

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

Judicial Review Case No.16 of 2015

BETWEEN: BILL STEPHEN
Claimant

AND: ALICTA VUTI KWIRINAVANUA
First Defendant

AND: ATTORNEY GENERAL
Second Defendant

Coram: Justice D. V. Fatiaki

Counsel: Mr. S. Hakwa for the Claimant
Mr. S. Kalsakau for the Defendants

Date of Judgment: 1 April 2016.

JUDGMENT

1. In counsel for the applicant's words this is a "test case" under the Custom Land Management Act ("CLM Act") seeking the grant of a certificate of a registered interest in customary land. In particular the case concerns the refusal of a request by the claimants for a certificate registering their interest in two (2) custom lands in South Santo, namely, "Nasulnun" and "Artacha".
2. In form, the claim is an opposed application for judicial review to quash the decision of the National Coordinator of Land Dispute Management contained in a letter dated 27 April 2015 the body of which reads:

"Dear Sir,

Subject: NASULNUN AND ARTHACHA

We write in refer to the above subject in response to your letter dated 7th April 2015.

The Customary Land Management Office has received you request for a certificate for recorded interest in land on behave of your clients. We have scrutinized all the files and would like to advice that we could not issue a certificate or act on your request. This is due to the fact that the Supreme Court on civil case no. 107 of 2011 does not uphold the declaration of the Join Village tribunal after quashing the declarations made on Santo/Malo Joint Land Tribunal (SMJALT) and Santo/Malo Island Land Tribunal (SMILT).

Supreme Court states,"

"38. Mindful of the commencement of the Custom Land Management Act, I make no order as to the continuation or resolution of the existing dispute **instead leaving it to the parties and their advisors to consider the best way forward for dealing with their dispute** unconstrained by the defendant Tribunal's determinations".



The above caption from the Supreme Court decision shows that the land is still in dispute and the Court is referring the matter to be solved by the parties and their advisors in a best way.

Therefore we advise that the matter is still not solved, so we could not act on your request. The office could refer the matter to a Nakamal meeting or Area Land Tribunal constituted under the Customary Land Management Act.

Thank you

Yours Faithfully,
(Signed)
Alicta Vuti KWIRINAVANUA
National Coordinator."

3. In this latter regard the claimant's counsel had earlier written to the National Coordinator, in a hand delivered letter dated 22 April 2015 as follows:

"Dear Sir,

Re: Bill Stephen v. Santo Malo Joint Area Land Tribunal and others: Civil Case No. 107 of 2011 – Supreme Court

.....
The judgment is clear and speaks for itself. Paragraphs 37 and 38 of the Judgment are clear and speak for itself.

The Claim which Bill Stephen made in Civil Case No. 107 of 2011 seeks (amongst other things) and order to quash the decision which the **Santo Malo Joint Area Land Tribunal ("the SMJALT")** made on 03 December 2009 ("**the SMJALT Decision**") and the decision which the **Santo Malo Island Land Tribunal ("the SMILT")** made in April 2010 ("**the SMILT Decision**").

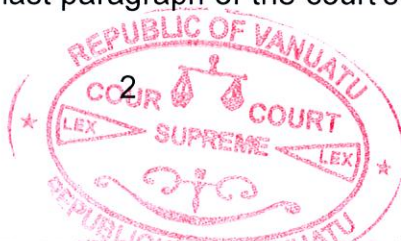
In paragraph 37 of his Judgment Mr Justice Fatiaki says (amongst other things) that the Supreme Court has quashed the SMJALT Decision and SMILT Decision.

In paragraph 38 of the Judgment Mr Justice Fatiaki says (amongst other things) that in view of the enactment of the **Custom Land Management Act No 33 of 2013** as amended ("**the Act**") the Court is not in a position to make any order as to the continuation of any dispute which was the subject of the SMJALT Decision and SMILT Decision and instead living it to the parties and their advisors to consider the best way forward for dealing with such dispute (if any).

Following the enactment of the Act in 2013 Parliament has also repealed the Customary Land Tribunal Act No 07 of 2001 thereby abolishing all Customary Land Tribunals. Determination of custom ownership of land now rests with Nakamals or other customary institutions which are set up by or in accordance with the provisions of the Act. That is the reason why Mr Justice Fatiaki did not make an order.

Yours faithfully,
SILAS CHARLES HAKWA & ASSOCIATES"

4. In so far as it may be necessary to do so and to avoid any further confusion that may arise as a result of the last paragraph of the court's judgment in Civil Case



No. 107 of 2011, the Court confirms its agreement with the views expressed by claimant's counsel in the above extracts for the following reasons:

- (1) The correctness of the decision of the Vaturani Malo/Santo Joint Vilej Land Tribunal (a.k.a Vaturani Island Council of Chiefs South Santo Area II) was not challenged in Civil Case No. 107 of 2011;
- (2) The quashing of the two (2) appellate Land Tribunal decisions in Civil Case No. 107 of 2011 leaves the decisions of the Vaturani Malo/Santo Joint Vilej Land Tribunal the only remaining effective determinations of the customary ownership of "Nasulnun" and "Artacha";
- (3) In the absence of any challenge within 12 months of the commencement of the CLM Act on 20 February 2014, the above determinations are, in terms of Section 58; "... deemed to create a recorded interest in land in respect of the person or persons determined by such tribunal to be a custom owner" (ie: from 20th February 2015);
- (4) Although the Supreme Court's judgment was based (in part) on a breach of the requirements of Section 5 of the Customary Land Tribunals Act as well as the absence of any record of the defendant tribunals proceedings, neither reason precludes a new and fresh claim concerning the same custom lands being instituted and commenced under the Customary Land Tribunals Act ("CLT Act") [see: paragraphs 17 and 25 of the judgment).

5. Having said that I note the submissions of defence counsel that:

"... any issuance of a certificate of recorded interest pursuant to the Land Management Act No. 33 of 2013 would be an injustice to those others who would have their rights affected by the same by reason that there has been no resolution of the dispute of customary ownership of the said lands".

6. I disagree however for two (2) reasons:

- (1) Section 19 (2) of the CLM Act provides an avenue for challenging an improperly recorded interest in land; and
- (2) Section 58 of the CLM Act is a deeming provision specifically dealing with unchallenged Land Tribunal decisions under the CLT Act which obviates the need to invoke the procedures under the CLM Act in order to create "a recorded interest in land". As was said by Lord Radcliffe in St Aubyn v. Attorney General [1952] A.C 15 at p 53:

"The word deemed is used a great deal in modern legislation. Sometimes it is used to impose for the purpose of a statute an artificial construction of a word or phrase that would not otherwise prevail. Sometimes it is used to put beyond doubt a particular construction that might otherwise be uncertain. Sometimes it is used to give a comprehensive description to include what is obvious, what is uncertain and what is, in the ordinary sense impossible."

I am satisfied given the definition of the phrase "a recorded interest in land" and the provisions of Section 19, that the word "deemed" in Section 58 is used in the first and third senses identified in the above dictum,




namely, to impose an artificial construction and put beyond doubt a construction of the phrase “a recorded interest in land” that might exclude prior unchallenged decisions of a land tribunal under the repealed CLT Act.

7. The above is sufficient to dispose of this application which is granted in the following terms.
- (1) The National Coordinator’s refusal decision in his letter of 27 April 2015 is quashed;
 - (2) Declare that the determinations of the Vaturani Malo/Santo Joint Vilej Land Tribunal on 9 September 2008 in respect of “Nasulnun” and “Artacha” creates for the claimant’s family, a recorded interest in land for the purposes of the Custom Land Management Act;
 - (3) The National Coordinator is ordered within 14 days to provide to the claimant a certificate under Section 19 of the Custom Land Management Acts in respect of “Nasulnun” and “Artacha” customary lands;
 - (4) The claimant is awarded standard costs to be taxed by the Master if not agreed.

DATED at Port Vila, this 1st day of April, 2016.

BY THE COURT


D. V. FATIAKI
Judge.

