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

Civil Appeal
Case No. 18/1673 SC/CIVA

BETWEEN:
1. **SETH KAURUA**
2. **NIANGIAN TASSO LOMANI**
3. **NAUMU LOMANI**
4. **JOHN KAURUA**
5. **TUMAN NAKOU**
6. **SAWE LOMANI**
7. **SAMSON LOMANI**
8. **SAM NARIAN**
9. **SETH LOMANI**

Appellants

AND:
1. **DANIEL KAMISAK**
2. **ANDREW KAMISAK**

Respondents

Before: ***Justice D. V. Fatiaki***

In Attendance: *Counsel – Mr. R. T. Kapapa for the Appellants*
Counsel – Mr. R. Rongo and Mrs. T. Harrison for the Respondents

Date of Judgment: *01 April 2019*

REASONS FOR JUDGMENT

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1. On 01 April 2019 this Court allowed the appeal and quashed the decision of the Magistrate's Court, Tanna in **Civil Case No. 14/17** in its entirety. The respondent was summarily ordered to pay the appellant VT40,000 assessed costs of the appeal within 21 days. The Court said it would deliver its fuller reasons later. The following are the Court's reasons for allowing the appeal.

2. The background facts are not in a dispute and may be briefly summarised. On 15 July 2013 the respondents were declared custom owner of *"Nahabaumene land"* at South Tanna by the Tassa Village Land Tribunal. By an amended claim dated 25 November 2014, the respondents relying on the said custom ownership declaration sought VT50, 000 damages against the appellants "*for trespass and unlawful use of land*" as well as an "*order for eviction*" against the appellants together with costs in **Civil Case No. 14/17**. Default Judgment was entered in the respondents favour in the absence of the appellants' counsel. Subsequently the Magistrate's Court set aside the default judgment and the respondents appealed against the setting aside. Their appeal was dismissed and the matter

returned to the Magistrate's Court to determine [***see:*** Kamisak v Niangen [2016] VUSC 102].

3. This is a second appeal against the decision of the Magistrate Court, Tanna in **Civil Case No. 14/17** delivered, again in the absence of the appellant's counsel, on 18 May 2018. This time the Magistrate's Court awarded the respondent damages of VT50, 000 for trespass and unlawful use of the respondent's land and the appellants were ordered to remove all their properties out of the boundaries of "*Nahabaumene land*" within 3 months. Wasted costs of VT91,650 was also awarded to the respondents to be paid by the appellant within 6 months.

4. At the outset and before dealing with the grounds of appeal I note that on 4 March 2014, 3 weeks after the claim was filed, the appellant filed an application to strike out the claim on the basis that it failed to comply with the Civil Procedure Rules 2002 in particular **R14.39** which mandatorily prohibits the making of:

"... an enforcement order for the possession of customary land except after hearing a claim under rule 16.25"

R16.25 in turn provides:

"A person who wishes to enforce a decision of a Land Tribunal may file a claim in the Supreme Court."

5. Although invoking the rule appears to be discretionary as to the Court ("*may*") **R16.1** which expressly deals with the application of PART 16 clearly states that: "*Division 8 (dealing with customary land) apply only to the Supreme Court."*

6. The respondents' original and amended claims are predicated upon there being a valid declaration of custom ownership by the Tassa Village Land Tribunal in the respondent favour, and mindful of the "*order for eviction*" sought against the appellant's, there is not the slightest doubt that the respondent's claim seeks, in the words of **R14.39**: *"the possession of customary land"* and whatsmore, in terms of **R16.65**, evinces a desire: *"... to enforce a decision of a land tribunal."*

7. Plainly the respondents' claim brought and filed in the Magistrate Court, Tanna constitutes a failure to comply with above Rules and although not necessarily affecting its jurisdiction, the Court may nevertheless "*set aside all or part of the proceeding*" [*see:* R18.10(2)(a)]. The appellants' application to strike out the entire claim did not refer to any Rule, nevertheless, it should have been considered and dealt with by the Magistrate Court before it entered a default judgment on 22 July 2015 and even when it set aside the default judgment on 22 March 2016 almost 2 years after the appellants' strike out application had been filed.

8. By a Notice of Appeal filed on 15 June 2018 the appellants sought the setting aside of the entire decision of the Magistrates Court on the following grounds:

1. *"That the valuation of the properties of the appellants exceed 10,000,000VUV to be fully assess (see the Court of Appeal decisions in the sworn statement to be file in support of this claim;*

2. *That there is still pending land appeal issues and as confirmed by the Island Court dated 24th of May 2018;*

3. *Pursuant to the principle of Iaus v Noam [2017] VUCA 40;*

4. *That the Court cannot deal with issues of trespass and unlawful uses of the land given the current position of the Court where secondary rights are concern;*

5. *The Island Court still have unfinished matter to deal with in relation to the review of the decision*".

9. The appellants also sought leave to adduce further evidence at the hearing of the appeal, in particular, a Valuation Report of the land which the appellants had been ordered to vacate and which report assessed the market value of "*Nahabuamene land*" at **VUV92,000,000**. The second item of evidence sought to be adduced, is a registered stamped copy of an appeal/review application filed in the **Tanna Island Court (Land)** challenging the decision of the Tassa Village Land Tribunal.

10. In this latter regard, the existence of a valid subsisting appeal against a land tribunal decision does not mean that the tribunal's decision is suspended or stayed or ceases to exist or is incapable of vesting any rights in the person in whose favour the declaration of ownership was made. On the contrary, the tribunal's decision exists for all intents and purposes until it has been quashed or set aside by order of a Court or a higher tribunal (if any).

11. In the present case even if the appellants' additional evidence is accepted on its face evidencing an application under the Custom Land Management Act ('CLMA') for the **Island Court (Land)** to review the decision of the Tassa Village Land Tribunal, that alone, does not alter the fact that the tribunal's decision in the respondents favour subsists and governs the "*status quo*" until it is quashed or cancelled.

12. The grounds of appeal may be reduced to the following:

(1) Absence of jurisdiction in the Magistrates Court; and

(2) Absence of locus on the respondent's part in bringing the claim owing to the existence of an appeal against the custom ownership declaration in the respondent's favour.

13. As to ground (1), appellant's Counsel submits that the Magistrates Court, Tanna failed to satisfy itself that it had jurisdiction to deal with the claim in terms of section 1 of the **Magistrate's Court (Civil Jurisdiction) Act [CAP. 130]** which delineates the jurisdiction of the Magistrates Court in civil proceedings in the following relevant terms:

"***The Magistrates Court shall have jurisdiction to try all civil proceedings –***

(a) ***In which the amount claimed or the value of the subject matter does not exceed VT1,000,000*** *except claims relating to permanent physical damage to a person*".

(my highlighting)

14. In National Housing Corporation v Okau [2013] VUCA 21 where the Claimant sought an eviction order and loss and damages and mesne profits valued at VT500, 000, the Court of Appeal in discussing the nature of an eviction order and the jurisdiction of the Magistrates Court said:

"A claim for an eviction order is a civil matter. If the Magistrates Court had jurisdiction it would have to arise under either s.1(a) or 1(b) of the Act. The other paragraphs of s.1 plainly do not have application."

And after describing the claim advanced "*as a straight forward case of trespass...*" and excluding s.1(b) the Court continued:

"The question therefore is whether the Magistrates Court had jurisdiction under s.1(a) as a civil proceeding. "....in which the amount claimed or the subject matter does not exceed VT1,000,000...."

The claim for an order for eviction was not a money claim. What was claimed was possession of the leasehold land of which NHC was the registered lessee. Did the subject matter of the claim exceed VT1,000,000."

15. The Court of Appeal then referred to the deposed purchase price of the lease and a valuation certificate which assessed the value of the leasehold to be VT1,500,000 and the Court opined:

"....where an order for possession or eviction is sought by the lessor the value of the subject matter before the Court is the value of the leasehold interest. In this case that value was clearly above VT1,000,000. The Magistrates Court therefore did not have jurisdiction.

In other cases where the value of the subject matter is uncertain the provision of s.4 of the Act will be important."

16. Section 4 of the **Magistrate Court (Civil Jurisdiction) Act** expressly provides:-

"(1) where the value of property or a claim cannot be precisely given a plaintiff may give an estimated value in his plaint."

Although the section refers to "*a plaintiff*", it does not expressly bar a defendant from giving "*an estimated value*" if the jurisdiction of the Magistrate Court is denied or being challenged as in this case. In both instances however, subsection (2) requires the Magistrate Court: "*... to try the question of value as a preliminary issue*".

17. In the present case, the first named appellant deposed in a sworn statement in support of an application to stay enforcement of the Magistrate Court judgment, as to the "*estimated value*":

"That the land subject of dispute is more than 100 hectares of land and valued at over VT10, 000,000 to which the Magistrate Court has no jurisdiction."

The statement is not disputed by the respondent and indeed is fully supported and confirmed by the Valuation Report subsequently produced by consent at the hearing of the appeal.

18. In light of the foregoing and given the undisputed value of "*Nahabaumene land*" which is undoubtedly, the "*subject matter*" of the respondent's claim for eviction, the irresistible conclusion that this Court is driven to, is that the Magistrates Court, Tanna did not have jurisdiction to hear and determine the claim when it purported to do so. Its eviction order was a nullity and must be and is hereby quashed. The award of damages however, is prima facie within jurisdiction and unaffected by the quashing of the eviction order.

19. The second basis [ground 2] on which the Magistrate's Court decision is challenged is that the award of VT50,000 for trespass and unlawful use is an award that is predicated on the magistrate's acceptance of the respondent's claim that they have a valid declaration of ownership from a lawfully constituted customary Land Tribunal under the Customary Land Tribunals Act ("***CLTA***"). In the event, however, that the Tassa Village Land Tribunal's decision is successfully appealed or reviewed the entire basis for the claim of trespass and unlawful use falls away and so too must the consequential award of damages based on it.

20. The declaration of the Tassa Village Land Tribunal in the respondents' favour, is recorded in a prescribed statutory Form and is dated 15 July 2013. The Tribunal was chaired by **Kapaho Peter** with **Alex Moses** as the secretary. On its face, the Form clearly shows in Box *2* entitled: "*Nem blong ol klemens*", that there were no counter-claimants or competing claimants to the disputed land ["*INOGAT (NIL)*"] other than "*Daniel Kamisak*". The declaration therefore was not one that resulted from a determination of a "*dispute*" about ownership of customary land but, rather, was a certification of an uncontested ownership claim to

"Nahabaumene land". That is not a procedure or order provided for in the CLTA and such declaration is therefore unlawful.

21. The declared object of the CLTA is: *"....to provide for a system based on custom to resolve disputes about customary land"*. This is achieved by the establishment of a hierarchy of land tribunals commencing with the village land tribunal at the lowest level and ascending through an appeal process through various custom sub-area and custom area land tribunals culminating in the Island Land Tribunal which is the final appellate tribunal in the hierarchy.

22. Within that structure at the lowest level would be the Tassa Village Land Tribunal which deals with *"disputes about the ownership or boundaries of customary land ... situated wholly within the boundaries of a village"*. **Section 7** requires Notice of the dispute to be given to the principal chief of the village and the Notice must clearly identify the disputed land and include "*the names of the parties to the dispute*".

23. In the Court's view and in light of the wording of Section 7, in the absence of a recorded and notified "*dispute*" concerning customary land, the provisions of the CLTA have no application and no declaration of ownership could be issued or recorded using the Form prescribed in the Act. This factor alone raises serious doubts about the validity and lawfulness of the declaration of the Tassa Village Land Tribunal in the respondents' favour. That in turn, critically undermines, the respondents' claim before the Magistrate's Court which is based on the existence and validity of the declaration.

24. In addition, the appellants in their defence also claim to be the rightful custom owners of "*Nahaumene Land*" by virtue of an earlier determination of the South Tanna Area Council of Chiefs on 5 September 1998 which is 15 years earlier than the declaration in the respondent's favour. Based on that declaration the appellants also claim "*the customary right to use the land*". It is undisputed that the appellants have occupied and built homes and developed gardens on the disputed land since long before independence. Needless to say without determining the validity of the appellants' competing custom ownership claim the Magistrate could not accept the respondents' ownership without providing some reason(s) for rejecting the appellants' claim.

25. Even assuming there was a genuine "*dispute*" that had been referred to the principal chief, **section 8** requires such chief to establish a village land tribunal to hear and determine the dispute. The principal chief if qualified and willing, is to chair the tribunal with two (2) other qualified chiefs or elders of the village appointed by him to sit as members of the tribunal. **Section 37** sets out part of the qualification requirements for appointment of tribunal members including being named in a "*list of approved chiefs and elders*" for the particular custom area where the disputed land is situated.

26. In the case of the Tassa Village Land Tribunal its members were: **Kapaho Peter** as chairman and **Iawikou Smith** and **Iawikou Timothy** as members. The secretary to the Tribunal was **Alex Moses**. Concerning all four (4) named individuals, the Senior Land Management Officer, South wrote in an open letter dated 4 August 2014:

> "*We would like to confirmed* (sic) *that our office have not train any of the above personal* (sic) *as the Adjudicators of Land Tribunals on Tanna Island.* ***The names of the above personals*** **(sic)** ***are not in the list of the listing of Tanna Adjudicators***".
>
> (my highlighting)

This information is reinforced in an open letter of the same date from the chairman of the highest chiefly council on Tanna Island, namely, the Nikoletan Island Council of Chiefs (***see:*** Section 36 of the CLTA).

27. On this basis also, the validity and qualifications of the members and therefore the composition of the Tassa Village Land Tribunal is open to considerable doubt. Needless to say an unlawfully constituted tribunal is legally incapable and incompetent to determine a customary land dispute.

28. Furthermore section 37(2)(d) of the CLTA disqualifies a person or tribunal member from being appointed or continuing to sit as a member of a land tribunal if he/she:

> *"....has such business or financial interest, or social, religion, political or other beliefs or associations that will prevent him or her from applying custom honestly, and adjusting impartially."*

29. In this regard too there is some evidence to suggest that the tribunal chairman and secretary are "*close friends*" of both respondents and the two (2) other tribunal members are "*real brothers (one blood)*" of the secretary. In other words, all members of the tribunal including the secretary may well be disqualified by virtue of their close personal, social and family associations with the respondents in terms of Section 37(2)(d) (above).

30. Having said that, this Court cannot ignore the provisions of Section 58 of the Custom Land Management Act (**CLMA**) which replaced the CLTA and which provides for a right to challenge existing decisions of a single village tribunal made before the commencement of the CLMA (**ie:** 20 February 2014), if such challenge occurs "*... within 12 months after the commencement of CLMA*" (**ie:** between 20 February 2014 and 20 February 2015).

31. Subsections (3) then provides for the filing of an application with the appropriate **Island Court (Land)** where a person seeks to challenge the decision of a village customary land tribunal under s.58.

32. In the present case the decision of the Tassa Village Land Tribunal is dated 15 July 2013 which is 7 months before the commencement of the CLMA (the first condition precedent) and the first indication and confirmation of the appellants' challenge to the said tribunal's decision is the letter dated 4 December 2014 from the National Coordinator to the first named respondent Daniel Kamisak and a second letter dated 08 January 2015 which is 6 weeks before the last possible date of the 12 month window provided by Section 58 *ie*. 20 February 2015 from the National Coordinator to the second named appellant confirming the acceptance and validity of the appellants' challenge to the Tassa Village Land Tribunal's decision which complies with the stipulated statutory timeframe.

33. There is also the suggestion in counsel for the respondents' submissions that the appellants intentionally absented themselves from the Tassa Village Land Tribunal hearing and therefore cannot now be heard to complain about it.

34. In rejecting a very similar submission in Taliban v Worworbu [2011] VUCA 31 the Court of Appeal said:

> *2. "Mr Taliban (the appellant) applied to the Supreme Court pursuant to s. 39 of the Customary Land Tribunal Act to cancel the decision of the Land Tribunal and for the dispute to be determined by a differently constituted land tribunal. The essential basis of his application was that the Land Tribunal was improperly constituted and that it had determined the matter in the absence of all the claimants to the land.*
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> *3. In a decision given on 19 July 2011, Fatiaki J dismissed Mr Taliban's application on the grounds that Mr Taliban had "(waived) his rights to object to the qualifications of the tribunal" pursuant to section 26(2). The basis for Fatiaki J's conclusion in that respect was the clear and determined refusal by Mr Taliban to attend the Land Tribunal hearing despite receiving ample notification of that hearing and even after being prompted by an emissary sent by the Land Tribunal requesting his attendance.* ***Mr Taliban's refusal to attend the Land Tribunal hearing was unquestionably a protest principally directed at (what he considered to be) the improper makeup of the tribunal.***
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> *4. Whether or not Fatiaki J's reaction to Mr Taliban's protest was an available outcome critically depends on whether the Land Tribunal was lawfully constituted under the Customary Land Tribunal Act. Fatiaki J did not address this issue notwithstanding that it was central to the application before him.*
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> *5.* ***If the Land Tribunal was not lawfully constituted then Mr Taliban had nothing to which he needed to object.***
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> *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".*

And later the Court of Appeal said (at para.11):

"In order to determine whether this Land Tribunal was lawfully constituted, and accordingly whether its decision is valid, it will be necessary for the Supreme Court first to ascertain which particular council of chiefs had "customary regulation" over the land in question. Once that is established, ***it will then need to determine whether the members of the land tribunal in question were, in each case, drawn from the list of approved adjudicators compiled by that particular council of chiefs****. Finally, it must be satisfied that the necessary procedural steps (the giving of public notice and suchlike) have been taken pursuant to ss 7 - 9. This is a different issue to whether a land tribunal has conducted itself correctly under Part 6 of the Act".*

(my highlighting)

35. On the above basis assuming the appellants were aware of the tribunal's sitting, counsel's submissions concerning the non-appearance of the respondents before the Tassa Village Land Tribunal is without merit and must be rejected.

DATED at Port Vila, this 1st day of April, 2019.

BY THE COURT

D. V. FATIAKI
Judge.