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 YOKAOAIU**
Claimants

AND: **NAKOU IAWHA**
First Defendant

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

Coram: ***Justice D. V. Fatiaki***

Counsel: *Mr. W. Kapalu for the Claimants*
Mr. J. I. Kilu for the First Defendant
Ms. F. Williams for the Second Defendant

Date of Decision: *11 October 2013*

RULING

1. On 3 October 2013 the Court granted the first defendant an interim injunction directed at the claimants and effectively halting any further development works on part of "*Taniwenu*" customary land in West Tanna that was being undertaken by the claimants. The papers had been served on the claimants' counsel.

2. The basis on which the "*exparte*" injunction was granted was that the Court was satisfied from the materials presented in the application that there was a serious question to be tried between the parties as to the true custom owners of "*Taniwenu*" land and that damages was an inadequate remedy in the circumstances.

3. In particular, the court was concerned that the first defendant had a subsisting declaration of customary ownership in his favour over the said land, and, despite the claimants having filed an application to set aside the said decision and despite no decision having been given in the claimant's appeal, nevertheless, the claimants commenced clearing and subdivision works on part of the disputed land.

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4. The clear intention and purpose of the interim injunction was to maintain the "*status quo*" until the matter could be fully considered at an *inter parties* hearing which was immediately sought by the claimants by an application dated 4 October 2013 in which, the claimants seek the setting aside of the injunction in its entirety or alternatively, the variation of the injunction "*to allow for all* (unspecified) *monies due to custom owners (to) be paid* (into) *the trust account* (to) *be kept in the court*".

5. The claimant was ordered to serve its application which was fixed for oral argument on 7 October 2013 at 8.30 a.m. I am grateful to counsels for the assistance provided to the Court.

6. The grounds advanced in the claimants' application to discharge the injunction are:

> "2. *The claimants have a registered lease; lease title No. 14/2213/005 on the said land. The orders have directly affected the interest of the claimants in respect to the said lease. This interest is protected by the Land Leases Act [CAP. 163].*
>
> *3. The claimants especially Jack Natmaning Natuman as a lessee has an interest on the said lease and his interest is protected by sections 13 and 14 of the Land Leases Act.*
>
> *4. The claim for Judicial Review is to review the decision of a decision maker and such proceeding cannot form the basis upon which can be relied upon to restrain dealings in respect to a lease.*
>
> *5. The determination of custom ownership is done by the process of a Customary Land Tribunal Act. The said Act also provides avenue for challenging tribunal decisions, which is exactly what the claimants have done in the instant case. The hearing has taken place and the decision is pending. The interlocutory orders has cause prejudice to the claimants.*
>
> *6. The prejudices include a loan at the Vanuatu National Bank, the customers who have already paid deposits for each plot of land, the development that has already take place in the said lease, the leasehold interest that is conferred by registration.*
>
> *7. There was no undertaking as to damages filed by the first defendant for the court to grant the orders which is currently putting the claimants in an awkward situation. They are suffering as a result of the orders.*"

7. As for the claimants having a registered lease over part of "*Taniwenu*" land, this is not disputed and it is common ground that most of the claimants are the lessors of a rural residential Lease Title **No. 14/2213/005** registered on 7 July 2008 with an area of approximately 158 hectares and, of which, **Jack Natmaning Natuman** is the sole named lessee.

8. Likewise, it is common ground that the lessee has finalized a survey plan of the leased land subdividing it into approximately 184 lots of different sizes between 1,300 square meters and 50,000 square meters with different sale prices for the lots ranging from VT1,3 million to VT46 million.

9. By any standards the proposed subdivision is ambitious and extensive and is likely to generate and contribute very large sums of money for Government revenues, the developer, and the custom owners of the land.

10. Finally, it is common ground that the custom owner(s) of *'Taniwenu'* has **not** been finally and conclusively determined because of an appeal instituted by the claimants under the provisions of the **Customary Land Tribunal Act** [CAP. 271] challenging a declaration of custom ownership by the defendant tribunal in the first defendant's favour.

11. In this regard **Section 39** of the **Customary Land Tribunal Act** [CAP. 271] provides:

> ***"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."*

12. It is clear from **paragraphs (a)** and **(b)** above, that the Supreme Court hearing an application under the Act can make only two kinds of orders, namely, (1) to discontinue a proceeding or cancel a decision and (2) have the dispute determined or re-determined by a differently constituted land tribunal. Neither order addresses the substantive merits of the competing claims to customary ownership of *'Taniwenu'* which is exclusively vested in a land tribunal under the Act [*see also:* **Saripan v. Worworbu** (2010) VUSC 128].

13. Indeed if the Supreme Court dismisses an application under **section 39** that does not mean that it is deciding who is the true custom owner of the disputed land, no, all that the Supreme Court is deciding in such a dismissal is that the application challenge to the process adopted by the relevant land tribunal or its composition fails or is unsuccessful, and nothing more.

14. In other words, depending on what decision this Court makes in regard to the claimants challenge of the defendant Tribunal, the existing determination in the first defendant's favour by the defendant Tribunal will either remain as it is or be cancelled and the dispute returned for re-determination of the custom ownership of "*Taniwenu*" land by another tribunal in accordance with the provisions of the **Customary Land Tribunal Act**. In neither event, is the Supreme Court deciding the custom ownership of "*Taniwenu*" land. This clarification needs to be clearly understood by the parties.

15. In the above circumstances, I cannot accept claimants' counsel's submission that a mere application under **section 39** of the **Customary Land Tribunal Act** either extinguishes the defendant tribunal's decision in the first defendant's favour or supersedes the decision which can then be ignored. Nor is the application one such that the claimants' actions on its registered lease must be given precedence over the claimants' (NOT the 1st defendant) challenge to the defendant tribunal's decision in the first defendant's favour which occurred first in time.

16. Although claimant's counsel was unable to refer to any authority to support his submission, I accept that **section 112** of the **Land Leases Act** [CAP. 163] expressly provides:

> *"Where a provision of this Act conflicts with a provision of any other written law except the Constitution, the provisions of this Act shall prevail."*

which suggests that the **Land Leases Act** prevails over other Acts of Parliament but that is confined to a direct "*conflict*" between "*the provisions*" of the conflicting Acts and not where the conflict arises indirectly from the implementation of the provisions or as a result of the exercise of rights granted under the provisions of an Act.

17. In this case claimants' counsel forcefully argues that there is a "*conflict*" between the **Customary Land Tribunal Act** and the **Land Leases Act** and therefore a proceeding under the **Customary Land Tribunal Act** (***viz:*** the claimants' application under section 39) cannot be relied upon to restrain dealings in respect of the claimants' lease issued under the **Land Leases Act**. I cannot agree. No conflicting "*provisions*" in the two Acts were specifically identified in counsel's submissions as they should have been.

18. What's more the so-called "*conflict*" in this case between the claimants' challenge to the declaration of custom ownership in favour of the first defendant and the claimants' exercise of its rights under the lease to subdivide, surrender and sell the subdivided land is entirely the making of the claimants who should not be allowed now to cry "*conflict*" in order to prefer their rights under the **Land Leases Act** over their appeal under the **Customary Land Tribunal Act**. If I may say so there is merit in defence counsel's submission that such behaviour constitutes "*unclean hands*" in so far as the claimants are seeking to benefit from the so-called "*conflict*" they themselves created. But, in any event I do not agree that there is a "*conflict*" between the "*provisions*" of the two Acts. Accordingly this submission is rejected.

19. I do not doubt that the injunction has had a chilling effect on the claimants proposed subdivision plans for his lease title. In the claimants' words:

> "... (it) *has cause prejudice to me*" including "... (to) *my loan at the Vanuatu National Bank, the* (unidentified) *customers who have already paid* (unquantified) *deposit for each plot of land, the* (undefined) *development that has already taken place in the said lease and the leasehold interest that is conferred by registration*" (whatever that may mean).

20. Undoubtedly, a purpose of a prohibitory injunction is to restrain action(s) that seeks to alter the "*status quo*" that exists between disputing parties before the determination of the dispute.

21. In this case, the actions of the claimants on the land comprised within the lease would irreparably and irreversibly alter the original character and natural topography of the land as well as its existing usage which includes cattle grazing and subsistence gardens. In addition, subdividing the land and leasing the subdivided plots would effectively divest the land from its eventual custom owners for a period of 75 years (***i.e.*** the duration of the leases) and finally, the claimants' current unilateral actions denies the eventual custom owners of "*Taniwenu*" land, any say as to *how?* and *what?* developments (if any) should take place on their customary land.

22. In my view the "*balance of justice*" in this case strongly favours the first defendant and the maintenance of the "*status quo*" pending the final determination of the true custom owners of *'Taniwenu'* land by a land tribunal and which is presently held in abeyance because of the claimants'

own challenge to the defendant tribunal's determination in favour of the first defendant.

23. Counsel for the claimants submits nevertheless that the development of the claimants' leasehold title should be allowed to continue because in the event that the first defendant succeeds in finally and conclusively establishing his custom ownership of "*Taniwenu*" land, then, the first defendant can always obtain a rectification of all the leases granted under the claimants' subdivision by substituting his name as the "*lessor*" of all the leases. Acceding to this submission presents the first defendant with a 'fait accompli' as far as the subdivision of the land is concerned.

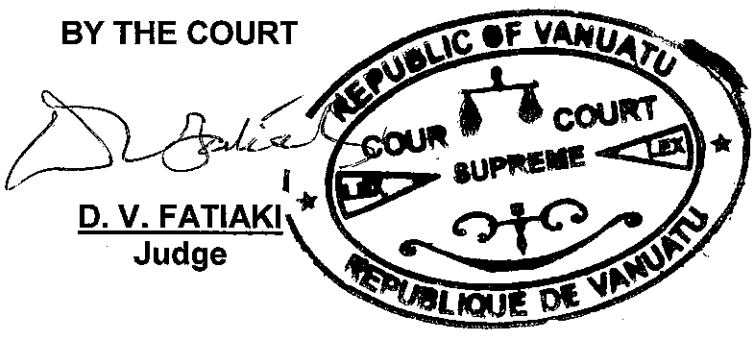
24. Defence counsel, not surprisingly, opposes such an uncertain futuristic "*resolution*" of his client's present complaint as being expensive, unrealistic and incomplete is so far as the so-called rectification would only occur many years after the land has been subdivided and after the subdivided plots with individual leases would have been sold-off for an undisclosed valuable land premium.

25. If I may say so the claimants are the authors of their own misfortune and prejudice in knowingly registering a lease over part of a disputed customary land and in attempting to steal an advantage over the 1st defendant by developing part of the disputed land without his prior knowledge or consent after challenging a custom ownership declaration in the 1st defendant's favour.

26. In light of the foregoing the claimants' application must be and is hereby dismissed with costs of VT30,000 summarily assessed in favour of the first defendant.

DATED at Port Vila, this 11th day of October, 2013

BY THE COURT



D. V. FATIAKI
Judge