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

CIVIL APPEAL CASE No.25 OF 2014

BETWEEN: **SOLOMON SAIPIR AND WILLIAM KALOTITI MATAKUTALO**
Appellants

AND **SIVIRI/SUNAE JOINT LAND TRIBUNAL**
First Respondent

AND **KALKAUA LAUMANU**
Second Respondent

AND **OBED PAKOA (PHILIMON PAKOA)**
Third Respondent

AND **HARRY GILBERT (TAURASONGI DICK TAKUTA)**
Fourth Respondent

AND **ANDREW POPOVI**
Fifth Respondent

Coram: *Hon. Chief Justice Vincent Lunabek*
Hon. Justice Bruce Robertson
Hon. Justice Oliver Saksak
Hon. Justice John Mansfield
Hon. Justice Dudley Aru
Hon. Justice Stephen Harrop

Counsel: *Mr George Nakou for Appellants*
Mrs Viran Molisa Trief for First Respondent
No appearance by the Second, Third, Fourth and Fifth Respondents

Dates of Hearing: *10 and 12 November 2014*
Date of Judgment: *14 November 2014*

JUDGMENT

Introduction

1. The appellants issued proceedings in the Supreme Court as Civil Case No. 66 of 2009. The proceeding was instituted pursuant to section 39 (1) and (2) of the Customary Land Tribunal Act [CAP. 271] (the Act). The Act was repealed by Parliament by the

Customary Land Tribunal (Repeal) Act No. 34 of 2013 with effect from 20 February 2014. In place of this Act Parliament enacted the Custom Land Management Act No. 33 of 2013 which took effect also on 20 February 2014.

Background

2. In or about 2008 the appellants and the second, third, fourth and fifth respondents had gone before the Siviri/Sunae Joint Village Land Tribunal, the first respondent in this appeal, to have their dispute addressed as to customary ownership of land known as "Udaone" which is situated in North West Efate. The appellants were the claimants in that Land Claim No. 1 of 2006. The first respondent did not uphold the appellants' claims. Aggrieved by that result the appellants commenced Civil Case No. 66 of 2009 on 10 June 2009. That was some 18 months after the decision of the Tribunal. They sought orders under section 39 (1) and (2) of the repealed Act that the Tribunal's decision dated 9 January 2008 be set aside, and that the Tribunal be ordered to convene and re-determine custom ownership of "Udaone" Land.

3. The matter was listed before the primary judge for management conferences on 24 September 2009, 16 October 2009, 14 December 2009, 9 February 2010, 1 March 2010, 22 March 2010 and 16 April 2010. The hearing was completed in 2010.

4. On 2 July 2014 the Chief Registrar issued a notice of delivery of judgment for Friday 4 July 2014. On 3 July 2014, the appellants applied to the Supreme Court for leave to re-open their case and to present further evidence and material which had become available to them between the time the judgment was reserved and that date.

5. On 4 July 2014 the Supreme Court delivered a formal judgment. The primary judge concluded that Civil Case No. 66 of 2009 was *"wholly inappropriate and misconceived"* by reason of the new legislation and therefore allowed the respondents' application to strike out the proceeding with costs on the standard basis. The primary Judge also made some observations about the merits of the grounds on which the appellants brought their claims before the Supreme Court. The application of 3 July 2014 was not listed for conference or for hearing before judgment was delivered and no reference was made to it in the judgment.

6. The appellants appeal against that judgment on two main grounds: (a) breaches of procedural fairness and (b) delay.

7. When the Court first heard this appeal on 10th November Mr Nakou and Mrs Trief acknowledged and accepted that the proceeding was instituted under the Customary Land Tribunal Act. Both counsel acknowledged and accepted that the Act has now been repealed and replaced by the Custom Land Management Act No. 33 of 2013. Further both counsel accepted that the primary judge was correct in holding that the dispute of the parties to this appeal is subject to the provisions of sections 5 and 58 of the Custom Land Management Act, and should now be considered under that Act.

8. However Mr Nakou advanced a further argument that if the judgment was upheld on appeal the appellants were concerned that some parties may take advantage of the passing comments or decisions of the primary judge made in relation to complaints of *"non-compliance" "disqualification", "bias", "lack of jurisdiction"* and *"composition"* of the tribunal. These are contained in paragraphs 25-36 of the judgment of the primary judge. In the event that occurred, Mr Nakou argued that would be a bar to the appellants proceeding with their dispute under the provisions of the Custom Land Management Act.

9. The Court then invited Mrs Trief to indicate whether the first respondent was in a position to agree that there was a breach of natural justice, either by the application of 3 July 2014 not being addressed at all before the judgment, or by the judge not inviting submissions on the applicability of the new legislation before the judgment, that the appeal should be allowed and that by consent the matter be dealt with under the new legislation. Mrs Trief sought an adjournment to take instructions.

10. When the matter was recalled on 12 November 2014 Mrs Trief indicated to the Court that she had been unable to take instructions, but as a Tribunal the first respondent would abide orders of the Court. Counsel reminded the Court of the position reached on 10 November that the appeal might be allowed and the matter be returned to the primary judge for the parties to be heard on whether or not they would consent to the matter proceeding under the Custom Land Management Act. Counsel relied on the case of West Tanna Area Council Land Tribunal v. Natuman [2010] VUCA 35 CAC 21 of 2010.

11. Mr Nakou objected to the proposition by Mrs Trief on the basis that none of the parties apart from the first respondent had displayed any interest in the judgment. Their non-appearance at the hearing of this appeal was clear indication of that. Mr Nakou did however make clear to the Court that the appellants were no longer pursing their application to re-open the proceeding in the Supreme Court but rather that the appeal should be allowed purely to avoid the risk associated with the adverse comments by the primary judge on the merits of their application. These comments were not the reason why the claim was dismissed. It was dismissed because of the effect of the new legislation.

12. That being the position of the appellants and in view of the first respondent indicating that it would abide the decision of the Court, it is not necessary to consider the merits of the case addressed by the primary judge. The first respondent did not dispute that the primary judge should have given the appellants an opportunity to be heard, either on the application to call new evidence having regard to the period between the hearing and the judgment or on whether the new legislation meant that the Supreme Court action should be dismissed.

13. We accept Mr Nakou's argument that although the primary judge was correct in holding that the unresolved dispute as to custom ownership of "*Udaone*" Land between the parties now falls to be determined under the Custom Land Management Act, there was a failure to accord procedural fairness. That may have led to the primary judge making the additional observations on the merits of the claims which were not appropriate. The observations of the primary judge in paragraphs 25 – 36 of the judgment therefore have no significance for the future hearing in the Land Tribunal in so far as it deals with the merits as noted in [8] above.

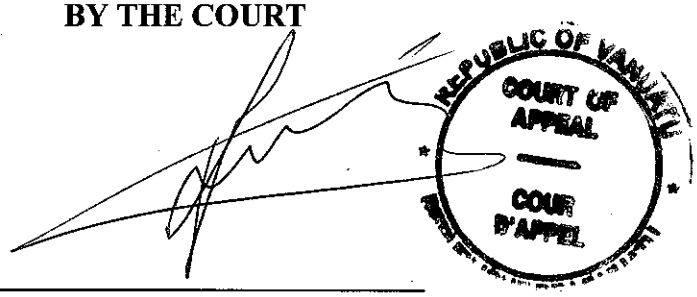
14. We allow the appeal for those reasons and set aside the judgment of the Court below. As the appellants do not now wish to reopen the case and have acknowledged that their dispute is currently pending before the Land Tribunal and have indicated their willingness to have their dispute heard under the scheme established by the Custom Land Management Act, it is not necessary to remit the matter for a rehearing. Civil Case 66 of 2009 should now be at end. The disputing parties should adopt the common sense approach to make progress towards having their dispute heard under the Custom Land

Management Act. This means that Section 5 (4) of the Custom Land Management Act becomes operational.

15. Under those circumstances the appeal is allowed and each party is to pay their own costs of the appeal.

DATED at Port-Vila this 14th day of November 2014

BY THE COURT



Vincent LUNABEK
Chief Justice