

**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

Counsels: Mr. Willie Kapalu for the Claimant
Mr. Jack Kilu for the First Defendant
State Law Office for the Defendant Tribunal

Date of Judgment: 10 March 2017

JUDGMENT

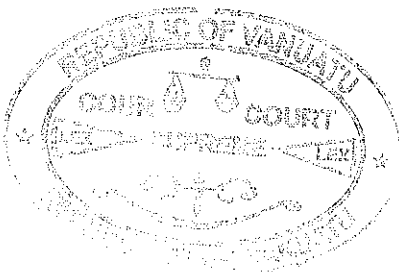
Background and Chronology

- 14 August 2008 - After several unsuccessful attempts to get the claimants to attend its proceedings, the "West Tanna Joint Village Land Tribunal" under the chairmanship of Tom Nangia and concerning a dispute over "Taniwanu" land situated in West Tanna, declared:

"(the first defendant) *nao hemi tru bloodline blong Natingne tribe land Tanivanu*".

- 20 May 2009 - Again after numerous unsuccessful attempts to get the claimants to attend its proceedings, the "West Tanna Area Council Land Tribunal" under the chairmanship of Chief Naka Nilaplapin, (the "defendant Tribunal") issued a declaration over "Taniwanu land" at West Tanna to the effect that:

"*Nakou lawah noa ireally custom owner blong disputed land ia*".



- 10 June 2009 - The claimants issued a judicial review application in the Supreme Court naming the defendant Tribunal as the sole defendant later amended at the court's direction to include the Nakou lawha and the Attorney General;
- 18 June 2009 - The claimants paid their fee for an appeal against the defendant Tribunal's decision to the Niko Letan Council of Yeni (ie. Tanna Island Land Tribunal);

1. I digress at this point to refer to the provisions of Rule 17.8(3)(d) which clearly states: "*There is no other remedy that resolves the matter fully and directly*" as a basis for a judge to refuse to hear an application for judicial review ie. if he is satisfied that such an alternative "*remedy*" exists. This is an answer to the submissions of claimants' counsel that despite the existence of a "*right of appeal*" from the defendant Tribunal to the Island Land Tribunal under Section 20(2) of the Customary Lands Tribunal Act ("*CLT Act*"), nevertheless, the claimant's may also issue separate proceedings in the Supreme Court invoking Section 39.

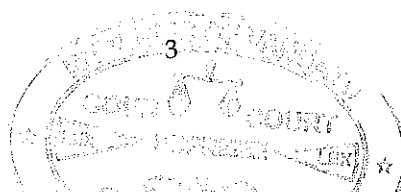
- 6 August 2009 - The first defendant obtained an ex-parte injunction against the claimants in Magistrate's Court Case No. 82 of 2009 restraining them from "*developing land comprised within Lease Title No. 12/02213/005*" located in "*Taniwanu*" land;
- 15 Sept. 2009 - In the absence of the first defendant or his counsel the injunction was "*vacated entirely*" by the Magistrate's Court on the basis that it has no jurisdiction to deal with land matters;
- 26 Sept. 2009 - The first defendant successfully obtained an ex-parte injunction in the Supreme Court restraining the claimants from dealing with or developing "*Taniwenu land*" pending the final resolution of the custom ownership dispute;
- 29 July 2010 - This Court issued an interlocutory Ruling determining 3 procedural issues including, the proper parties in an application under Section 39 and the appropriate court process or procedure for invoking Section 39. The State appealed the Ruling with leave;
- 3 Dec. 2010 - The Court of Appeal in West Tanna Area Council Tribunal v. Natuman [2010] VUCA 28 delivered its reasons for returning the case to the Supreme Court "*for further management*";

2. The year 2011 and the early part of 2012 was devoted to case management matters. The application for judicial review underwent several substantive amendments which required amended defences to be filed. The first defendant applied to strike out the application for judicial review which was strenuously opposed. Lastly after ordering sworn statements from the parties, the court



considered the questions under Rule 17.8(3) of the Civil Procedure Rules at a conference hearing in May 2012.

- 3 Oct. 2013 - This Court granted the first defendant an ex-parte injunction restraining the claimants from dealing with or developing "*Taniwenu land*" pending the final resolution of the land ownership dispute.
 - 11 Oct. 2013 - This Court confirmed its injunction in a Ruling that dismissed the claimant's application seeking to set it aside. The claimants appealed the Ruling to the Court of Appeal;
 - 22 Nov. 2013 - The Court of Appeal in Natuman v. lawha [2013] VUCA 39 continued this Court's injunction for four weeks on conditions, including, the issuance by the first defendant of a claim for rectification of Lease Title No. 12/02213/005 under Section 100. Thereafter the case was returned to this Court for continuation;
3. After the preliminary skirmishes which saw the case twice appealed unsuccessfully to the Court of Appeal and two interlocutory injunctions granted in the first defendant's favour, finally, in May 2012 the Court heard the substantive application for judicial review. In doing so the Court heard arguments on the four (4) items listed in Rule 17.8(3) without cross-examination being requested by counsels of the deponents who filed sworn statements.
4. For convenience I shall adopt the four items in Rule 17.8(3) in dealing with the claimant's application.
5. Items (2) and (3) namely whether the claimant is "*directly affected by the (impugned) decision*" and whether there has been "*undue delay in making the claim*" are not seriously disputed or denied by the defendants. Leaving aside the question of lack of notice or service on the claimants of the defendant Tribunal's proceedings, there is no doubt that the claimants' application for judicial review was brought "... *within 6 months of the (defendant Tribunal's) decision*". Furthermore the claimants are named as lessors and/or lessees in Lease Title No. 14/02213/005 which qualifies them as "*parties to the dispute*" under Section 39 of the Customary Land Tribunal Act (see: West Tanna Area Council Land Tribunal v. Natuman [2010] VUCA 28 *ibid*) and more specifically, Natmaning Natuman was the unsuccessful party before the defendant Tribunal.
6. Item 4 poses the question whether "*there is no other remedy that resolves the matter fully and directly*". Further to the Court's observations at para. 1 above, claimants' counsel submits that invoking Section 39 is the only remedy available under the Act to address the two narrow questions raised by subsection (2) namely, – the qualification of a member or secretary to participate in the proceedings of the land tribunal that made the impugned decision and under



subsection (3) – whether the tribunal failed to follow any of the procedures under the Act. These may be contrasted with what a land tribunal under the Act (whether at first instance or on appeal), determines and that is the merits of a claim to custom ownership.

7. This distinction counsel submits is clear in the present case where the defendant Tribunal under Section 28 is required to resolve the case before it “*according to custom*” and the tribunal has power to “... *declare the rights of the parties*” and order that a person “*move out of occupation of the land*” and “*pay compensation for the use of the land or any damage*” done to it or any crops, plants or animals present on the land [see: Section 30]. Whereas the Supreme Court under Section 39 is solely concerned with the composition and manner in which the tribunal arrived at its decision.
8. Defence counsel submits that, in the face of the claimants’ pending appeal before the Tanna Island Land Tribunal, this Court has “... *no power to send the matter back to the village or area level tribunal*” and what the claimants have done in invoking Section 39 while appealing under Section 20(2) constitutes an “*abuse of process*”.
9. As to the first submission, I disagree with defence counsel in so far as the provisions of Section 39 are clear in that the Supreme Court has specific power where it upholds an application under the Section, to discontinue the tribunal’s proceedings, cancel its decisions, and order the matter to be “... *re-determined by a differently constituted land tribunal*”. Furthermore in none of the above orders would the Supreme Court be determining the merits of the competing claims to the custom ownership of the disputed land.
10. Accordingly, although, ideally, an application to the Supreme Court under Section 39 should be reserved until after the appeal processes under the Act have been exhausted, it is not an “*abuse of process*” to invoke Section 39 at an earlier stage, to prevent the appeal process continuing and being rendered nugatory in the sense that the defendant Tribunal’s decision on appeal, would not be addressing the narrow procedural questions being considered by the Supreme Court under Section 39. In short, there is no inevitable clash or inconsistency in pursuing both processes nor is it abusive.
11. Finally I turn to consider item (1) – whether the claimant has established any of its numerous grounds of challenging the defendant Tribunal’s decision.

The Composition and Nature of the Defendant Tribunal

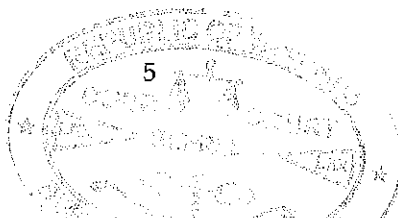
12. The basic underlying fact that the claimant relies on in this regard, is the undisputed fact that “*Tanivanu land*” has within its custom boundary no less than 7 villages – “*Imaelo, Louniparu, Ivarao, Loukatipis, Lounapkau, Lounapik and Lamafa*”. Therefore any tribunal set up under the CLT Act to determine the

ownership of "*Tanivanu land*" (whether at first instance or on appeal) must be a joint village land tribunal or a single or joint custom area land tribunal [see: Sections 2(3); 7(2)(b); 9(2) and the definition of a "*custom area*"].

13. Counsel for the claimants submits (assuming that this was a determination at first instance):

"In this case the total number of judges would be 21. That is 7 principal chiefs of the 7 villages and another 14 chiefs or elders from the 7 villages. However the number of judges that made up the (defendant) tribunal is only 5 which is contrary to the composition of the tribunal provided by the Act".

14. Alternatively, if the defendant was an appellate tribunal hearing an appeal under **Part 4** as a "*single or joint custom area land tribunal*" then Section 18 provides that the custom area land tribunal will be comprised of the chairperson of the custom area council of chiefs and 2 other chiefs or elders from the custom area appointed by the area council of chiefs *ie.* a total of 3 members and a secretary also appointed by the relevant area council of chiefs for a single custom area land tribunal.
15. In the present case claimants' counsel argues that the defendant Tribunal's official seal clearly shows it was created by an area council of chiefs namely: "*West Tanna Eria Kaonsel Blong Ol Jif*" and such a body has only an appellate function under the CLT Act (see: Section 17) the defendant Tribunal improperly "*... heard the case as a court of first instance*" in breach of the relevant provisions of the CLT Act and, in doing so, wrongly denied the claimants a second right of appeal it would have had under the Act if the sequence of appeals within the hierarchy of tribunals under the Act had been correctly followed and complied with.
16. Defence counsel for his part, refers to the numerous handwritten notices issued to the claimants to attend the proceedings in June/July/August 2008 (7 notices). The relevant notices are variously addressed as issued by the "*Joint Village Council of West Tanna*" or "*Joint Village Land Tribunal Council*" including the typewritten decision under the hand of its chairman "*Tom Nangia*". Accordingly counsel submits that the immediate predecessor to the defendant Tribunal was a "*joint village land tribunal*" which substantially complies with the provisions of the CLT Act and was a tribunal of first instance. Likewise the defendant Tribunal was an appellate tribunal with a different membership and chairman and therefore complied with the scheme and hierarchy of Tribunals under the CLT Act.
17. Additionally, the claimants lodged an appeal against the decision of the defendant Tribunal which had power to determine the merits of the appeal before it and therefore, counsel submits, the claimants acquiesced and waived any possible breaches of the earlier "*joint village land tribunal council*" proceedings



which the claimants themselves persistently and deliberately refused to attend. Likewise with the proceedings before the defendant Tribunal.

18. Counsel accepts that the use by the defendant Tribunal of the area council of chiefs seal or stamp may be *"inappropriate"* but counsel submits the intention was clear that the defendant Tribunal was giving notice of its intention to sit and determine the appeal of a dispute that had already progressed through a joint village land tribunal.
19. As for the qualification of the members of the defendant Tribunal, counsel points to the existence of an Approval Form issued under Sections 35, 36 and 37 of CLT Act dated "16 March 2009" and entitled: "WEST TANNA ERIA COUNCIL LANDS TRIBUNAL JUDGES" signed by the chairman of the council and bearing the official stamp of the "*West Tanna Eria Kaonsel Blong Ol Jif*". The Form also bears at the right hand top corner the official stamp of the "*Ofis Blong Land Tribunals*" under a hand written acknowledgement of the list provided. Included in the list of approved judges are the names of: "*Nikat Kilaplapien*"; "*Johnny Nimas*"; "*Nakaou Niaua*"; "*Jotil laprapir*" and "*Bob Marae*" who were the judges in the defendant Tribunal.
20. Even if it could be said that the composition of the "*joint village land tribunal council*" was non-compliant with the relevant provisions under the CLT Act, this Court is satisfied that the issuance of the present application for judicial review in July 2009 a whole year after the decision of the "*joint village land tribunal*" in August 2008 was, itself, non-compliant with the requirements of Rule 17.5 and, given the lodgement of an appeal by the claimants in my view, such delay must be considered "*undue*". In other words, while I accept that with regards the defendant Tribunal's decision, the claimants' application for judicial review is within time but where the ground of challenge or complaint is directed at the "*joint village land tribunal*" decision, the application suffers from "*undue delay*" and should not be allowed on that score.
21. I accept that Section 18 only mandates the appointment of 3 justices for a "*custom area land tribuna*" but where there is more than one custom area involved as under Section 19 the number of justices will inevitably increase. Even accepting that the defendant Tribunal consisted of two (2) more members than it should that alone, is not a sufficient reason to quash its unanimous decision that the first defendant is the real custom owner of "*Tanivanu land*".
22. As was said by Tuohy J. in Umou v. Erromango Island Land Tribunal [2008] VUSC 65 where in rejecting a complaint in that case about a technical non-compliance with the requirement of serving a notice of hearing under Section 25 (at para. 25):

"Section 39 is curiously worded. It does not directly say what the Court is to do if one of the matters in the section is made out. However it does not (sic) require the Court to



make one of the orders which it is empowered by the section to make. I consider that it was Parliament's intention to give the Court a discretion. It is very unlikely that Parliament would have wished the Court to overturn an Island Land Tribunal decision on the basis of some minor and inconsequential irregularity in procedure. I consider that this is what happened in this case. The claimant actually had full opportunity to present his case but chose not to ... In the exercise of the Court's discretion I decline to make any order disturbing the decision of the Tribunal".

23. For the foregoing reasons the application for judicial review fails on all grounds and accordingly is dismissed with standard costs to be taxed if not agreed.
24. In the absence of any formal notice and grounds of appeal filed by the claimants in the Tanna Island Land Tribunal and given the repeal of the Customary Land Tribunal Act in February 2014, I make no orders concerning the claimants' pending appeal, leaving it instead to the claimants and their counsel to consider how best to progress that outstanding matter.
25. The defendants are awarded standard costs to be taxed if not agreed.

DATED at Port Vila, this 10th day of March, 2017.

BY THE COURT



D. V. FATIAKI
Judge.

