IN THE COURT OF APPEAL OF THE REPUBLIC OF VANUATU
(Appellate Jurisdiction)

Civil Appeal
Case No.17/642 CoA/CIVA

BETWEEN: NAKOU NATUMAN, KODNY NATUMAN, NISIKAPIAL TUAKA, JOHN IARAMAPEN and JAMES YOKAOAIU
Appellants

AND: NAKOU IAWHA
First Respondent

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

Coram: ***Hon. Chief Justice Vincent Lunabek***
Hon. Justice John von Doussa
Hon. Justice Ronald Young
Hon. Justice Oliver Saksak
Hon. Justice Dudley Aru
Hon. Justice Paul Geoghegan
Hon. Justice David Chetwynd

Counsel: *Felix Laumae for Appellant*
Jack Kilu for the First Respondent
Sammy Aron for the Second Respondents

Date of Hearing: *17th July 2017*
Date of Judgment: *21st July 2017*

JUDGMENT

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1. This is an appeal from a decision of the Supreme Court that dismissed an application for judicial review of a decision made by the second respondents, the West Tanna Area Council Land Tribunal represented by the named second respondents (the Area Tribunal) made on 29th May 2009. The application for judicial review was filed on 10th June 2009 well within the six month time limit imposed by Rule 17.5 of the Civil Procedure Rules. The Area Tribunal declared the first respondent Nakou Iawha to be the custom owner of the land in dispute known as the Taniwanu land in West Tanna. The appellants brought their proceedings in the Supreme Court on the ground that they, not the first respondent, should be recognised as the custom owners of Taniwanu.

2. Before dealing with the merits of the appeal we mentioned two procedural matters. First, when the appeal was called for hearing there was no appearance of counsel for the first respondent, and no application for an adjournment. Counsel had filed written submissions on the preceding business day, but the Court had received no notification that the counsel would not be absent. The Court received no explanation for his non-appearance. We have addressed the problems caused by the non-appearance of counsel in another case in this session: Fogarty v. Air Vanuatu (Operations) Ltd, Civil Appeal Case No. 739 of 2017. Where counsel does not appear the Court may proceed with the hearing in the absence of counsel. We did so in Fogarty v. Air Vanuatu (Operations) Ltd, and we did so in this case. Here, many interested parties were at Court ready for the case to proceed, and the Court had written submissions from the parties. Had a new issue arisen as the appeal proceeded that could not in justice be resolved without hearing the first respondent, the Court would have had no option but to adjourn the hearing to enable that to happen. However no new issue did arise. For reasons which follow we consider this appeal must inevitably be allowed, and there is nothing that could have been advanced by the first respondent in oral submissions to alter this outcome.

3. The second point concerns the inadequacy of the material included in the appeal book. The book did not include many sworn statements and exhibits directly relevant to the appeal grounds, particularly some of those that formed part of the first respondent's case. The omitted sworn statements dealt with factual matters which were in contest between the parties. Their inclusion would have greatly assisted the Court in more quickly identifying the essential issues that fell to be decided in the Supreme Court. The primary responsibility for including material actually relevant to the appeal is with the appellant, but it is also important that a respondent checks that relevant documents are before the Court. If not, the respondent should take steps to ensure that the appellant rectifies the position, or failing that to file the omitted material. Here, counsel for the first respondent in his written submissions complains about the omission of material relevant to his case but regrettably took no step to file it. Fortunately however his written submissions summarize the facts which he says were deposed to in the missing material and that has assisted the Court. Parties to an appeal should realize that if relevant material is not placed before the Court, the case of the party they represent may not be properly brought to the attention of the Court with resulting prejudice to their client.

The Claim

4. It seems to be common ground that the Taniwanu land in dispute covers an area of several hundreds of hectares and includes seven villages. The scheme for the resolution of custom ownership disputes under the Customary Land Tribunal Act

[CAP. 271] (CLTA) in force at the relevant time would require a dispute over the Taniwanu land be first heard by a Joint Village Land Tribunal under Part 2 of the CLTA. An appeal would lie from the decision of the Joint Village Land Tribunal to a Custom Area Land Tribunal under Part 4 of the CLTA. The jurisdiction of a Custom Area Land Tribunal arises by way of the appeal provisions of the CLTA and is conditional on there first having been a decision of a Village Land Tribunal – in this case a Joint Village Land Tribunal.

5. The application for judicial review sought orders under s.39 of the CLTA which relevantly provides:

> *"(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.*
>
> *....."*

6. The factual basis on which the appellants sought an order setting aside the decision of the Area Tribunal can be summarized under three topics:

- First, under s.39(2), that the Area Tribunal being a body established under the CLTA as an appellate body in this instance sat as a first instance tribunal because there never had been a Joint Village Land Tribunal hearing and decision (grounds 2(b) (c) and (b) of the Further, Further Amended Application for Judicial Review);

- Secondly, under s.39(2), the appellant had never received notification of any tribunal hearing, either for a hearing by a Joint Village Land Tribunal, or for a hearing by the Area Land Tribunal as required by Part 6 of the CLTA (grounds 2(e) (f) (g); and

- Thirdly, under s.39(1), that the members of the Area Tribunal were not qualified as required by Part 7 of the CLTA to sit as members of the Joint Village Land Tribunal if they were purporting to exercise first instance

jurisdiction (ground 2(h)). This ground was extended in submissions before the trial judge to extend to challenge the qualification of the named second respondents to sit as members of the West Tanna Area Council Land Tribunal.

Factual Issues before the Supreme Court

7. Before the trial judge sworn statements were filed on behalf of the appellants which asserted that:

   - They were the true custom owners of the Taniwanu Land;
   - They first learned that there had been steps taken by the first respondent under the CLTA to determine the custom ownership of the Taniwanu Land when they received a document setting out a decision by the Area Tribunal dated 29th May 2009 declaring the first respondent to be the custom owner;
   - They filed the application for judicial review on 10th June 2009 and on 18th June 2009 also lodged an appeal from the Area Tribunal decision to the next level of decision makers under the CLTA, namely with the Niko Letan Council of Yeni (the Tanna Island Land Tribunal);
   - They alleged they had received no notice of any land dispute hearing either from a Joint Village Land Tribunal or from the West Tanna Area Council Land Tribunal, and were totally unaware that any tribunal hearings were taking place;

8. Apart from acknowledging the institution of the judicial review proceedings and the appeal to the Tanna Island Land Tribunal, the first respondent disputed all the allegations of the appellants. The first respondent filed sworn statements in support of his position alleging that:

   - The appellants were duly notified and well aware of a hearing in the Joint Village Land Tribunal in July 2008 which resulted in a decision on 14th August 2008 declaring the first respondent to be the custom owner of Taniwanu;
   - The appellants were duly notified and well aware of the intention of the second respondent to hold the hearing which led to its decision on 29th May 2009;
   - The appellants deliberately refused to attend the hearings of either tribunal even though those tribunals gave the appellants several opportunities to do

so. This refusal was deliberate as an attempt to frustrate the processes of the tribunals.

The Judgment Under Appeal

9. The judgment commenced immediately with a heading "*Background and Chronology*" and continued:

- *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. Then follows a summary of the many procedural issues that had been dealt with before the trial including references to matters relevant to an initial rule 17.8 hearing. The judgment then addresses the question whether the appellants had established "*any of its numerous grounds of challenging the defendant Tribunal's decision*".

11. Under the heading "The composition and nature of the defendant tribunal" the judge recites the appellants' allegation that if the tribunal purported to set as a first instance Joint Village Land Tribunal it was not properly constituted as it did not comprise seven village chiefs and fourteen nominees of those chiefs, twenty one people in all. Alternatively if it was sitting as an Area Tribunal its membership was not comprised of eligible people. The opposing cases of the appellants and the first respondent were summarized. Reference was made specifically to the submission of counsel for the first respondent which pointed to the existence of an Approved Form issued under ss.35, 36 and 37 of the CLTA entitled "*West Tanna Area Council Land Tribunal Judges*" and included the names of the second respondent tribunal members. Then comes the critical passage in the judgment:

"*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".

12. Finally in so far as the respondent Area Tribunal comprised five instead of three members as s.18 of the CLTA appear to mandate, the trial Judge considered that was not a sufficient reason to quash its unanimous decision. The judgment concludes: "*For the foregoing reasons the application for judicial review fails on all grounds ...*".

13. Other grounds raised in the amended application for judicial review and not covered by the heading "*The composition and nature of the defendant tribunal*" are not considered in the judgment.

Discussion

14. Whilst the chronology at the commencement of the judgment baldly states that there were sittings of a Joint Village Land Tribunal and of the Area Tribunal following several unsuccessful attempts to get the appellants to attend, there is no discussion about the evidence led by the parties as to these events which were both contested issues, and no reasoned finding is made to prefer the evidence of the first respondent. Moreover, the chronology descriptions do not address the question whether the appellants received notices of the hearings. The descriptions in the chronology leave open the possibility that the attempts of the tribunal to have the appellants attend failed because the appellants did not receive notice. Further the chronology does not address the question whether the procedures prescribed the CLTA for notifying proposed hearings had been fulfilled.

15. Then, although reference was made to counsels' submissions about evidence relevant to the composition and membership of the Area Tribunal, no findings are made to resolve the dispute between the parties on that question.

16. The conclusions expressed in paragraph 20 do not express findings on these matters. They addressed an entirely different issue, namely that of delay. By the time of trial the occasion to consider matters which the Court was required to address under Rule 17.8 had long passed. Rule 17.8 requires the Court at the first available opportunity after the commencement of an application for judicial review to consider whether an application should be allowed to go forward. At that stage "*undue delay*" is to be considered, but by the time of this trial the

proceedings had been underway for some years. Undue delay in commencing the proceedings was not a relevant consideration by the time the matter came on for trial.

17. In any event, the delay which the judge criticized is a delay by the appellants in raising complaint about the composition of the Joint Village Land Tribunal. But the appellants' case disputed that there had been such a hearing, and if there had been they were unaware of it, and indeed unaware of any tribunal hearing until after 29th May 2009. Once they learned that the hearing had occurred in the Area Tribunal they took very prompt steps to complain.

18. The reasoning in paragraph 20 of the judgment assumes that there was a Joint Village Land Tribunal hearing and that the appellants were well aware of it. Both these facts were disputed. There is no reasoned finding to support the first fact (only the bald assertion in the first item in the chronology) and no finding as to the second fact. The reasons stated in paragraph 20 for dismissing the application cannot be sustained for these reasons.

19. The reasons for judgment do not address at all the challenges to the Area Tribunal's judgment based on failure to comply with prescribed procedures as to notice of a proposed hearing or about the composition and the qualification of the membership of the Area Tribunal.

20. In short, the allegations raised by the appellants in the application for judicial review have not been adjudicated upon.

21. The appeal must therefore be allowed, and regrettably the only further order this Court can make is to return the matter to the Supreme Court for retrial before another judge. The costs of the previous trial in the Supreme Court will abide the outcome of the further trial.

22. The parties should now reflect on what has happened under the processes that existed whilst the CLTA was still in force, and decide whether they may not be better off to abandon those processes and the application for judicial review so as to allow their dispute to be resolved according to the new Custom Land Management Act, No. 33 of 2013, as amended.

23. The second respondent has opposed this appeal and must therefore pay the appellants' costs of the appeal. The second respondent tribunal is named as a necessary party but its role in proceedings of this kind is a neutral one. Nevertheless as it is a necessary party the unsuccessful party must pay its costs.

24. The orders of the Court are:

    (1) Appeal allowed;

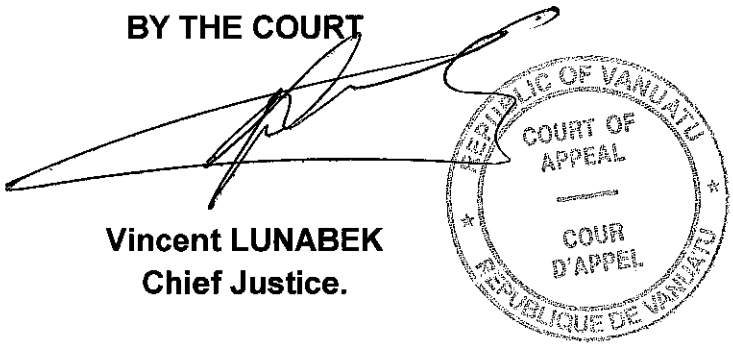
(2) The judgment in the Supreme Court is set aside;

(3) The application for judicial review is returned to the Supreme Court for retrial;

(4) The first respondent must pay the costs of this appeal of the appellants and the second respondents on the standard basis;

DATED at Port Vila, this 21st day of July, 2017.

BY THE COURT



Vincent LUNABEK
Chief Justice.