

**IN THE SUPREME COURT OF  
THE REPUBLIC OF VANUATU**  
(Civil Jurisdiction)

Civil Case No. 67 of 2009

**BETWEEN:** NATMANING NATUMAN, NAKOU  
NATUMAN, KODNY NATUMAN,  
NISIKAPIAL TUAKA, JOHN IARAMAPEN,  
JAMES YOKAOAI  
Claimants

**AND:** ATTORNEY GENERAL  
First Defendant

**AND:** WEST TANNA AREA COUNCIL LAND  
TRIBUNAL represented by CHIEF NAKAT  
KILAPLAPIN, JOHNNY NIMAU, NAKOU  
IAROU, IOTIL RAPRAPIE, BOB MARAI  
Second Defendants

**Coram:** Justice D. Fatiaki

**Counsel:** Mr. D. Yawha for the Claimants  
Ms. J. Harders and Ms. F. Williams for the Defendants

**Date of Decision:** 29 July 2010

**RULING**

1. On 7 July 2008 a rural residential lease title No. 14/2213/005 (the lease) was registered in favour of Jack Natmaning Natuman pursuant to an agreement made between him and Nakou lenatum and 5 other named lessors.
2. On 29 May 2009 the West Tanna Area Council Land Tribunal (the Tribunal) declared Nakou lawak custom owner of a piece of customary land entitled "*Taniwanu*" situated at West Tanna.
3. In the absence of survey plans it is unclear what (if any) is the relationship between the land comprised in the residential lease No. 14/2213/005 and the land comprised within the customary title "*Taniwanu*". The Claimants depose however that they are both lessors and lessees of the lease "*which comprises over 150 hectares situated on the part of the said land that is subject to the said decision (of the West Tanna Area Land Tribunal)*". What part of the land is not explained or clarified in the sworn statement however, and the matter remains in doubt.

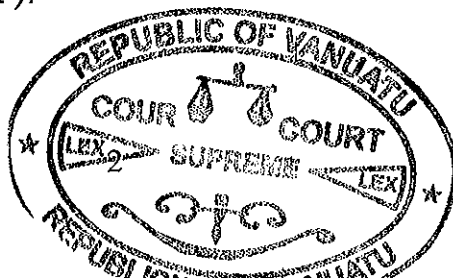


4. On 10 June 2009 the Claimants issued a proceeding in the Supreme Court seeking an order quashing the Tribunal's decision of 29 May 2009. The action is brought pursuant to sections 39 (1) (a) and 39 (2) (c) of the Customary Land Tribunal Act No. 7 of 2001.
5. The proceeding is entitled: Claim for Judicial Review and named, as defendant, the West Tanna Area Council Land Tribunal (the Tribunal) represented by Chief Nakat Kilap Lapin, Johnny Nimau, Nakou Iarou, Iotil Raprapir and Bob Marai. These named individuals were the Chairman, Vice Chairman and Members respectively of the Tribunal which determined the customary land dispute and against whose decision the present application has been brought.
6. On 12 June 2009 the Claim for Judicial Review and sworn statement in support were personally served on the Chairman of the Tribunal at Lenakel, Whitewood in Tanna.
7. On 17 September 2009 a Notice of Conference was issued by the Court fixing the matter for first conference on 23<sup>rd</sup> September 2009.
8. On 23 September 2009 counsel appeared for the Claimants but there was no appearance for the Tribunal. The matter was adjourned to 14 October 2009 and fresh notices were ordered to be served by the applicant on the defendants by 9 October 2009. The Court also ordered that the papers be served on the Attorney General and leave was granted to include the Attorney General as a party to the proceedings.
9. On 24 September 2009 the claim was amended to join the Attorney General as a defendant and the amended papers were served on the State Law Office on 29 September.
10. On 13 October 2009 the Solicitor General filed an application seeking the following orders:-

*"(1) The Judicial Review claim dated 24 September 2009 be struck out in relation to all but the first-named claimant;  
(2) The claim be struck out as against the first defendant;  
(3) The Claimants pay the Defendants' costs of the application."*

11. The application also listed 5 grounds in support as follows:-

*"1. That Claimant's "Judicial Review Claim" purports to be made under section 39 (1) (a) and 39 (2) (a) of the Customary Land Tribunal Act (the "Act")."*



2. *Section 39 of the Act provides for a limited supervisory jurisdiction in the Supreme Court. It does not provide a mechanism for judicial review otherwise.*
  3. *The jurisdiction given by section 39 is given only to "parties" to the land tribunal proceedings. Only the first-named claimant was a party. None of the other claimants have standing.*
  4. *The proper parties to an application under section 39 of the Act are the party invoking the jurisdiction and the relevant land tribunal.*  
*Jack Umou v. Erromango Island Land Tribunal [2008] VUSC 65; CC93 of 2007*  
*Family Rongo v. Lap [2005] VUSC 118; CC13 of 2005*
  5. *The Judicial Review Claim does not disclose a right of review as against the Attorney General. Members of land tribunals are chiefs or elders of a village and are appointed in accordance with the Act. Members are required to resolve disputes referred to them in accordance with custom. Members of land tribunals are not employees or agents of the Republic of Vanuatu. This process does not involve the Attorney General to any extent."*
12. On 14 October 2009 Mr. Kapalu appeared for the Claimants and Ms. Jennifer Harders and Ms. Florence Williams appeared for the Defendants. After much discussion between the Court and counsels it was agreed that submissions should be ordered on the following 3 preliminary issues:-
- (1) Who are the proper parties to an application invoking section 39 of the Customary Land Tribunal Act?
  - (2) What is the appropriate Court procedure or process for invoking section 39?
  - (3) Is the Attorney General an appropriate party to a section 39 proceeding? and what is the meaning and effect of Rule 17.4 of the Civil Procedure Rules read with section 5 of the Government Proceedings Act No. 9 of 2007.
13. On 3 November 2009 when the matter was next called in chambers written submissions had been filed by the parties as ordered. The Court also heard brief oral submissions from counsels.



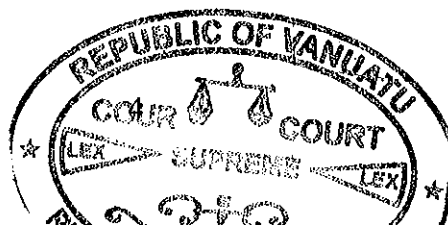
14. I turn now to consider the agreed questions and counsels interesting and helpful submissions and I set out in full the provision of section 39 which reads as follows:-

**“Supervision of land tribunals by Supreme Court**

- 39. (1).** *If a person who is not qualified to be a member or a secretary of a land tribunal participates in the proceedings of the tribunal, a party to the dispute may apply to the Supreme Court for an order:*
- (a) to discontinue the proceedings before the tribunal or to cancel its decision; and*
  - (b) to have the dispute determined or re-determined by a differently constituted land tribunal.*
- (2).** *If a land tribunal fails to follow any of the procedures under this Act, a party to the dispute may apply to the Supreme Court for an order:*
- (a) to discontinue the proceedings before the tribunal or to cancel its decision; and*
  - (b) to have the dispute determined or re-determined by a differently constituted land tribunal.*
- (3).** *The Supreme Court in determining an application may make such other orders as it considers necessary.*
- (4).** *Subject to the Constitution, the decision of the Supreme Court on any application:*
- (a) is final and conclusive; and*
  - (b) is not to be challenged, appealed against, reviewed, quashed, set aside or called in question in any court on any ground.”*

Issue (1): Who are the proper parties to an application under section 39 of the Customary Land Tribunal Act?

15. The States answer to the question is: *“The party invoking the jurisdiction, the relevant land tribunal, and all the parties in the land tribunal case”*. Furthermore the *“party invoking the jurisdiction must have been a party to the dispute before the tribunal.”* Accordingly in this latter regard, State counsel submits that, other than the first named claimant (Natmaning Natuman) all other named claimants should be struck out as not being proper parties to the application under the section.
16. Claimants' counsel however whilst accepting that the first named claimant is undoubtedly a proper party to the application, nevertheless submits in

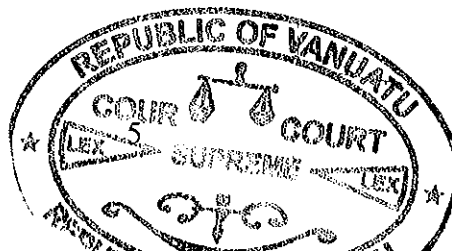


reliance on the provisions of Articles 73, 74 and 75 of the Constitution and the decision of *Kent J. in Noel v. Toto [1995] VUSC 3* that the other-named "co-claimants .....are entitled to make an application under section 39. Further some of the named claimants are lessors in (the lease) and are directly affected by the said decision (of the Tribunal). Therefore their inclusion as party in this proceeding is correct."

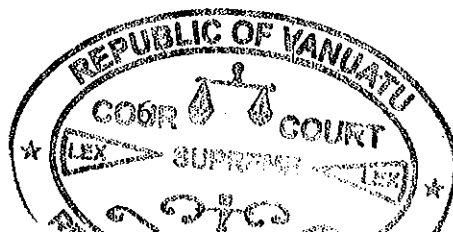
17. Sections 39 (1) and (2) clearly identifies "a party to the dispute" as the proper applicant to the Supreme Court for an order under the section. Although the Act does not define the expression, its object and overview makes it clear that the Act is concerned with ownership and boundary "disputes about customary land" which, in turn, means: "... land owned or occupied, or an interest in land held, by one or more persons in accordance with the rules of custom". Self-evidently a torrens lease is not customary land.
18. More particularly however, a notice of a dispute under the Act may be given by an individual or a group and must "contain the names of the parties to the dispute". Plainly the identity of the parties to a customary land dispute under the Act is best ascertained from an examination of the written "Notice of Dispute" if one was given for the particular dispute or as identified in the decision of the land tribunal concerned.
19. Counsel for the Attorney General while maintaining the position taken in her written submissions, nevertheless orally accepted, that non-parties to a customary land dispute could bring a separate judicial review proceeding to challenge the Tribunal's decision if they were adversely affected by the decision sought to be reviewed. This would be outside Section 39 however, and presumably would be brought in the Supreme Court and governed by Part 17 of the Civil Procedure Rules 49 of 2002.
20. Given the above I prefer the Claimant's submissions and hold that the named Claimants are proper parties to the application.

Issue (2): What is the appropriate Court process or procedure for invoking the provisions of Section 39 of the Customary Land Tribunal Act [Cap.271]?

21. In this regard Counsel for the applicant submits that in the absence of any express guidance in the Act or in the Supreme Court Rules, Section 39 could be invoked "by way of an application to the Supreme Court for orders pursuant to Section 39 of the Act." No statutory provision or court rule was referred to in counsels written submissions to support such an application and one is presumably driven to Rule 1.7 of the Civil Procedure Rules.



22. Claimant's counsel on the other hand places emphasis on the heading of Section 39 namely, "*Supervision of Land Tribunals by Supreme Court*" as indicating the nature of the power granted to the Supreme Court under Section 39 and, whilst counsel accepts that subsections (1) & (2) sets out specific orders that the Supreme Court may make in an application invoking section 39, such orders are not exhaustive of the orders the Supreme Court can make under the section as is clearly contemplated by subsection (3) which provides: "*The Supreme Court in determining an application may make such other orders as it considers necessary.*"(my underlining for emphasis).
23. It is plain that subsection (1) of section 39 deals with the situation where the Tribunal against which an order is sought, is improperly constituted; and, subsection (2) deals with the situation where the Tribunal, although properly constituted, has failed to follow the procedures laid down under the Act. In both instances a party to the dispute "may apply to the Supreme Court." (my underlining). If there is no application or appeal the Tribunal's decision is confirmed and registered with the Director of Lands (see: Sections 34 and 40).
24. It is equally plain that the supervisory power given to the Supreme Court under Section 39 is not an appeal power, which, in terms of Parts 3,4 & 5, of the Act is given to three different entities namely, the Custom Sub-Area Land Tribunal; the Custom Area Land Tribunal and the Island Land Tribunal.
25. The types of orders that the Supreme Court is expressly empowered to make under subsection (1) and (2) are two-fold namely:-
- (a) to discontinue the tribunal proceedings; or
  - (b) to cancel the tribunals decision ;and
  - (c) to have the dispute determined by a differently constituted tribunal; or;
  - (d) to have the dispute re-determined by a differently constituted tribunal.
26. In other words, every decision under Section 39 must have 2 limbs or aspects: viz a discontinuance and determination; or a cancelation and re-determination. Furthermore in neither of these decisions are the merits of the tribunal's substantive determination under scrutiny or consideration by the Supreme Court.
27. I have dealt in some depth with the nature and limits of the Supreme Court's power under Section 39; the nature of the orders that it can make



in the exercise of those power and the grounds upon which the orders can be made.

28. I am satisfied, that the supervisory power given to the Supreme Court under Section 39 so closely mirrors the Court's power in a Claim for Judicial Review, such that the most appropriate procedure or court process for invoking Section 39 is by way of a Claim for Judicial Review pursuant to Part 17 of the Civil Procedure Rules and I so rule.

Issue (3) Is the Attorney General a proper party to an application under Section 39? and, by way of a supplementary issue, what is the true meaning and effect of Rule17.4 read with section 5 of the Government Proceedings Act No. 9 of 2007

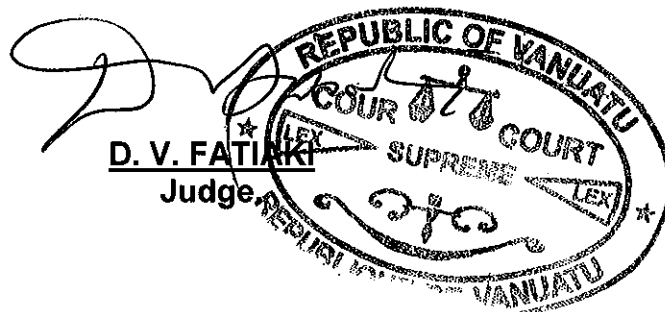
29. Counsel for the Attorney General forcefully submits that the Attorney General should not be named as a party in these proceedings invoking Section 39 nor in a Claim for Judicial Review in the absence of an application for a declaration about an enactment. This counsel submits, is the clear effect of Rules 17.4(1)(a) and 17.4 (2)(a) of the Civil Procedure Rules read with section 5(2) of the Government Proceedings Act as interpreted by the Supreme Court in *Vanuatu Maritime Authority v. Athy* [2006] VUSC 110. I cannot agree.
30. Whilst Rule17.4 (2) and Section 5 of the Government Proceedings Act No. 9 of 2007 are undoubtedly complementary and mandatory, neither is, in its terms, exhaustive or exclusive. In other words both provisions identifies who "must" be named as a defendant in a claim for judicial review but neither identifies who cannot be named. In this regard Rule17.6 which deals with service of a claim for judicial review identifies two further parties who "must also be served" with the papers, namely, "any other person who is directly affected by the claim" and "any other person the Court orders to be included as a party". In this case the Attorney General was joined and served as a party to the claim for judicial review pursuant to Rule17.6 (2) (b) at the Court's direction.
31. I note that a similar service order was made by *Tuohy J.* in *Port Vila Town Island Council of Chiefs v. Chief Paul Tahi* [2008] VUSC 21 where, in a claim for judicial review which did not name the Attorney-General as a party, a declaration was nevertheless granted.
32. Even if it were arguable that Section 5 (2) is exclusive by virtue of the use of the word "only", it would still have no application to this case because this particular claim for judicial review is not "a proceeding instituted by or against the Government of the Republic of Vanuatu" which is the condition precedent for the application of the section.



33. In light of the above, whilst I do not agree with the narrow interpretation advanced by counsel for the Attorney General I am content to dispose of this issue on the basis of counsel's concession that the Attorney General is content to continue to represent the defendant tribunal "*as a matter of administrative policy*". The Attorney General need no longer be joined as a party to the proceeding but will continue instead as counsel for the defendant Tribunal. Accordingly the Attorney General is struck off as a party to the proceedings. I make no order as to costs.
34. I shall now hear counsels on how best to advance this claim for judicial review which raises fundamental issues about the status and jurisdiction of the defendant Tribunal as well as breaches of the provisions of the Customary Land Tribunal Act. [CAP. 271].

DATED at Port Vila, this 29<sup>th</sup> day of July, 2010.

BY THE COURT



D. V. FATIAKI  
Judge.