

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

Judicial Review Case No.13 of 2014

BETWEEN: IATA REVA IARITAN & FAMILY
Claimant

AND: NIPRAINTATA COUNCIL (LAND TRIBUNAL
COURT) REPRESENTED BY CHIEF TOPY AS
CHAIRMAN, & OTHERS
First Defendants

AND: IATIKA NAWAR & FAMILY NAWAR
Second Defendant

AND: CHIEF MOSES KAHU
Third Defendant

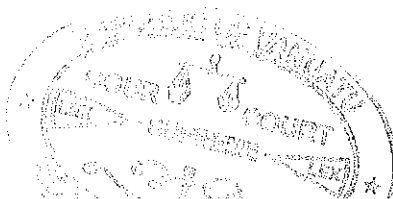
Coram: Justice D. V. Fatiaki

Counsel: Willie Kapalu for the Claimants
Lenon Huri for the First Defendant
Robin T. Kapapa for the Second and Third Defendants

Date of Decision: 30 September 2016

JUDGMENT

1. In this application for judicial review the claimant invokes the provisions of Section 39 of the Customary Land Tribunal Act (*"the CLT Act"*) and seeks an order quashing the decision of the Nipraintata Area Council of Chiefs of South East Tanna (*"The defendant Tribunal"*) delivered on 10 April 2014 in favour of the Second Defendants in respect of custom land known as *"laknapkapki land"* situated at Port Resolution area on Tanna.
2. The relevant type-written decision indicates that the hearing of the dispute occurred on 3 April 2014 at lakupen Nakamal under the chairmanship of *"Topy N"* and 4 other named chiefs with *"Chief Kahu M"* as the secretary who has been wrongly sued as Third Defendant. The composition of the defendant tribunal *viz* a chairman and 4 other chiefs and a secretary suggests that the defendant Tribunal was an Island Land Tribunal under Part 5 of the CLT Act from which there is no right of appeal only a right of *"re-hearing"* see Section 24.
3. The decision also informed the parties of their *"right to appeal"* against the decision within 21 days to the *"Island Council of Chiefs (Nikoletan)"*. This



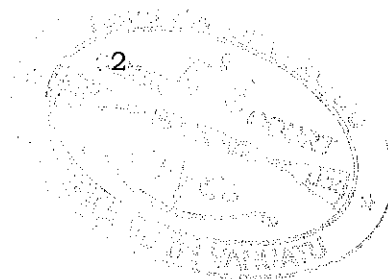
information suggests that the defendant Tribunal was a "customary area land tribunal" under Part 4 of the CLT Act and from which tribunal an appeal lies to an Island Land Tribunal under Part 5 of the CLT Act.

4. The relevant Notice of the dispute issued on 7 March 2014 by the Secretary under Section 25(1) of the CLT Act identifies the disputed land ("Ikunapkapki") and the original claimant (not appellant) as: "IATIKA RICHARD mo family Nawar" and any other interested party. The Notice also fixes the hearing of the dispute "... long namba 3rd of April 2014 long nakamal lakupen long 9.30 a.m."
5. In both above instances however, the defendant Tribunal would be an appellate tribunal and the relevant initiating document would be an Appeal Notice issued under Section 22(2) of the CLT Act and the Hearing Notice under Section 25(1) would specify the grounds of appeal. No such grounds are specified in the relevant notice in this case and prompted the complaint that the defendant tribunal was wrongly acting as a "court of first instance".
6. Notwithstanding the confusion on 30 June 2014 the present judicial review application was filed. Although outside the 21 days appeal period given it was within the 6 month period allowed under Rule 17.5 of the Civil Procedure Rules which governs applications for judicial review. There is also no suggestion that the successful defendant was prejudiced in any way by the delay which was not inordinate.
7. The sole ground advanced in the application challenging the determination of the defendant Tribunal is as follows:

"... the purported first defendant land tribunal did not confirm (sic) to the Customary Land Tribunal Act [CAP. 271] and (the claimants) say there are irregularities in the procedure and composition (of the Tribunal)".

There then follows 12 particulars of irregularities.

8. The application is also supported by a sworn statement deposed by Nesam (Bruno) lata as representative of the claimant family who deposes inter alia:
 5. ***The members and secretary are from different areas other than Port Resolution area. That is, the chairman Chief Topy is from Ikurip area, Chief Nakuerin N is from Ikuanemi area, Chief Nakou F from Irmanga area, Chief Ruben I from Enmirin area and Chief Sita from Ianasune area. These areas are far away from Port Resolution where the dispute land is located.***
 8. *I verily belief that the tribunal was not set up according to law on the following grounds:*



- (a) **The first defendant purported tribunal adjudicated the said land when the Customary Land Tribunal Act has already been repealed by the Parliament of the Republic of Vanuatu and that the Customary Land Tribunal office in Port Vila has publicly announced in radio, newspapers and television that all tribunal ceased to operate.**
- (b) The name of the purported first defendant Land Tribunal as recorded as "Niprintata Area Council (Land Tribunal Court)" is only an area council that has no standing to act as a land tribunal; however, they refer to relevant sections of the Customary Land Tribunal Act in their undated notice.
- ...
- (d) The members of the first defendant tribunal did not come from the area where the land is located.
- (e) **The first defendant tribunal if a proper tribunal has appellate jurisdiction only as the name indicates as an area tribunal. As such it cannot hear fresh case as in the instant case. In other words, it cannot act as the court of first instance.**
- (f) The members of the purported first defendant tribunal are not qualified because:
- (ii) **the members' names were not approved by the Port Resolution area Council of Chiefs which is made up of the principal chiefs of all the nakamals of Port Resolution area. The disputed land is located at Port Resolution and not from the area that the judges come from.**
- (iii) they are not the registered judges of the tribunal.

9. **The secretary is not qualified as he is not appointed by the Chiefs of Port Resolution area to be a secretary'.**

(my highlighting)

9. On 13 August 2014 in view of the various irregularities raised in the application and sworn statement in support, the Court ordered in the presence of defence counsels:

- "1. Tribunal to file and serve a response and sworn statement verifying (if possible) the validity of the name and composition of the defendant tribunal under the Customary Land Tribunal Act by 27 August 2014;
2. Second and Third Defendants to file a Memo dealing with the relevance of the Customary Land Management Act No. 33 of 2013 by 27 August 2014."



10. On 19 August 2014 counsel for the Second and Third Defendants filed a Memorandum to the effect that the Custom Land Management Act 33 of 2013 ("CLM Act") "... provides no room for this Honourable Court to determine and/or entertain land ownership or land dispute except by way of appeal from the Island Court" and further: "... the Supreme Court has no power to hear the matter and the claimant's claim in (the present case) is misconceived that ought to be struck out ...".
11. Although counsel refers to several sections of the CLM Act including Sections 20, 45, 47 and 58, the Court was not assisted by the Memorandum.
12. It may be judicially noticed that although the CLM Act commenced on 20 February 2014 it does not in terms repeal the CLT Act. Indeed Section 5 of the CLM Act assumes the existence of pending court and tribunal proceedings under the CLT Act and, in the case of the latter, subsection (4) relevantly provides:

"If proceedings relating to a dispute over a custom land are before a ... 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".
13. Needless to say the above provision can only apply to a valid dispute before a properly constituted Tribunal that complies with the provisions of the CLT Act and which is pending determination on 20 February 2014.
14. On 11 September 2014 Gordon Arnhambath the Senior Customary Land Tribunal officer filed a sworn statement deposing inter alia:

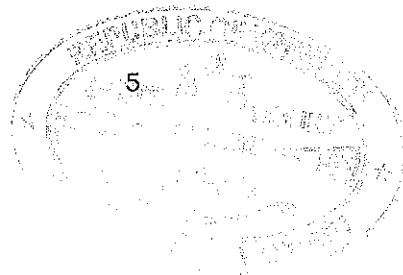
"1. I am the Senior Customary Land Officer in the CLMO which is the office of the National Coordinator of the Land Dispute Management, a position appointed pursuant to the Custom Land Management Act NO. 33 of 2013 (the new 'Act'). The new Act commenced on 20 February 2014. The predecessor to the CLMO was the Customary Lands Tribunal Office in which I held the position of Senior Customary Lands Tribunal Officer since 2010 – 2011.

2. My responsibilities as Senior Customary Lands Tribunal Officer included providing training and advise to chiefs about the Customary Land Tribunal Act [CAP. 271] (the 'old Act'), receiving and keeping records of decisions by customary land tribunals and assisting the State Law Office in relation to civil proceedings involving customary land tribunals.



3. *I make this statement from the records of the Customary Lands Tribunal Office and CLMO unless otherwise stated.*
4. *I confirm that this case is not a tribunal case; it is a council of chiefs decision and should be referred back to the nakamal pursuant to the new Act as the decision was made when the new Act was already in force. Attached and marked "GA1" is a true copy of my letter to the State Law Office advising them of the same dated 21 August 2014."*
(my emphasis)
15. In the present case the relevant chronology may be summarized as follows:
- 20 Feb. 2014 - Custom Land Management Act No. 33 of 2013 commenced;
 - Customary Land Tribunal Act 34 of 2001 was repealed;
 - 7 March 2014 - Notice of a dispute/hearing under Section 25(1) Customary Land Tribunal Act over "*Ikunapkapki land*" was issued to the claimant;
 - The relevant Notice states inter alia:

"... Blong yufala i mas submitim claim (not appeal) mo fees blong yufala long Tribunal Court start today numba 7th of March 2014 igo kasem 27th March 2014 we hemi end blong 21 day we law i required".
 - 3 April 2014 - Nipraintata Area Council (Land Tribunal Court) South East Tanna sat at "*lakupen nakamal*" and heard the matter;
 - 10 April 2014 - Nipraintata Area Council of Chiefs delivered its decision in favour of *latika Richard Nawar* (the second defendant);
 - 10 July 2014 - *Nesam (Bruno) lata* filed an application for judicial review challenging the above decision;
16. From the foregoing it is clear that the CLM Act had already commenced a month before the Notice of Dispute/Hearing was issued in the present case. Likewise in terms of the **Customary Land Tribunal (Repeal) Act 34 of**



2013 the CLT Act of 2001 was repealed a month before the Notice of Dispute/Hearing was issued under the CLT Act.

17. In other words when the Notice of Dispute/Hearing was issued in the present case the Act which the claim was brought under no longer existed and therefore the Notice of Dispute/Hearing was a nullity and can not be saved under the transitional provisions of Section 5 of the Custom Land Management Act noted earlier.
18. The Notice of Dispute/Hearing being a nullity everything that followed it, including the determination of the Nipraintata Council (Land Court) whatever its correct status or description, was similarly tainted and is null and void and of no effect.
19. Accordingly the application is granted and the decision of the defendant Tribunal dated 10 April 2014 is formally quashed and the parties are left to pursue their dispute under the provisions of the new replacement Custom Land Management Act.
20. The claimant having succeeded is awarded costs summarily assessed at VT30,000 to be paid within 21 days by the Defendants in equal amounts.

DATED at Port Vila, this 30th day of September, 2016.

BY THE COURT



D. V. FATIAKI

Judge.

