

IN THE MATTER OF: UDAONE CUSTOM LAND, NORTH-WEST EFATE

AND:

**IN THE MATTER OF: AN APPLICATION PURSUANT TO SECTION 45 OF
THE CUSTOM LAND MANAGEMENT ACT**

**BETWEEN: Andrew Popovi & Family Popovi, Timothy Obed
Kalangis & Jackly Obed Kalangis
First Applicant**

**AND: Chief Philemon Pakoalaelae
Second Applicant**

**AND: Farea ni Tagimalo
First Respondent**

**AND: Chief Taurasong Dick Takurua and Descendants
Second Respondent**

Before: Justice D. V. Fatiaki (Chairman)
Justice Eddie Karis
Justice Metoloa Silou Poilapa
Justice Kalserei Jonah
Justice Felix Thomas

Counsels: H. Vira for the First Applicant
G. Boar for the Second Applicant
S. Aron for the First Respondent
D. Yawha and A. Sarisets for the Second Respondent

DECISION

1. This is the first decision by a "nakamal" that this Court has had to manage and consider under the provisions of the new Custom Land Management Act ("CLMA"). The nakamal is called "Farea ni Tagimalo" and its decision concerning "Udaone customary land" situated in North West Efate, was orally delivered on 22 February 2017 and later confirmed in writing on 10 March 2017.
2. The relevant written declarations by the "nakamal" are:
 - "1) Custom owner blong Udone customary land hemi Chief Takurua (Marik Takou) Paramount Chief blong Udaone Customary Land mo ol Descendants blong hem.



- 2) *Taurasongi Dick Takurua hemi tru bloodline blong Chiefly Title ia Takurua (Marik Takou) wea hemi Paramount Chief blong Udaone customary land mo hemi tru custom owner blong Udaone Customary Land.*
- 3) *Esema land parcel istap insaed long Udaone Customary Land.*
- 4) *Taem Taurasongi Dick Takurua itet, right blong chiefly title ia "Takurua (Marik Takou)" bae ipass igo long pikinini blong hem we nem blong hem Api mo bae Api nao bae tek ova Land Ownership Rights long Udaone Customary Land.*

Pikinini blong Taurasongi Dick Takurua, we nem blong em, Api mo ol Descendants blong em nao bae oli tek ova ownership blong olketa chiefly custom properties mo graon blong Takurua long Udaone Customary Land, we custom nems blong olgeta hemi go olsem:

- a) *Custom Ceremonial Sites*
"Farea ni Tagimalo", "Malala ni Saumoria" mo "Nawora Selo"
- b) *Ol Tapu Stone Objects*
"Toko" mo "Wedde"
- c) *Custom Boundary Land Marks"*

(our highlighting)

3. Not satisfied with the decision, the first applicant which comprises three named individuals and Family Popovi filed an application on 27 April 2017 in this Court to review the decision of the respondent nakamal. A second review application was later filed by Chief Philemon Pakoalaelae pursuant to leave granted on 26 June 2017.

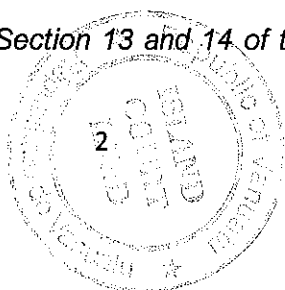
4. The first applicant's grounds of appeal are:

"1. That the nakamal was not properly constituted:

- (i) *Farea ni Tagimalo is not the proper customary institution within the meaning of the Custom Land Management Act No. 33 of 2013 to preside over, hear and determine the dispute over Undaone Custom Land;*
- (ii) ***Farea ni Tagimalo being situated on Nguna Island is not and has never been the seat of governance of Undaone Custom land;***
- (iii) *That Dick Takurua being the head of the nakamal Farea ni Tagimalo has no authority to convene and preside over the determination of custom ownership of Undaone Custom land other than land;*
- (iv) *At all material times, Dick Takurua was aware of and had agreed with other disputing parties including the Appellant that the dispute over Undaone custom land was to be referred to the North West Efate area land tribunal in accordance with the Court of Appeal decision in Civil Appeal Case No. 25 of 2014.*

2. That the nakamal had not proceeded in accordance with the provision(s) of the Custom Land Management Act No. 33 of 2013:

- (i) *No notice as required under Section 13 and 14 of the Custom Land Management Act was ever issued;*



- (ii) *Parties to the dispute were never notified or informed of the purported hearing of the dispute over Udaone Custom Land and therefore were denied an opportunity to be heard, such denial being a breach of their constitutional right;*
- (iii) *The Custom land officer was not present as an observer as required by Section 16 of the Custom Land Management Act;*
- (v) *The community land officer was not appointed by the National Coordinator".*
(our highlighting)

5. The second applicant's grounds are said to be based on the provisions of Section 58 of the CLMA. That Section according to its heading, refers to an existing decision of a customary land tribunal constituted under the now repealed Customary Land Tribunals Act ("CLTA") and is of doubtful relevance or application to the present decision which is that of a "nakamal" under the provisions of the CLMA.
6. Be that as it may, the second applicant's detailed grounds of appeal challenges the composition and qualifications of the members of the nakamal adjudicating panel as well as the process(es) undertaken by the panel in hearing and determining the dispute including the acceptance of "Kastom bribery" items by the adjudicating panel and the identity of the correct "nakamal" to hear the dispute.
7. Common to both applications is a ground of appeal that the earlier decision of the Siviri/Sunae Joint Village Land Tribunal had been quashed by the Supreme Court (**see: Saipir v Siviri-Sunae Joint Village Land Tribunal [2014] VUSC 82**). This was later overturned in [2014] VUCA26 but the Court of Appeal nevertheless said:

"13. We accept Mr Nakou's argument that although the primary judge was correct in holding that the unresolved dispute as to custom ownership of "Udaone" Land between the parties now falls to be determined under the Custom Land Management Act, there was a failure to accord procedural fairness. ...

14. We allow the appeal for those reasons and set aside the judgment of the Court below. As the appellants do not now wish to reopen the case and have acknowledged that their dispute is currently pending before the Land Tribunal and have indicated their willingness to have their dispute heard under the scheme established by the Custom Land Management Act, it is not necessary to remit the matter for a rehearing. Civil Case 66 of 2009 should now be at end. The disputing parties should adopt the common sense approach to make progress towards having their dispute heard under the Custom Land Management Act. This means that Section 5 (4) of the Custom Land Management Act becomes operational".

(our highlighting)



8. Section 5(4) of the CLMA provides:

"If proceedings relating to a dispute over a custom land are before a single or joint village Customary Land Tribunal, a single or joint sub-area Customary Land Tribunal, a single or joint area Customary Land Tribunal or an island Customary Land Tribunal when this Act comes into force, such proceedings will be suspended, and the dispute will be referred by the custom land officer to the appropriate nakamal or custom area land tribunal for decision under this Act".

(our highlighting)

9. In the present case it is common ground that the dispute over "Udaone" custom land was before the Siviri/Sunae Joint Village Land Tribunal when the CLMA came into force on 20 February 2014 and as a result of Court of Appeal's decision (*ibid*). It was therefore subject to being referred "... by the custom land officer to the appropriate nakamal or custom area land tribunal for decision ...". In this latter regard by letter dated 26 July 2016 after much urging by the appellants, **Alicta Vuti Kwinavanua** the "National Coordinator" appointed under the CLMA wrote to the West Efate Area Council of Chiefs referring the dispute concerning "Udaone custom land" to the "Area Land Tribunal".

10. In particular the letter makes reference to para. 14 of the judgment of the Court of Appeal (*op. cit*) and continues:

"Office hemi bin lukluk long matter ia mo skelem gud ol events we hemi tkeem place finis mo luk se case ia hemi bin pas tru long custom determination finis mo hemi bin pass tru long Village Land Tribunal. Case ia hemi no save stap lo Nakamal from case ia hemi wan pending case blong Eria level ino lower level. Lower level hemi bin lukluk long case ia finis tru long Land Tribunal Act finis be still hemi no solve yet. Ofis hemi luk se hemi mo proper blong harem case ia long Eria Lands Tribunal.

Folem ol thinktink ia, ofis hemi stap referem case blong Udaone ikam long Eria Council blong West Efate blong appointem wan panel blong Eria Lands Tribunal blong harem case ia. Mifala iadvaes se ol adjudicators we bai oli harem case ia bai oli mas be appointed long list blong adjudicators we oli pas long training. Case ia hemi mas stap wetem ol existing parties nomo blong case. Plis contactem ofis sapos yu gat any query long matter ia".

(our highlighting)

11. Clearly there was a referral of the "Udaone custom land" dispute to the "... appropriate ... custom area land tribunal" for determination in terms of Section 5(4) of the CLMA albeit that it is unclear whether or not the National Coordinator is himself appointed as a "custom land officer". However a later reminder letter dated 12 October 2016 referring to the Udaone land case pending before the West Efate Area Land Tribunal is signed by **Daniel Lukai** the "CLO – Shefa".

12. Subsequently on 23 February 2017 **Daniel Lukai** wrote to the National Coordinator confirming the referral of the Udaone custom land case to the Custom Area Land Tribunal and noting his attendance at the nakamal meeting on 22 February 2017 at Tanoliu village and his unsuccessful attempt to stop its proceedings.



13. From the foregoing it is clear that the subsisting dispute concerning "*Udaone custom land*" which had been commenced under the provisions of the now-repealed CLTA and which was before the Siviri/Sunae Joint Village Land Tribunal, had been referred under the provisions of the CLMA, to the appropriate "*custom area land tribunal*".
14. It must be remembered that this was not a new dispute that was begun after the commencement of the CLMA, on the contrary, this was a long-standing dispute that was commenced in 2008 under the CLTA and remained unresolved and extant at the time of its repeal. The dispute did not abate with the repeal but continued under the transitional provisions of the CLMA namely Section 5 and, as such, the dispute could not be dealt with under the provisions of PART 4 of the CLMA as if it was a completely new dispute being reported to the head of a nakamal for the first time.
15. It is equally clear that there has been no such referral by a "*custom land officer*" to the respondent nakamal to determine the dispute, indeed, the evidence is to the contrary, and therefore the respondent nakamal had neither the authority or power to proceed with and determine the dispute as it purported to do. Its decision is therefore a nullity and void and must be and is hereby set aside and the dispute is referred to the West Efate Area Council of Chiefs to establish a custom area land tribunal to determine the dispute. We make no order as to costs.

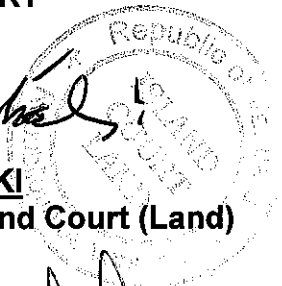
DATED at Port Vila, this 30th day of August, 2017.

BY THE COURT

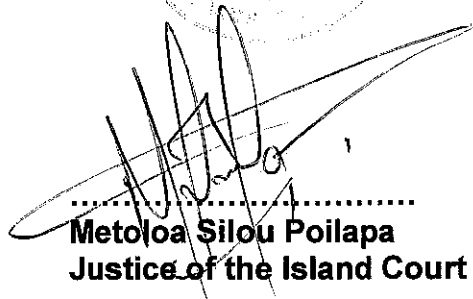


D. V. FATIAKI

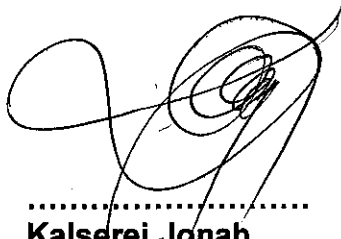
Judge/Chairperson of Island Court (Land)



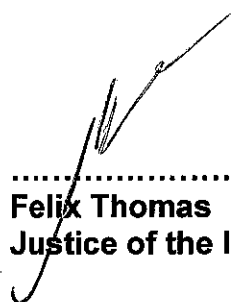

Eddie Karis
Justice of the Island Court



Metoloa Silou Poilapa
Justice of the Island Court



Kalserei Jonah
Justice of the Island Court



Felix Thomas
Justice of the Island Court