

BETWEEN: TOUMATA TETRAU FAMILY
Claimants

AND: ALICTA VUTI KWIRINAVANUA
First Defendant

AND: THE ATTORNEY GENERAL
Second Defendant

Coram: *Mr. Justice Oliver A. Saksak*

Counsel: *Silas C Hakwa for the Claimant*
Sammy Aron for the First and Second Defendants

Date of Hearing : *2nd November 2017*
Date of Decision: *23rd February 2018, 9:30am*

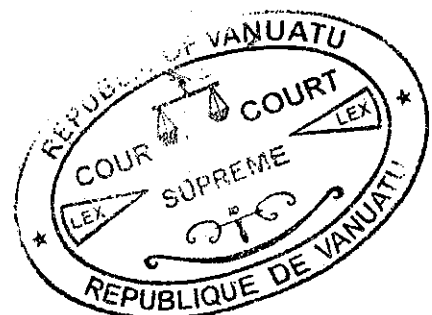
JUDGMENT

Introduction

1. The Claimant filed this proceeding pursuant to rule 17.4, 17.5, 17.6, 17.8 and 17.9 of the Civil Procedure Rules No. 49 of 2002. (the Rules).
2. The claimant challenges the validity of the First Defendant's decision made on 15th January 2017 cancelling his earlier decision made on 4th November 2015 to issue a Certificate of Recorded Interest in Land described as Mantantopua Land. (the Land)

Facts

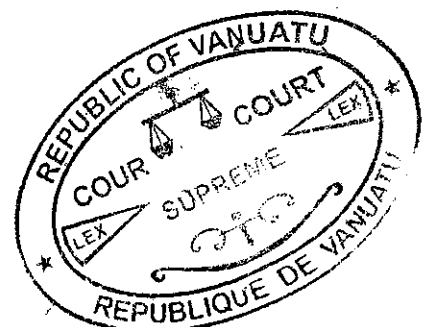
3. The Claimants obtained judgment in their favour as custom owners of the land in the Efate Island Court (EIC) in Land Case No.1 of 1996 on 26th August 2013.
4. Following that decision there was no known appeal filed by any parties against the judgment.



5. The claimant then lodged an application for a Certificate of Recorded Interest in the Land in accordance with sections 19 and 57 of the Customary Land Management Act No. 33 of 2013.
6. As a result of the application the First Defendant issued a Certificate of Recorded Interest on 4th November 2015.
7. The Claimant received the Certificate and took steps to obtain a lease over part of the Land. The Claimant applied for approval to the Land Management Committee and received assurances for the Chairman of the Committee he would recommend approval of the application to the Minister.
8. On 4th February 2016 the Minister approved and issued a Certificate of Registered Negotiator to the Claimant.
9. Despite all that having been done the First Defendant then made another decision in January 2017 to cancel the Certificate of Recorded Interest which he had issued to the Claimant on 4th November 2015.
10. On 18th January 2017 the First Defendant wrote a letter to Tony Kanegai, representative of the Claimant advising him that (among other things) he had received advice from the other parties that there is an appeal in the Supreme Court against the EIC judgment in Land Appeal Case No. 6 of 2013. The appeal warranted the cancellation of the Certificate issued in November 2015.
11. Those facts are not in dispute.

The Reliefs Sought

12. The Claimant challenges the decision of the First Defendant and claims-
 - a) A declaration that the decision made on 18th January 2017 is ultra vires, is a nullity and of no effect.
 - b) The said decision be quashed.



- c) A mandatory order that the First Defendant restore forthwith the Certificate issued in November 2015 to its full force and effect, or alternatively to issue a new Certificate to the Claimant.
- d) Any other orders the Court deems just, and
- e) Costs of and incidental to the proceeding.

The Issues

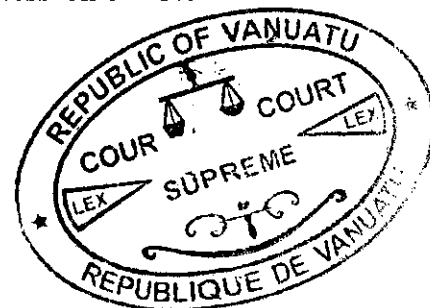
13. Mr Hakwa raised two legal issues for the Court's consideration and determination as follows-

- a) Does the Customary Land Management Act (the Act) make provisions to enable the National Co-ordinator (First Defendant) to review or change his own decision?
- b) Is there any right of appeal prescribed by the Island Courts At [Cap.167] (as amended) to enable an aggrieved party to appeal to the Supreme Court after 25th February 2002?

Discussions and Considerations

14. At the hearing on 2nd November 2017 the Court heard and received oral evidence from Tony Kanegai for the Claimant and from Alicita Vuti, the First Defendant for the defendants. At the close of the defendant's evidence Counsels requested time to file written submissions. The Court allowed 6 weeks to Mr Hakwa to file submissions (by 15th December 2017) and another 6 weeks to Mr Aron (by 27th January 2018).

15. Mr Hakwa filed his written submissions 4 only on 19th January 2018. As at the time of writing this judgment on 14th February 2018 the State Law Office had not filed any written submissions. The defendants have had 27 days from 19th January 2018 to file written submissions in response. That is sufficient time. The Court will in the absence of written submissions by the defendants, consider the oral submissions made by Mr Aron in his opening address prior to calling the State's witness on 2nd November 2017.



16. I now consider the first legal issue. Mr Hakwa submitted the relevant law is the Customary Land Management Act No. 33 of 2013 (the Act) and that there is no other Act of Parliament giving to or conferring upon the First Defendant another other powers, duties and responsibilities other than those conferred upon him under the Act. Further Mr Hakwa submitted the Act does not provide any authority to the First Defendant to review his own decisions. Mr Hakwa relied on section 19 (2) of the Act which states-

"When a determination is filed with the office of the National Coordinator, the written record of the custom ownership determination and the area of land that is owned by the group will become a recorded interest in Land that may not be challenged except on the grounds of improper process or fraud.

(my emphasis)

Mr Hakwa submitted that the First Defendant acted in breach of section 19 (2) of the Act when he cancelled the Claimant's certificate issued by him on 4th November 2015.

17. Mr Aron in his opening submissions referred to sections 5 (3) and 57 of the Act.

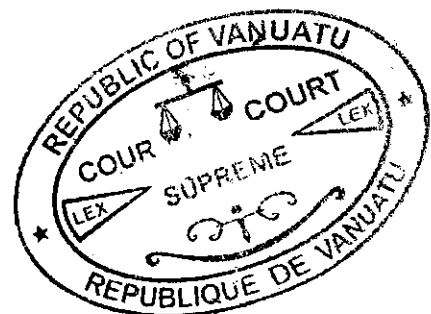
Section 57 states-

" 57 Existing decisions of Island Court and Supreme Court Decisions of the Supreme Court and an Island Court which determine the ownership of custom land and which were made before the commencement of this Act are deemed to create a recorded interest in land in respect of the person or persons determined by such Court to be the custom owners and will enable the custom owners so recorded to be identified for the purpose of consenting to an application for a negotiator's certificate or a lease, or is to provide the basis for rectification of an existing lease instrument."

(my emphasis)

Section 5 (3) states-

"5 Pending court or tribunal proceedings



(3) To avoid doubt, if, at the time that this Act comes into force, proceedings are pending before the Supreme Court or an Island Court relating to a dispute over a custom land, the dispute cannot be dealt with under this Act without the agreement of all parties to the dispute.”

In relation to section 57 of the Act Mr Aron said the section is self-explanatory. He conceded that existing decisions of an Island Court made before the commencement of the Act is a “deeming” decision and is a final decision upon it being recorded, and as such it conveyed a recorded interest in land.

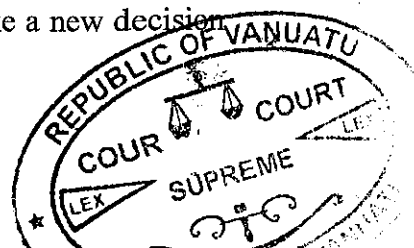
And in relation to section 5 (3) of the Act Mr Aron said it had nothing to do with the subject.

Mr Aron conceded that the facts of the case were not in dispute. However Counsel said that at the time of issuing the Certificate, the First Defendant was not aware of any appeal and it was only after he was made aware that the First Defendant took the decision as a reasonable person to cancel the Certificate he had first issued on 4th November 2015. Counsel argued that because of the existence of the appeal the dispute is not yet settled.

Counsel conceded there was no stay of the judgment and that it was incumbent on the losers to apply for stay, but what the First Defendant did was in the public interest and was done in good faith to enable the appeal to be heard and determined.

Counsel acknowledged there were technicalities as to the service of the appeal but said that did not render the appeal invalid. Counsel invited the Court to take judicial notice of it and to treat it as a valid appeal and to treat it as a “ pending proceeding” under section 5(3) of the Act and allow it to be proceeded with.

18. Mr Hakwa on the other hand argued and submitted that pursuant to section 19 (2) of the Act, the decision is final and may not be challenged in any way except on grounds of improper process or fraud. Further that the First Defendant did not have authority to review his own decision made on 4th November 2015 and to make a new decision



in 2017 to cancel that Certificate. Having done so it is submitted the First Defendant acted outside his powers and was in breach of section 19 (2) of the Act.

19. I accept the submissions of Mr Hakwa for the following reasons-

a) I find no evidence by the defendants showing that the other parties to Land Case No. 1 of 1996 filed any proceedings under section 19 (2) of the Act to challenge the registration of a recorded interest on grounds of improper process or fraud.

b) The Certificate of Recorded Interest In Land issued by the First Defendant on 26th August 2013 states at its very bottom this:-

“ This registered interest is hereby declared as an official and legal determination under the Customary Land Management Act No. 33 of 2013 ”

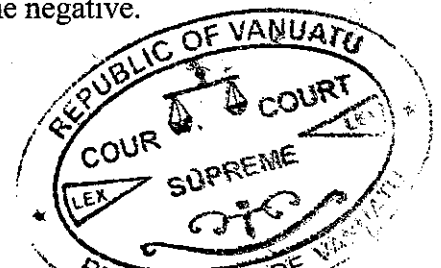
(my underlining for emphasis)

It is sealed by the National Coordinator’s stamp and the Official Stamp of the Registry.

This declaration and the official stamps make it difficult and indeed illegal for the First Defendant to just take an arbitrary decision to cancel the certificate.

Looking at the time frame that had lapsed since registration on 26th August 2013 until 18th January 2017, that was a period of 3 years and 4 months. Other events which the First Defendant was well aware had taken place over this period. For the First Defendant to just ignore all that and proceeded to cancel the Certificate which was “ Official and legal ” was not an action expected of a reasonable person. The submission by Mr Aron in that regard is therefore rejected.

20. For those reasons I answer the first issue raised by Mr Hakwa in the negative.



21. Now the second issue: whether there is a right of appeal by an aggrieved party to the Supreme Court after 25th February 2002?
22. Mr Alicta Vuti's evidence shows in Annexure " AV5" a letter dated 3rd November 2016 written by Family Warakali Saurei which endorsed the Notice of Appeal in Land Case No. 6 of 2013. It is an appeal against the whole judgment of the Efate Island Court date 5th August 2013 in Land Case No.1 of 1996.
23. The appeal was filed purportedly pursuant to section 22 of the Island Court's Act Cap. 167. Subsection 1 states:
- " Any person aggrieved by an order or decision of an Island Court may within 30 days from the date of such order or decision appeal there from to-*
- a) *The Supreme Court, in all matters concerning disputes to ownership of land,*
- b) *The competent Magistrate's Court in all other matters."*
24. Mr Hakwa however pointed out in his submissions that the Island Courts Act was amended in 2001 by Amendment Act No. 15 of 2001 by Parliament removing the right of appeal direct to the Supreme Court but directing that all appeals be made to the Magistrates Court.

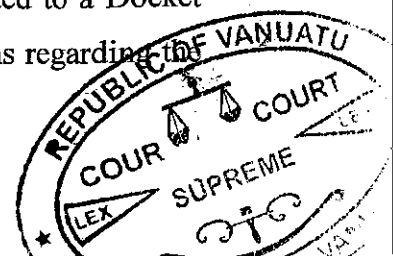
With the amendment, section 22 (1) now states:

" Any person aggrieved by an order or decision of an Island Court may within 30 days from the date of such order or decision appeal from it to the competent Magistrate Court."

(my emphasis)

Mr Hakwa relied on the case of Poilapa iv. Masaai [2011] VUSC 69 and Bob.v. Mala [2015] VUCA 3 where both the Supreme Court and the Court of Appeal have confirmed the change and repeal of the original subsection 1 to section 22 of the Act.

25. Land Appeal Case No. 6 of 2013 has been renumbered as Land Appeal Case No. 17/2157. It has been managed by Justice Aru and is yet to be allocated to a Docket Judge for hearing. Mr Hakwa may need to make the same submissions regarding the



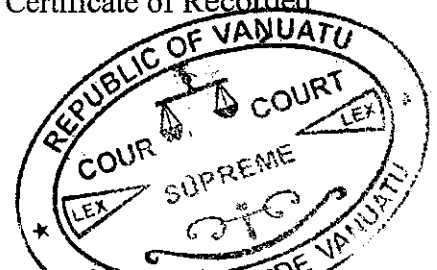
appeal when the appeal is heard so the other parties could be given the opportunity of being heard. But since the issue was raised before me in this case, I cannot help but answer the issue very simply.

And the simple answer to the issue raised by Mr Hakwa is “ No”, there is now no right of appeal (in view of the Amendment Act No. 15 of 2001) direct to the Supreme Court after 25 February 2002 by any aggrieved party.

26. Having found as I have, the First Defendant’s action in cancelling the Claimant’s Certificate issued in November 2015 was unlawful and ultra vires his powers, duties and responsibilities under the Customary Land Management Act. The purported appeal filed on 25th September 2013 could not be the valid grounds for cancelling the Certificate. Once the Certificate was issued and registered on 4th November 2015 it could not otherwise be cancelled, let alone be reviewed, by the Co-ordinator except by a proceeding instituted under section 19 (2) of the Act and after a competent Court had heard and found the registration to have been made on grounds of improper process or fraud.

27. For those reasons I give judgment in favour of the Claimant and therefore issue the following-

- a) A Declaration that the decision of the Efate Island Court made in Land Case No. 1 of 1996 on 26th August 2013 declaring the Claimant as custom owners of part of the land which is comprised in the land which is commonly described as MANTANTOPUA LAND, situated at or near Malapoa College and Vanuatu Institute of Teachers Education on Efate is an existing decision of an Island Court within the meaning of Section 57 of the Act.
- b) The First Defendant’s decision made on 18th January 2017 to cancel his earlier decision made on 4th November 2015 to issue a Certificate of Recorded Interest in Land to the Claimant is hereby quashed.
- c) The First Defendant be hereby required to issue a new Certificate of Recorded Interest in Land forthwith to the Claimant.

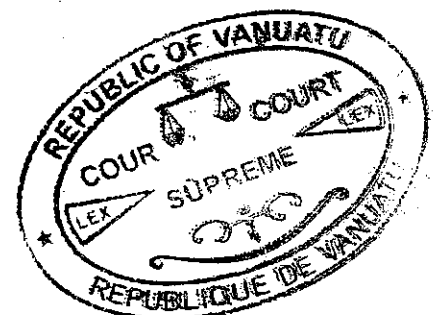


- d) The First and Second Defendants pay the Claimant's costs of and incidental to this action on the standard basis as agreed or taxed by the Master.

Late Submissions

28. The State filed late submissions on 20th February 2018 at 2:00pm. I only read them at 0930 yesterday when they were brought to me. I have observed the following-

- a) The Facts are not disputed.
- b) The date at paragraph 5 should be 4th November 2015 not 4th February 2015.
- c) The Court has dealt with the issues raised by the Defendants as one issue (Issue 1) by the Claimant.
- d) The date at paragraph 15 should be 4th November 2015 (not 2016).
- e) The date given at paragraph 18 as 4th February 2016 and as 3rd November 2016 are confusing and not consistent with the dates given at paragraphs 5 and 15.
- f) The Wednesbury Case cited by the defendants in paragraph 18 is very much against the defendants for reasons canvassed in paragraph 19 of the judgment. Those submissions in paragraphs 22, 23 and 34 are rejected.
- g) For reasons given in paragraph 26 of the Judgment Issue 2 is answered in the affirmative.
- h) The Tariwer Case as cited is distinguished and not applicable to this case.
- i) Stephen's Case in paragraph 46 in my view favours the Claimant's case.



DATED at Port Vila this 23rd day of February 2018

BY THE COURT


OLIVER A. SAKSAK

Judge

