

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

Civil Case No. 184 of 2009

BETWEEN: CHARLIE KAUN
Claimant

AND: LINGARAK & LIMAP VILLAGE JOINT
LAND TRIBUNAL
First Defendant

AND: LOUNI, URIPIV, VINAMAVIS, POTINDIR,
AND LITZLITZ VILLAGE JOINT LAND
TRIBUNAL
Second Defendant

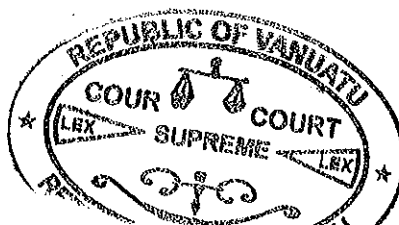
Coram: Justice D. V. Fatlaki

Counsel: Mr. S. Joel for the Claimant
Mr. C. Leo for the Defendants

Date of Ruling: 24 February 2012

RULING

1. **Background:** adapted from a chronology prepared by defence counsel as follows:
 - **26th & 27th April 1985** – The Council of Chiefs of Lingarak Village (Village Court) sat and determined the customary ownership of customary land known as “*Lannunu*” in favour of **Chief Daniel Leonard** and **Chief Jonnie Fatuga**;
 - **2 August 1985** – The claimant lodged in the **Malekula Island Court**, a claim of customary ownership over Bushman’s Bay Plantation also known as in custom as “*Arbotan*” custom land. The claim was registered as **Land Case No. 2 of 1992**;
 - **3 February 2003** – The above claim was directed by the **Malekula Island Court** to be pursued before the relevant land tribunal pursuant to the provisions of the Customary Land Tribunals Act;



2. Unfortunately, at that time no tribunal under the **Customary Land Tribunal Act** had been set up for **Malekula** and this marked the beginning of a great deal of the confusion which plagued the case from then on. Suffice to say that two (2) competing joint land tribunals were set up to hear the dispute involving part or the whole of the claimed custom land which included **Bushman Bay Plantation**.
3. I say "*part or the whole of the disputed land which included Bushman Bay Plantation*" advisedly, because there is no certainty or agreement as to the name of the customary land or its customary boundaries and whether or not Bushman Bay Plantation is completely or partly located within the boundary of the customary land being claimed. For example, the various claims evidenced by several dispute notices and correspondence produced by the parties mentions: "**Lannunu**" and "**Arbotan**" with different customary boundaries that includes reference to "*Bushman Bay River*" and Bushman's Bay Plantation.
4. In the absence of proper survey plans or a map of the area being claimed it is difficult, if not impossible, to verify the precise boundaries of the land being claimed or whether or not **Bushmans Bay Plantation** is included within the particular determination relied upon or being challenged.
5. Be that as it may the first tribunal to be set up was the second defendant tribunal under the chairmanship of **Chief Temo Saity** which issued a dispute notice dated 16 August 2005. Because of numerous unsuccessful attempts to convene a sitting of the tribunal the entire membership of the tribunal resigned on 14 June 2006 and the land dispute over **Bushmans Bay Plantation** was left unresolved.
6. The second tribunal to be set up to deal with the **Bushmans Bay Plantation** dispute was the first defendant tribunal under the chairmanship of **Chief Allan Nevanu** which issued a dispute notice dated 18 August 2006. A second and third dispute notice dated 30 April 2007 and 4 June 2007 respectively, were also issued but these notices inexplicably, went out under the chairmanship of **Chief Graham James Bansuk**.
- 26 October 2007 – the first defendant tribunal declared **Chief Lesly Malsungul** and **Chief Daniel Leonard** as the true custom owners of **Bushmans Bay Plantation**;
7. Two (2) years later on **9 December 2009** the claimant issued an application for a judicial review of the first defendant tribunal's decision. The principal ground urged in support was the apparent "*bias*" and "*abuse of process*" by **Chief Graham James Bansuk** who was a competing claimant for the disputed land albeit before the second defendant tribunal and who was also chairman of the first defendant tribunal that determined the customary ownership of the disputed land. In this latter regard it may be noted that the decision did not go in favour of **Chief Graham James Bansuk**. Significantly, neither successful claimant before the first



defendant tribunal was named as a party in the claim for judicial review which seeks to overturn the decision in their favour.

8. In opposing the judicial review application the first defendant tribunal deposes that the second defendant tribunal had **no** jurisdiction to hear the dispute under the **Customary Land Tribunals Act** as the disputed land was located outside its jurisdictional boundary which is confined to the **Litzlitz village** area, and, **secondly**, the chairman of the first defendant tribunal namely **Chief Graham James Bansuk** was **not** a claimant to the customary land which was dealt with by the first defendant tribunal.
9. This is an interlocutory application dated 20 June 2010 by **Chief Daniel Leonard** of **Lingarak Village** a successful claimant before the first defendant tribunal, asking for the claim for judicial review to "*be struck out in tota*" on two basies:
 - (a) The claim is statute-barred in having been issued well outside the 6 month time limit; **and**
 - (b) The claimant failed to file and serve a sworn statement within the 28 days period required by **Rule 17.6** of the Civil Procedure Rules;
10. Counsel for the first defendant tribunal also disputed the claimant's right to seek judicial review as he was **not** a party before the first defendant tribunal whose decision had, in any event, become final in accordance with **Section 34** of the **Customary Land Tribunal Act** and pursuant to the notice issued on **27 October 2008**.
11. Before dealing with the above grounds I set out the relevant provisions of **Rule 17.4 (3)**, **Rule 17.5** and **17.6** of the **Civil Procedure Rules** which deals with claims for judicial review as follows:

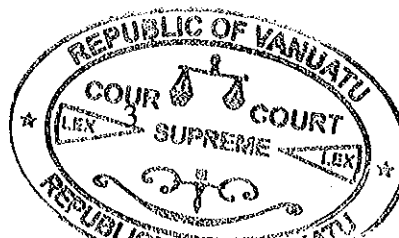
"Claim for judicial review

17.4 (3) The claim must:

- (a) set out the grounds for making the claim; and
- (b) have with it a sworn statement in support of the claim;
- and
- (c) be in Form 34.

Time for filing claim

17.5 (1) The claim must be made within 6 months of the enactment or the decision.



- (2) However, the court may extend the time for making a claim if it is satisfied that substantial justice requires it.

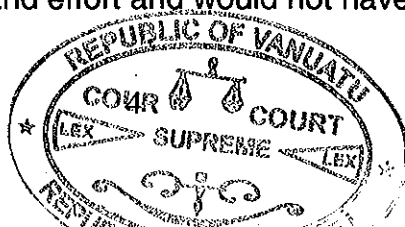
Serving claim

17.6 (1) The claim and sworn statement must be served on the defendant within 28 days of filing."

12. As to **ground (b)** above, claimant's counsel submits that a sworn statement by the claimant in support of the substantive application for judicial review was filed on **16 July 2010**, and, although acknowledging that there had not been strict compliance with the 28 day time frame provided in the **Civil Procedure Rules** for filing the sworn statement, counsel nevertheless submits that:

"... the claim ... involved serious issues against the (first defendant tribunal) and James Bangsul ... (the chairman of the first defendant tribunal) who by their action and conduct demonstrated blantant (sic) disrespect towards the law, knowing and taking part in the second defendant (tribunal) proceedings which is still pending and then forming the first defendant tribunal to issue the orders dated 26 October 2007 in a corrupt manner to attempt to defeat the purposes of the calling of the ... second defendant tribunal. That is by quickly declaring persons to be (customary) owners of the said land knowing a lot more claimants claims in the second defendant tribunal have yet to be determined and knowing their decision is not capable of bringing the dispute to a finality with the confidence it deserves in law. Accordingly there are very serious issues of law this Court must deal with its not proper at this stage to strike out the claim".

13. After careful consideration I am satisfied that there is no merit in **ground (b)**. Accepting that there has been a failure to strictly comply with the requirements of **Rule 17.6**, nevertheless, **Rule 18.10** renders such non-compliance "an irregularity" which may be ameliorated by the court declaring a document or step taken "to be effectual". In this regard too, the applicant has himself delayed in making the application nor has he deposed to any prejudice that has been or would be occasioned by accepting the claimant's sworn statement.
14. I am not unmindful that there have been several determinations of the customary ownership of Bushman's Bay dating back to 1985 and that the collating and compiling of much of the needed information would take some considerable time and effort and would not have been assisted by the



logistical and communication difficulties experienced by Port Vila counsel with remote outer island clients.

15. As to **ground (a)** above counsel's simple submission is that:

"... section 39 of the Land Tribunal Act does not set a deadline for bringing this type of claim. Use of the claim judicial review formate (sic) is just a means to effectively and clearly set out the issues the Court is required to resolve."

Furthermore:

"A failure to comply with the (Civil Procedure) Rules is an irregularity and does not make a proceeding, or a document, step taken or order made in the proceeding, a nullity".

and, although there is power to set aside a proceeding *"... it is a jurisdiction to be exercised sparingly and only in a clear case ..."*

16. In this regard defence counsel submits that the claim for judicial review is lodged well outside the 6 month time frame provided in **Rule 17.5** and, although the Court has a discretion to extend the time on the basis of *"substantial justice"*, the late filing of the claim is prejudicial to the overriding objectives of the Rules which the Court is required to consider in the exercise of its discretion. Nothing is said however, about what prejudice the applicant would suffer personally if the claim for judicial review was allowed to proceed.
17. Furthermore **no** useful purpose would be achieved as the second defendant tribunal is **not** a proper tribunal to entertain the hearing of the claimant's customary land claim as Bushman's Bay is **not** located within the jurisdiction of the second defendant tribunal.
18. I do not consider on the evidence presently adduced that it is either appropriate or desirable to determine this latter issue on the present application, given the uncertainties surrounding the location of Bushman's Bay Plantation customary land and its boundaries earlier referred to in this ruling.
19. Having said that, **Section 39** of the **Customary Land Tribunal Act** does **not** prescribe a time limit within which the section can be invoked after a land tribunal has delivered its decision. This omission contrasts significantly with the various other provisions in the Act which provides a dissatisfied party with a right of appeal *"... within 21 days after the announcement of that decision"* to a higher tribunal [**see**: Sections 12 (1); 17 (1) and 22 (1)].



20. Viewed in that statutory context and given the fairly limited nature of the Supreme Court's supervisory role under Section 39 of the Act, I am **not** persuaded that the "*omission*" of a time limit was unintended or that the 6 month time limit in **Rule 17.5** should be adopted unequivocally as to introduce a time limit for invoking section 39 where the Act itself has provided none.
21. Defence counsel's final submission questions the "*locus standi*" of the claimant to invoke Section 39 of the Customary Lands Tribunal Act. In particular, counsel submits that "... *section 39 can only be invoked by a 'party' to the dispute. The proper parties to an application under section 39 of the Act are the party invoking the jurisdiction of the relevant land tribunal, and all the parties in the land tribunal*". If what is meant by this latter expression are the members of the challenged tribunal then I cannot agree.
22. The Court of Appeal in **West Tanna Area Council Land Tribunal v. Natuman** [2010] VUCA 35 expressed the view that the term "... *the parties to the dispute*" under the Customary Land Tribunal Act [CAP. 271] was "... *not intended to be a restrictive one*" **and** "*may include any party whose proper interest may be affected by the resolution of the dispute*". Furthermore in discussing the role of the Land Tribunal in a claim under section 39 of the Act the Court of Appeal said: "*The Land Tribunal is necessarily a party to such an appeal because it is the order of the Land Tribunal which is sought to be set aside. However, as the primary decision maker, the Land Tribunal most commonly will indicate that it will simply accept the Supreme Court decision and will not take an active part in the proceeding*".
23. In my view the individual members of a Land Tribunal are indistinguishable from the Land Tribunal that they comprise and need not be named in the papers. Whatsmore given its limited role in a "*section 39 application*" to the Supreme Court, a Land Tribunal **cannot** be considered "*a party*" to the underlying customary land dispute nor, in my view, should it adopt an adversarial position of seeking to defend or sustain its decision before the Supreme Court.
24. In this latter regard it is quite unusual and unexpected that the applicant in this interlocutory matter should feel the need to obtain a written "*power of attorney*" from the chairman of the first defendant tribunal **and** for the power to be actually granted when the Land Tribunal was "*functus officio*". In any event as the co-beneficiary of the first defendant tribunal's decisions, **Chief Daniel Leonard** should have been named and served as "... *a person who is directly affected by the claim*" [**see**: Rule 17.6(2)].
25. Accordingly although the claimant was not a "*party*" before the first defendant tribunal, there can be no denying that it was very much interested in Bushman's Bay Plantation and the ownership of the customary land on which it sits. Furthermore the claimant was directly and adversely "*affected*" by the first defendant tribunal's determination in so far

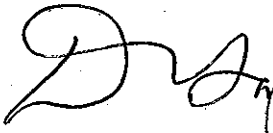


as it decided the custom owners of the land on which Bushman's Bay Plantation was situated without consideration of the claimant's outstanding claim to the same land.

26. The fact that the claimant's claim was already lodged and pending determination by an earlier constituted tribunal which has not been challenged or restrained or had its proceedings stayed, adds a further dimension to the claimant's interest in the first defendant tribunal's decision and mitigates against the summary striking out of the claim for judicial review.
27. For the foregoing reasons the application is dismissed and any order for costs is reserved until the final determination of the claim for judicial review.

DATED at Port Vila, this 24th day of February, 2012.

BY THE COURT


D. V. FATIAKI
Judge.

