IN THE SUPREME COURT OF

THE REPUBLIC OF VANUATU

(Civil Jurisdiction)

Civil

Case No. 22/1898 CVL

BETWEEN: **Family Jimmy, Family Alick, Family Supapo, Family Tom, Family Apia and Family Masiga**

Applicants

AND: **Humphrey Tamata**

First Respondent

Samuel Taritonga, Joseph Orah, Jack Ben, Holi Jospeh, John Benhjamin Taritonga, Apia Renzo Valia, Thompson Valia, John Lui Valia, Alfred Taritonga, Willie Taritonga

Second Respondents

Date: 22nd September 2022
Before: Justice S M Harrop
Counsel: Mr E Macreveth for the Applicants
Mr T Loughman for the First Respondent
Mr E Molbaleh for the Second Respondents

JUDGMENT

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1. The applicants have applied for leave to file a judicial review application out of time under Rule 17.5 (2) of the Civil Procedure Rules. The application is opposed by both respondents.

2. The applicants claim that they are custom owners of Lumuwi (Kalae) nasara situated at Borgue land, Lamen Bay, on the island of Epi.

3. In their proposed judicial review application they seek: (a) a declaration that a custom owners' consultation meeting convened on 18 September 2020 by some customary land management officers from the first respondent's office was null and void because they were wrongly excluded from it; and (b) an order quashing a "green certificate" i.e. certificate of recorded interest in land issued by the first respondent on 1 December 2021 because they are not included in it. A related order is sought that the first respondent be directed to restart the formal process of identifying and the custom owners of the Borgue (and Velague) Land.

4. The claim was filed on 22 July 2022 and subsequently, following the direction of Justice Tuohy on 18 August 2022, an application to file the judicial review out of time was filed.

5. The claim is strictly out of time because both of the decisions which are challenged were made more than six months before 22 July 2022. The primary decision of concern to the applicants is the issue of what they say is a defective green certificate. As I observed to Mr Macreveth, his

clients would not be complaining about exclusion from the meeting if the green certificate which resulted had nevertheless included them as custom owners. The applicants say they did not know about the 1 December 2021 decision until some time in February 2022 so, in relation to timing alone, I would have had sympathy with their application to file out of time because the claim was filed within six months of February.

6. However, the fundamental consideration on any application for leave to file out of time is the apparent merit of the proposed claim, although some caution is of course required in assessing this at an early stage of the case. If a claim appears to have merit then, especially in the absence of prejudice to the respondents, leave is likely to be granted, even if there has been quite a significant delay beyond the six months deadline set out in rule 17.5(1) of the Civil Procedure Rules. On the other hand, if a claim appears not to have merit then leave will almost certainly be refused. If there is a reasonable basis for thinking it might succeed then "substantial justice", to use the words of Rule 7.5(2), may require leave to be granted rather than to deprive the applicants of any chance of success by refusing leave.

7. After discussion at the hearing of the application in Chambers today, Mr Macreveth accepted that the proposed claim could not succeed because there is no proof beyond their own assertions that his clients are custom owners as they plead. There is no decision of the Epi Island Court or the Customary Land Tribunal to which they can point as confirmation of this critical status. They cannot complain about not being treated as custom owners at the meeting or in the green certificate unless they are proven custom owners.

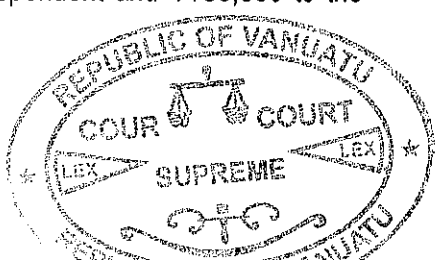
8. Reference was made to a decision on 17 October 2003 of the Epi Island Court in Land Case number 01/2000. More than a little ironically, Mr Macreveth was one of the Island Court justices (and the Clerk of the Court then is now the Registrar of the Supreme Court) who heard and determined that case. However as I read that judgment the current claimants were not parties to the case. Furthermore, those who were parties did not receive from the court any determination that they were custom owners. The claim of family Mokono and Charley Tomate to be custom owners was rejected and the counterclaim by Chief Orah Peter was upheld, but only in the sense that he was declared to be *representative of* the custom owners, whoever they may be. The judgment certainly did not establish whether or not the present claimants are custom owners or even consider whether they might be.

9. Mr Macreveth said his clients were, aside from this proceeding, seeking clarification of the 2003 judgment with a view to their being established as custom owners, but it seems to me that clarifying a judgment in which they were not parties will not assist them. Rather, I suggest they need to make a new application to the Customary Land Tribunal seeking to be declared custom owners. If they succeed in doing so then no doubt the first respondent will treat them accordingly.

10. The subsidiary order sought (that the court direct the first respondent to restart the process of identifying the custom owners) is not one the court could properly make in any event. It is surely for the claimants to make formal application to the Tribunal for determination of their claim, not for the first respondent to reach out to them to invite an application to him or the Tribunal.

11. Given that this claim has no prospect of success if leave is granted to pursue it, I decline to extend the time for making the claim.

12. At the conclusion of the hearing counsel discussed costs and reached agreement. By consent I award costs against the applicants of VT20,000 to the first respondent and VT30,000 to the second respondents.



Dated at Port Vila this 22nd day of September 2022

BY THE COURT

Justice S. M. Harrop