concerned the custom ownership of Part Emtenmap land:

> *"23. It is clear from the evidence that Mr Mera was not served notice of the nakamal meeting to determine the custom ownership of Part Emtenmap custom land as the letter was 'deposited' at a P. O. Box and there is no evidence that he actually received it. Further, it is common ground that Mr Mera's claim was not determined at the nakamal meeting on 29 October 2021."*

15. The primary Judge made the following findings in respect of the Nakamal meeting on 27 May 2022, which concerned the custom ownership of Part Etil land:

> *"25. It is also clear from the evidence that Mr Mera received just one day's notice of the nakamal meeting to determine the custom ownership of Part Etil custom land. I reject Defendants' counsel's submissions that Mr Mera had ample time to prepare his claim in time for the nakamal meeting. The ownership and use of custom land is the defining issue that united the people of Vanuatu (the New Hebrides, at the time) in their struggle for political independence. Giving someone only 24 hours' notice of the nakamal meeting that will determine their claim to custom ownership and/or use rights over custom land is simply insufficient. Mr Mera must be given a reasonable period of notice of a nakamal meeting, such as 14 days.*
>
> *26. In any event, it is also common ground that Mr Mera's claim for Part Etil custom land was not determined at or following the nakamal meeting on 27 May 2022."*

16. The primary Judge also determined that under Article 78(3) of the Constitution and ss. 47(4) and (5) of the Custom Land Management Act 2013 (the Act), the Court had no jurisdiction to review the merits of the nakamal decisions.

17. Article 78(3) of the Constitution provides that:

> *"(3) Despite the provisions of Chapter 8 of the Constitution, the final substantive decisions reached by customary institutions or procedures in accordance with Article 74, after being recorded in writing, are binding in law and are not subject to appeal or any other form of review by any Court of law."*

18. Subsections 47(4) and (5) of the Act provide that:

> *"(4) To avoid doubt, pursuant to Article 78 of the Constitution, the Supreme Court and all other Courts have no jurisdiction to determine matters related to land ownership or land disputes.*
>
> *(5) All matters related to land ownership or land disputes must be referred to a nakamal or custom area land tribunal for determination in accordance with the provisions of this Act."*

19. Having found the Court had no jurisdiction to review the decisions of the Nakamal, the primary judge referred Mr Mera's claims to the body that did, the Nakamal.

The Appeal

20. Mr Kallon and Mrs Ben appealed the Supreme Court's decision to refer Mr Mera's claims to the nakamal. They naturally wanted to preserve the Nakamal's declarations that they were the custom owners. Mr Kalsakau on their behalf emphasised the importance of finality of decisions concerning custom land ownership.

21. Mr Kalsakau's first ground of appeal was that the primary Judge had no jurisdiction to review the decision of the Nakamal under Art. 78(3) of the Constitution and s. 47(3) of the Act. He relied on *Family Mete v Family Wolu* [2006] VUSC 68 as authority for the proposition that a decision that was made in respect of an unopposed land claim and not appealed in time is a final decision and therefore not subject to review by the Supreme Court.

22. The second ground of appeal was that the primary Judge erred in purporting to direct the Nakamal to hear the claimant's claim under s. 47(5) when s. 47 only gives the Supreme Court supervisory powers over decisions of the Island Court (Land) but not nakamals.

23. The third ground of appeal was that the primary Judge erred in failing to give proper weight to evidence that Mr Mera had not properly registered his claim.

24. The fourth ground of appeal was that the primary Judge erred by purporting to review the decision of the Nakamal outside of the time frame permitted under s. 45(1).

25. Mr Kalsakau submitted that the proper course was for Mr Mera to have lodged an application for review by the Island Court (Land) of the Nakamal's decisions within 30 days of the dates of the decisions, but he did not do this. We observe that there does not seem to be any process in place that would ensure a claimant becomes aware of a decision within the 30 day period.

26. Mr Tevi on behalf of Mr Mera submitted that Article 74 of the Constitution needs to be satisfied before a written decision of a nakamal can be binding in law. Article 74 provides that "*The rules of custom*

shall form the basis of ownership and use of land in the Republic of Vanuatu." Mr Tevi submitted the failure to give proper notice to Mr Mera of both hearings meant he was unable to argue his claim and that was a breach of the rules of custom. Mr Tevi submitted as a result that there was no "*final substantive decision*" of the nakamal to which Article 78 could apply.

27. Mr Wells for the Republic said the Republic was neutral with respect to this appeal, but said he wished to point out some difficulties with aspects of the evidence considered by the primary Judge. He aligned himself with the third ground of appeal and submitted that Mr Mera's claim with respect to Part Emtenmap land was not properly made because it did not attach a family tree. As Mr Mera was not told this was fatal to his claim, and the Nakamal proceeded on the basis that the claim was formally valid by sending Mr Mera a letter that stated what he needed to file before the meeting, we give no weight to this submission. The third ground of appeal also fails for this reason.

28. We now consider the first, second and fourth grounds of appeal.

Discussion

29. We will consider the first and second grounds of appeal together.

30. We agree with Mr Kalsakau's submission in his first ground of appeal that the Supreme Court has no jurisdiction to review or hear appeals from "*final substantive decisions reached by customary institutions or procedures*" by virtue of Article 78(3) of the Constitution. With ss. 47(4) and (5) of the Act, Article 78(3) provides for certainty and finality of decisions made by nakamals. We do not however agree with Mr Kalsakau that these were "*final substantive decisions*" for the following reasons.

31. Two claims were filed in respect of each area of custom land. Without having been given adequate notice of either meeting of the Nakamal, Mr Mera, through no fault of his own, was unable to attend either meeting to present the claims he filed. It cannot be said therefore that the Nakamal considered and determined Mera's claim to custom ownership of the land. Only one claim in respect of each custom land was determined. His claims remain undetermined.

32. Mr Kalsakau submitted that by finding in favour of the other claimants, the Nakamal impliedly dismissed Mr Mera's claims. This submission would have more force if there was any consideration of Mr Mera's claims on their merits, but there was not. His claims were not heard. The primary Judge noted that "*it was common ground*" that Mr Mera's claims were not determined at either Nakamal meeting. Neither decision could be said to be a "*final substantive decision*" because the claimant's claim was not heard and no decision on its merits was made in respect of it. A "*substantive*" decision is a decision made on the merits of a claim or dispute. A "*final substantive decision*" is a decision that decides a claim on its merits after a procedurally fair process has been followed. In this case, a procedurally fair process was not followed because Mr Mera was not given adequate, or any, notice of the hearing to determine custom ownership, resulting in his claim not being heard and decided on its merits.

33. *Family Mete v Family Wolu* can be distinguished on its facts and does not assist the appellants. That case concerned an application to extend time to appeal a decision of an Island Court that issued a

judgment in an undisputed land claim. Eighteen months later, the applicant sought an extension of time to appeal the judgment, well beyond the statutory appeal period. The application was declined for that reason. In this case, Mr Mera filed his claim in time but it was not heard and determined. Unlike the facts of *Family Mete*, the land claims of the present appellants were therefore in dispute at the time of the nakamal's determinations.

34. We also do not agree with Mr Kalsakau that the primary judge "*directed*" the nakamal to hear Mr Mera's claim. The word used by the judge was "*refer*". Referring a claim to the body that has jurisdiction to hear and determine the claim is not directing that body to hear the claim. The Judge clearly knew it was for the Nakamal to decide whether or not it would hear the claim. The Court could only "*refer*" the claim to the Nakamal because it recognised it had no jurisdiction to do anything else. The findings the primary Judge made with respect to service and notice were the reasons for the referral.

35. Section 53 of the Act confirms the jurisdiction of nakamals by giving them the power to review at any time a determination of custom ownership:

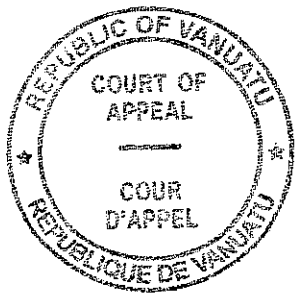
> "***53 Revision to a determination of custom owners***
>
> *(1) A determination of a nakamal may be reviewed at any time by a nakamal following the process in Part 4.*
>
> *(2) The custom land officer is to ensure a written record of the revised determination of custom owners is filed with the office of the National Coordinator to create a new determination of custom owners."*

36. The effect of s 53 is that Mr Mera can go back to the Nakamal "*at any time*" and ask it to hear his claim. That he has not done so does not change the Nakamal's jurisdiction to review its own decisions at any time. In light of s 53, it does not matter how Mr Mera's claim comes back to the Nakamal for the Nakamal to determine it. For this reason, we do not find much substance in Mr Kalsakau's objections to Mr Mera's use of judicial review to get his claim back to the Nakamal. The short point is that Mr Mera has never had his claim heard on its merits by the body with jurisdiction to hear and determine it on its merits.

37. Finally, the fourth ground of appeal must also fail. Mr Kalsakau submitted that the primary judge erred by purporting to review the decisions of the Nakamal outside of the time frame permitted under s. 45(1) of the Act. As we have said, the primary judge was not engaged in a review of the Nakamal's decisions. And as Mr Tevi submitted, s. 45(1) only applies to applications to Island Courts (Land) to review nakamal decisions on certain grounds. We agree with his submission that s. 45(1) is therefore not relevant.

Result

38. For the reasons above, the appeal is dismissed.



39. Costs follow the event and are awarded to the first respondent in the amount of VT 50,000, payment to be allocated equally between the appellants and the Republic.

DATED at Port Vila, this 16th day of February, 2024

BY THE COURT

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Hon. Chief Justice Vincent Lunabek

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