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

Civil Case No. 28 of 2010

BETWEEN: **Paul Hakwa**
Claimant

AND: **Molimaimai Land Tribunal**
Defendant

Civil Case No. 116 of 2010

BETWEEN: **Family Molivarakua, Family Sarinavanua and Family Bobonavanua**
Claimants

AND: **Wesley Rasu**
First Defendant

AND: **Director of Land Records**
Second Defendant

(The above claims were later consolidated and became:)

Civil Case No. 71 of 2010

BETWEEN: **PAUL HAKWA**
First Claimant

AND: **FAMILY MOLIVAKARUA**
Second Claimant

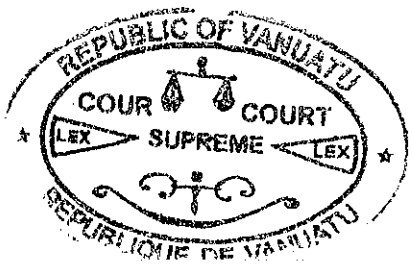
AND: **FAMILY BOBOVANUA**
Third Claimant

AND: **MOLIMAIMAI LAND TRIBUNAL**
First Defendant

AND: **WESLEY RASU**
Second Defendant

Coram: ***Justice D. V. Fatiaki***
Counsels: *Willie Kapalu for the Claimant*
Edward Nalyal for the Defendants
Date of Decision: *8 December 2017*

JUDGMENT



1. The above cases have a chequered history that needs to be set-out.

   (A) **Civil Case No. 28 of 2009** ("*CC28/2009*") was commenced in the Luganville, registry in Santo as a Supreme Court representative action filed on 29 September 2009 by the claimant as spokesman for "*Family Sarinavanua*". No other or interested party was named although the claim, if successful, would adversely affect the successful claimant before the defendant Tribunal namely Family Rasunaboe.

2. The original claim which was in Bislama invoked Section 39 of the Customary Land Tribunals Act ("*CLTA*") in challenging the decision of the defendant Tribunal delivered on 11 July 2008 which declared:

   "*Custom owner blong graon Navimapeololo we igat inside long hem Avasise, Abaone, Malotine (offshore Island), Malokilikili (offshore Island) mo Maloveleo (offshore Island) are upon customary basis (custom blong Malo) emi blong Family Rasunaboe*".

3. The principal ground of complaint is that the defendant Tribunal which was an appellate Tribunal did not comply with the relevant provisions of the CLTA and further, there had not been any decision(s) made by any lower tribunals about some of the lands included in the defendant Tribunal's declaration.

4. After several months of management conferences and a vacated hearing date in March 2010 the judge who had carriage of the case disqualified himself "*from further hearing or dealing with it in any manner*" by order dated 27 May 2010. The file was thereafter transferred to the Supreme Court Port Vila registry where it was re-allocated and renumbered: Civil Case No. 71 of 2010.

5. On 30 June 2010 this Court ordered the claimant to file and serve English translations of the claim and sworn statements filed in support. Response sworn statements were also ordered from the defendant Tribunal which was now represented by Mr. E. Nalyal.

6. On 20 September 2010 the claimant filed an amended claim naming Wesley Rasu the spokesman of "*Family Sarinavanua*" a beneficiary of the defendant Tribunal's declaration, as the second defendant and adding two further Families who were claimants in CC116/2010. The amended claim sought a declaration that the defendant Tribunal's declaration was "*null and void*" and/or alternatively a declaration that the reference to "*Malokilikili*"; "*Maloveleo*"; "*Navimapeololo*"; "*Avasise*"; "*Nambua*" and "*Malotine*" was null and void.

7. On 18 February 2011 defence counsel filed an application to strike out the amended claim on the basis that the claimant lacked the necessary standing to challenge the declaration of the defendant Tribunal as he was not "*a party*" before the defendant Tribunal.

8. On 20 June 2014 the Court delivered a Ruling dismissing the strike out application.

9. In the course of its ruling this Court summarised the factual background of the case as follows:

> *"... the statement of agreed facts and the sworn statements establish that the claimants were parties to a dispute over ownership of land which was submitted, in the first instance, to the* ***Molivitinatamata Village Land Tribunal*** *("the Village Land Tribunal") on 30th January 2007. The dispute submitted is described in the agreed statement of facts as relating to the "Abaone land claim". After publishing Notice of Hearing of the "Abaone land" claim the Village Land Tribunal delivered its judgment.*
>
> *On 5th November 2007 the East Malo Area Land Tribunal heard an appeal from the decision of the Village Land Tribunal. From that decision the* ***Family Rasu*** *(represented by the second defendant in these proceedings) appealed to the* ***defendant Tribunal****. The defendant Tribunal issued a notice of hearing ("the Notice") identifying the land the subject of the appeal to it. The defendants assert that the Notice expressly identified "Abaone Land" as one of the lands in question.*
>
> *The claimants did not appear at the hearing before the defendant Tribunal or take any part in it. They were aware of the Notice, but did not participate as they say the Notice did not specify "Abaone lands", and as the Department of Lands in Santo advised them not to attend as the land specified in the Notice was not the same land which was the subject of the two lower Customary Tribunal hearings that they had been involved in.*
>
> *It is not necessary for the purpose of this application to determine the correct meaning and scope of the Notice published by the defendant Tribunal. The undisputed fact is that the claimants did not participate in the hearing before the defendant Tribunal.*
>
> *The decision of the defendant Tribunal determined inter alia custom ownership of "Abaone land", and the claimants are aggrieved by the decision which they say is contrary to the claim which they had earlier made in the Molivitinamata Village Land Tribunal".*

(B) **Civil Case No. 116 of 2010** ("*CC116/2010*") – was commenced in the Port Vila registry of the Supreme Court on 17 August 2010 in the name of "*Family Molivakarua*"; "*Family Savinavanua*"; and "*Family Bobonavanua*" (who were the parties represented by the claimant in CC28/2009). The principal defendant was Wesley Rasu in whose family's favour ("*Rasunaboe*") the defendant Tribunal had made the earlier mentioned declaration of customary ownership of "*Navimapeololo lands*".

10. In form, the action was a claim for a declaration of nullity and an injunction restraining the defendants from registering any lease over the islands of "*Malokilikili*" and "*Maloveleo*" off the coast of South Santo.

11. The principal basis of the claim was that the declaration of customary ownership in the second defendant's favour was being challenged in CC28/2009 and had

not yet been determined. The claim is supported by a sworn statement deposed by Paul Hakwa.

12. By order dated 9 September 2010 this case was transferred for consolidation with CC28/2009 which had been earlier transferred from the Luganville registry and was renumbered Civil Case No. 71 of 2010.

13. Since the consolidation of this case with CC28/2009 (renumbered '71/2010') the claimant in CC116/2010 has not pursued the injunction application and nothing has been done to progress the claim for declaratory relief. So much then for background matters.

14. I turn next to consider the substantive claim which is set out in para. 6 of the amended claim as follows:

> "*The claimant contends that the judgment of the First Defendant* (Tribunal) *made in granting customary ownership to the Second Defendant* (Wesley Rasu) *was made contrary to the provisions of the* (CLTA).
>
> Particulars
>
> *(i) The claimants contend that the Notice issued by First Defendant on the East of Malo on 20 May 2008 which included the land Navinapeoloolo, Avasise, Malokilikili, Maloveleo, Nambua and Malotina land are not the lands subject of dispute in the Molitinatamata Village Land Tribunal and the East Malo Area Land Tribunal which had only dealt with the lands known as Abaone pursuant to Section 7 of the Act".*

15. In short, the complaint is that the defendant Tribunal which is the final appellate tribunal for Malo Island included customary lands and islands that were not the subject matter of the decisions of the lower tribunal(s) against which the appeal was brought.

16. In this latter regard the decision of the Molitinatamata Village Land Tribunal dated 30 May 2007 clearly states "*... i sidaon long lukluk lon wan pis kraon ia Amrobu inside long Abaone title No. 3422*". The Village Land Tribunal determined that Family Molivakarua and Family Rasunaboe "*... oli no kat right long kraon ia Amraobu*". The successful claimant "*... folem kastom Moli Karutuae, Mr. Ben Beru hemi tru kastom owner blong kraon ia Amarobu*".

17. Strictly-speaking the Village Land Tribunal determined the custom ownership of "*Amarobu land*" which is a piece of land within "*Abaone land title No. 3422*". It is not a declaration of the ownership of "*Abaone land*" which appears to be a larger customary boundary than "*Amarobu land*". Be that as it may what the Village Land Tribunal did not consider and determine was custom ownership of "*Namburu or Anamburu land*" or the three (3) off-shore islands of "*Malokilikili*", "*Malotine*" or "*Maloveleo*".

18. Although the actual appeal papers are not included in any of the documents filed in Court, it is common ground that an appeal was filed by Family Molivakarua against the decision of the Village Land Tribunal on or about June 2007 (**see:** the handwritten letters of John Belbong the Secretary of the East Malo Area Land Tribunal dated 16 June 2007 and 9 July 2007 about "*Appeal Case No. 2 of 2007 concernem Land Abaone Plantation title No. 3422* and the appellant family's appeal fees receipt dated 10 October 2007).

19. The decision of the East Malo Area Land Tribunal dated 5 November 2007 determined "*... se family Molibakarua oli no gat raet long graon ia Amarobu*". The decision is signed by the chairman and secretary and concerned "*Land Abaone Plantation title No. 3422*". Essentially the East Malo Area Land Tribunal affirmed the custom ownership of Ben Beru to "*Amarobu land*". It also declared that the second defendant's Family Rasunaboe owned the land "*... we igo fast long mark blong Amarobu mo igo fast long cattle gate long Avaisse*" (**translation:** "*... that borders Amarobu and borders the cattle gate at Avaisse*") whatever land that might be called.

20. Significant by its absence is any mention, in the correspondence and the record and decision of the East Malo Area Land Tribunal, of the islands of "*Malokilikili*", "*Maloveleo*", or "*Malotine*" nor indeed does the decision mention a custom land boundary called: "*Navimapeoloolo*".

21. Be that as it may Family Rasunaboe appealed the decision of the East Malo Area Land Tribunal to the defendant Tribunal which is the final appellate Tribunal within the appellate structure established under the CLTA on Malo Island. Unfortunately again the actual appeal notice is not included in the court file papers but Wesley Rasu the authorised representative of Family Rasunaboe deposes that there was an appeal lodged with the defendant Tribunal which clearly sought a decision on the following lands: "*(a) Avimapeololo (which includes Abaone, Anabuma and Aavasise);* and *(b) Offshore islands – Malokilikili, Malotine, Maloveleo*".

22. If I may say so the inclusion of "*Anabuma*" and the three named islands of "*Malokilikili*", "*Malotine*" and "*Maloveleo*" in the appeal notice was both unfortunate and misleading.

23. I say "*unfortunate and misleading*" because the defendant Tribunal based on the second defendant's appeal and ignoring a very clear warning letter dated 6 June 2008 from a Land Officer not to include "*Nambuma*" and the 3 islands in the appeal and his request "*... please yufala no mixup process*", nevertheless, issued a notice of hearing under Section 25 of the CLTA in the following terms (English translation):

"**PUBLIC NOTICE**

TODAY DATE 20th MAY 2008

THE OFFICE OF MOLIMAIMAI ISLAND LAND TRIBUNAL OF MALO IS PUTTING OUT THIS NOTICE CONCERNING THESE LANDS, ABAONE, NAMBUMA, MALOKILIKILI, MALOTINE, MALOVELEO, ETC... AT EAST MALO AREA.

THE MOLIMAIMAI ISLAND LAND TRIBUNAL COURT WILL SIT TO HEAR THIS CASE ON THE 10TH OF JUNE 2008.

PLACE: AVUNATARI MISSION, WEST MALO
TIME: 9.00 AM IN THE MORNING

PLEASE YOU, THE CLAIMANTS OF THESE LANDS, YOU HAVE TO PREPARE YOUR STATEMENTS, FAMILY TREES AND SKETCH MAPS OF THESE LAND TO COME AND PRESENT THEM IN COURT DURING THAT TIME.

THANK YOU VERY MUCH

(SIGNATURE)
CHIEF MOLIVARA
CHAIRMAN MOLIMAIMAI ISLAND LAND TRIBUNAL
MALO"

24. Plainly the hearing notice added "*Nambuma*" and the off-shore islands of "*Malokilikili*", "*Malotine*" and "*Maloveleo*" to the appeal. These were not the subject matter of the decision of the East Malo Area Land Tribunal.

25. The hearing notice under Section 25 may be contrasted with the appeal notice which an appealing party must give under Section 22 to the Island Land Tribunal. The relevant appeal notice must include within it "*... a description and specify the location of the land*" as well as "*... specify the decision being appeal against*".

26. The latter requirement when read with the provisions of Section 21 of the CLTA makes it abundantly clear that the subject matter of the decision being appealed against is confined and limited to the land(s) that was dealt with by the lower tribunal, in this case, the East Malo Area Land Tribunal and nothing else.

27. If a party to an appeal before the Island Land Tribunal was allowed to add to or increase the land(s) that was dealt with by the lower appellate tribunal and which was not the subject matter of its decision, then, that would be in breach of Section 21 which only applies to "*decisions*" of the appellate tribunals under Parts 2, 3 and 4 of the CLTA.

28. It would also breach the provisions of Part 1 of the CLTA which deals with first instance decisions of single and joint village land tribunals by by-passing the requirements of giving notice to the relevant principal chief(s) of the village or villages within which the additional land(s) are situated (***see:*** Section 7). Finally, it would improperly vest the Island Land Tribunal with an original jurisdiction that

it does not possess under Part 5 of the CLTA and therefore any decision reached by it would not be protected under Section 33.

29. Needless to say allowing an appellant before the Island Land Tribunal to add new lands in an appeal, effectively deprives the respondents to the appeal of any "*rights of appeal*" that they would have had if the added lands were the subject of a decision by a lower tribunal within the hierarchical structure of the CLTA.

30. Section 25 of the CLTA provides:

Notice of hearing

25. *(1). Within 21 days after the establishment of a land tribunal, the secretary of the land tribunal must give notice under subsection (2) to the parties to the dispute.*

(2). The notice must:

(a) be in writing in Bislama, French, English or another language of one or more of the parties to the dispute; and
(b) specify the date and time of the meeting of the land tribunal to hear the dispute; and
(c) specify the place of meeting of the land tribunal, being a place which is convenient having regard to the location of the land, the residences of the tribunal's members, the residences of the parties and the availability and security of meeting places; and
(d) specify the name and address of the secretary of the land tribunal; and
(e) if applicable – specify the grounds of the appeal.

(my highlighting)

31. Notwithstanding the quite improper inclusion of "*Nambuma*"; the 3 offshore islands; and the use of the abbreviation: "*... "ETC*", the defendant tribunal's hearing notice is also non-compliant with the requirements of section 25 of the CLTA in failing to "*... specify the name and address of the secretary of the land tribunal*" and in not including "*... the grounds of appeal*".

32. Even accepting that notice of the defendant Tribunal's hearing had been properly brought to the attention of the parties who appeared before the East Malo Area Land Tribunal including the claimants who chose not to attend the hearing, nevertheless, the composition of the defendant Tribunal was itself non-compliant with the requirements of section 23 of the CLTA.

33. That section requires an Island land tribunal to be constituted by a "*chairperson*" who is the chairperson of the custom area council of chiefs and "*4 other chiefs appointed by the Island council of Chief*" making a total membership of five (5) individual chiefs "*and a secretary*". The record of the defendant Tribunal however clearly identifies it had a chairman *"Chief Molivara Jingo*" and three (3) other members namely: "*Chief Warinaboe George*", "*Chief Mathew Simon*" and "*Chief Take Livo"* making a total membership of four (4) which is one (1) member short of the required number.

34. In my considered view an Island land tribunal which is comprised of four (4) members, one (1) short of the number required under Section 23 of the CLTA, is

not a validly constituted tribunal and is therefore not capable of legally carrying out the function which it is otherwise empowered to exercise under the CLTA. The defendant tribunal's purported hearing of the second defendant's appeal was a nullity because the defendant tribunal was not validly constituted and its decision is "*void ab initio*".

35. The "*locus standi*" and non-appearance of the claimants at the defendant tribunal hearing featured prominently in the sworn statement of Chief Molivara Jingo and in the submissions of defence counsel seeking to uphold the defendant tribunal's decision.

36. As for the claimants standing to invoke Section 39 of the CLTA, this Court in an earlier Ruling on the defendant's strike out application and relying on the decision of the Court of Appeal in West Tanna Area Council Land Tribunal v. Natuman and others [2010] VUCA 35 said:

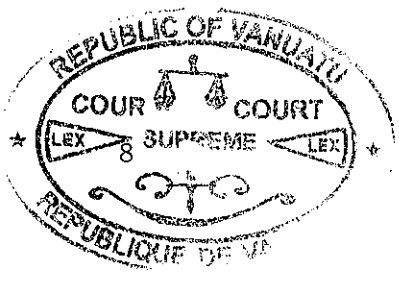
> "*In the present case the claimants were 'parties to the dispute' when it first arose and some of the claimants according to the agreed statements of facts, were parties who initiated or were initially notified of the dispute over 'Abaone land' ... the Court accepts that the claimants come within the expression 'a party to the dispute' in Section 3(2) of the (CLTA) ...*"

This ground of complaint is accordingly dismissed.

37. As for the claimant's "*non-appearance*" before the defendant Tribunal, given its incomplete membership I can do no better than iterate the words of the Court of Appeal where it said in rejecting a similar submission in Taliban v. Worworbu [2011] VUCA 31:

> 5. *"If the Land Tribunal was not lawfully constituted then Mr Taliban had nothing to which he needed to object.*
>
> 6. *While Mr Taliban could have appeared before the Land Tribunal and voiced his objection to any or all of the members of the Land Tribunal (pursuant to his rights under section 26 of the CLT Act), he will have lost nothing by staying away providing that it is eventually determined that the Land Tribunal was not lawfully constituted in the first place. It must be said that there are significant risks in the strategy adopted by Mr Taliban.*
>
> 7. *It was necessary for the Supreme Court to address the issue of whether the Land Tribunal was lawfully constituted before it could consider the consequences of Mr Taliban's decision not to attend the hearing and, more specifically, not to attend and voice his objection to the individual members of the Land Tribunal".*

38. In light of the foregoing the claim succeeds and the decision of the defendant Tribunal is formally quashed.

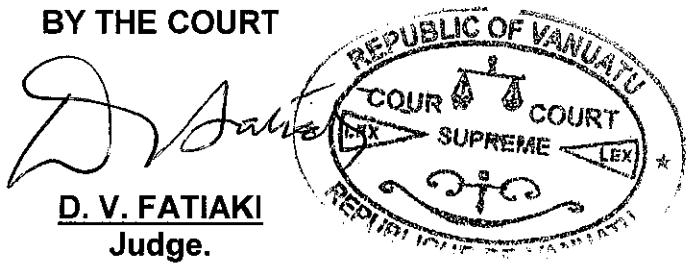


39. As the CLTA has been repealed and replaced by the new Custom Land Management Act ("*CLMA*") I leave it to the parties to consider how best to progress their respective claims.

40. The claimant having succeeded is awarded standard costs against both defendants in equal proportions to be taxed if not agreed.

DATED at Port Vila, this 8th day of December, 2017.

BY THE COURT



D. V. FATIAKI
Judge.