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

Civil Appeal
Case No.16/3618 CoA/CIVA

BETWEEN: **ALICTA VUTI KWIRINAVANUA**
Appellant

AND: **KENNEDY MATOKOALE TARIWER**
Respondent

Before:	***Hon. Chief Justice Vincent Lunabek*** ***Hon. Justice John von Doussa*** ***Hon. Justice John Mansfield*** ***Hon. Justice Oliver Saksak*** ***Hon. Justice Daniel Fatiaki*** ***Hon. Justice Dudley Aru*** ***Hon. Justice David Chetwynd*** ***Hon. Justice Paul Geoghegan***
Counsel:	*Samy Aron for the Appellant* *Willie Daniel for the Respondent*
Date of Hearing:	*9 November 2016*
Date of Judgment:	*18 November 2016*

JUDGMENT

Introduction

1. This is an appeal against the ruling of Justice Sey issued on 17 October 2016 in Judicial Review Case No. 15/24 SC/JUDR (the JR Case) whereby the Judge quashed the appellants' refusal to grant the respondent a certificate of registered interest under the provisions of the Custom Land Management Act No. 33 of 2013 in respect of leasehold titles located within Forari/Manuro customary land, and ordered the appellant to issue the certificate within 14 days. The appellant however filed this appeal and sought a stay of execution of the decision of 17 October 2016. On 3 November 2016 the Court issued an Order staying the execution of the decision.

2. The parties to the JR case were Kennedy Matokoale Tariwer as the Claimant and Alicta Vuti Kwirinavanua, the National Coordinator of Land Dispute Management, Customary Lands Tribunal Unit as the defendant.

Background Facts

3. In 2013 the claimant Kennedy Matokoale Tariwer (the respondent in this appeal) initiated a land dispute claim in the Forari Village Land Tribunal (the Tribunal) over the Forari/Manuro customary land. The Tribunal heard the dispute between the claimant and five other claimants namely: Alick Louis Manusakau, Nalae Vakalorana, Timatasomata Samuel, Kalo Marakipule and Mautiketike Vanuakorotivate (the aggrieved parties). The claim was registered as Land Case No. 1 of 2013.

4. On 14 February 2014 the Tribunal published its decision which found in favour of the claimant.

5. In 2013 Parliament repealed the Customary Land Tribunal Act [CAP 271] by the Repeal Act No. 34 of 2013 effective from 20 February 2014.

6. Parliament passed the new Custom Land Management Act No. 33 of 2013 which also took effect on 20th February 2014.

7. In March 2014 the aggrieved parties to Land Case No. 1 of 2013 filed Judicial Review Claim No. 5 of 2014 challenging the decision of the Forari Village Land Tribunal dated 14th February 2014.

8. On 29th September 2014 the Supreme Court dismissed Judicial Review Claim No.5 of 2014 on the basis the Court lacked jurisdiction to determine the claim pursuant to the incumbent new Custom Land Management Act.

9. On the same date 29th September 2014 the aggrieved parties prepared an application pursuant to section 58 (3) of the Custom Land Management Act to appeal to the Island Court (Land) and lodged it with the Customary Land Management Office.

10. In the meantime on 23rd February 2015 the present respondent requested the appellant to issue a Certificate of Recorded Interest in Forari/Manuro customary land pursuant to the decision of the Forari Village Land Tribunal decision dated 14th February 2014 as the decision of the Tribunal delivered on 14 February 2014 had not been challenged within 12 months after the commencement of the Custom Land Management Act: *see:* s. 58(1).

11. The appellant acting on the advice of the Attorney General declined to issue the Certificate on the basis of the application lodged by the aggrieved parties dated 29th September 2014. This decision was communicated by letter dated 18th May 2015.

12. On 1st October 2015 the respondent filed Judicial Review Claim No. 24 of 2015 seeking a quashing order against the appellant's refusal and a mandatory order requiring the appellant to issue a certificate on the ground that the application lodged by the aggrieved parties had not been filed in the Island Court (Land) as required under the Custom Land Management Act and did not constitute a valid challenge of the Tribunal's decision.

13. On 14th December 2015 the respondent filed a supporting statement.

14. On 12th August 2016, the appellant filed a defence and supporting sworn statement in response. On the same date the Court below issued orders for the filing of submissions and listed the claim for hearing on 23rd September, 2016.

15. On 23rd September 2016 in the absence of Counsel for the respondent the Court adjourned the claim for a Rule 17.8 hearing to 17th October 2016, at 4pm.

16. On 17th October, 2016 the Court below sat and issued its ruling, quashing the appellant's refusal and granting a mandatory order against the appellant.

17. The appellant then filed this appeal.

Issues

18. The following issues were raised in the appellant's written submissions for determination by this Court:

    (a) Whether the decision of the Forari Village Land Tribuinal dated 14th February 2014 created a recorded interest in favour of the respondent in respect of the Forari/Manuro Customary Land?

    (b) Whether the primary judge misguided herself in law in relying on section 19(2) of the Custom Land Management Act without regard to section 58 of the Act?

    (c) Whether the Ruling of the Court below dated 17th October 2016 was issued without a hearing pursuant to Rule 17.8(3) and 17.9 of the Civil Procedure Rules No.49 of 2002 (the Rules).

Discussions

19. The submissions of the appellant on the first two issues turn essentially on s. 58 of the Custom Land Management Act. Section 58 states:

Existing decisions of single or joint village customary Land Tribunal.

(1) Decisions of :

(a) a single or joint village Customary Land Tribunal, or

(b) a single or joint sub-area Customary Land Tribunal

(c) ... (not relevant)

(d) ... (not relevant)

which determined the ownership of custom land and which were made before the commencement of this Act and have not been challenged within 12 months after the commencement of this Act, are deemed to create a recorded interest in land in respect of the person or persons determined by such tribunal to be a custom owner.

(2) ...

(3) A person may challenge a decision of a Customary Land Tribunal under this section by filing an application with the appropriate Island Court (Land) that the decision of the Customary Land Tribunal Act be reviewed on the ground that:

(a) it has been made at a meeting that was not properly constituted; or

(b) it has been made in breach of the authorised process; or

(c) it has been procured by fraud; or

(d) it was wrong in custom or law.

(4) The Island Court (Land) after hearing all relevant evidence may dismiss the application for review, or may asle that the decision of the Customary Land Tribunal be set aside and direct that the ownership of custom land be determined in accordance with this Act.

20. In short the appellant argues that an application had been sufficiently filed as required by s. 58(3) to challenge the Tribunal's decision and for this reason provisions of the Act such as s. 19(2) that deem a determination as to custom ownership to become a recorded interest in land if not challenged do not apply in this case.

21. Counsel for the Respondent argued that as the aggrieved parties had not filed their application in the appropriate Island Court (Land) pursuant to section 58(3) of the Act within 12 months, the Respondent is deemed to have a recorded interest in land.

22. The outcome of this appeal therefore turns on the question whether the application by the aggrieved parties on its face to the Island Court (Land) and lodged with the

Custom Land Management Office on 29 September 2014, in the particular facts of this case, should be accepted as a valid challenge to the Tribunal's decision for the purpose of s. 58(3) of the Custom Land Management Act.

23. The first argument by the appellant was that the aggrieved parties have been denied their right of having access to the process for challenging the Tribunal decision and therefore to justice by the non-establishment of the Island Court (Land) under section 43 of the Act.

Section 43 of the Customary Land Management Act States:-

Composition of Island Court (Land)

(1) Each Island Court established by the Chief Justice under the Island Courts Act may sit as an Island Court (Land) to review decisions made by nakamals and custom area land tribunals under this Act.

(2) When sitting as an Island Court (Land) the Court is composed as follows:-

(a) a Judge or Magistrate who shall be appointed by the Chief Justice as the Chairperson,

(b) four justices of the Island Court having jurisdiction in the area where the land is located who are knowledgeable in the custom of the area in which the land is situated, are willing to so act, and are not disqualified under the Act.

(3) If such Justices referred to in paragraph (2) (b) are not available, such other persons who are knowledgeable about the custom of the area in which the land is situated, who are willing to act and are not disqualified under this Act, and who are nominated by the area council of chiefs of the island in which the land situated and approved by the Judicial Services Commission.

24. This argument has no merit as each Island Court already in existence was vested with power to act as an Island Court (Land) by force of s.43(1). Island Courts (Land) therefore existed, although certain administrative steps remained to be put in place to enable them to fully function. One of those administrative steps has recently been completed upon the appointment of a chairperson on the advice of the Chief Justice under Section 43(2) (a) of the Act, and the appointment has been duly published in the Official Gazette No. 76/2016 dated 19th October, 2016.

25. A difficulty however for the respondent's argument lies in Section 44 of the Act, not Section 43. Section 44 of the Act provides as follows:

Registrar of Island Court (Land)

(1) **The Clerk of an Island Court is to be the Registrar of each Island Court (Land), if the clerk is not disqualified under Part 9 of this Act, and if the clerk is disqualified, the Judicial Service Commission is to appoint a person to be the Registrar of an Island Court (Land).**

(2) **Before acting as a Registrar of an Island Court (Land) a person must take the oath set out in section 4 of the Oaths Act [CAP.37].**

(Underlining for emphasis)

26. There are clerks of the current Island Courts who pursuant to section 44(1) are to be the Registrars of the Island Court (Land) but by the administrative requirement in subsection (2) they are to be sworn in prior to assuming the role of Registrar. That has not yet occurred. At 29 September 2014, and even now, there is no Island Court (Land) Registrar who can accept the aggrieved parties' application in an Island Court (Land).

27. On the material facts it must be accepted that the aggrieved parties lodged their application at the Appellant's office on 29 September 2014, that was some 7 months after the Custom Land Management Act had come into effect on 20 February 2014. Clearly the application is a direct challenge to the Forari Village Land Tribunal decision of 14 February 2014.

28. The application still exists, despite it not being filed in the appropriate Island Court (Land) Registry. The aggrieved parties did not fail in their obligation under section 58(1) of the Act. Rather it is the system or scheme that has failed them. Therefore, could and should they be made to face the consequences of that failure? In our view the answer must be in the negative. In the result no recorded interest in land has arisen under the Act and therefore the argument by Mr Daniel is untenable.

29. The third issue concerns the non-compliance with Rule 17.8 of the Rules. The Appellant argued that there was no hearing for the purposes of deciding the criteria provided in Rule 17.8(3) which are:-

(a) that the Claimant has an arguable case;
(b) the claimant is directly affected by the enactment or decision;
(c) there has been no undue delay in making the claiming; and
(d) there is no other remedy that resolves the matter fully and directly.

30. The JR case was fixed for "*hearing of the application*" on Friday 23 September 2016 by order dated 12 August 2016 at a conference held the same day as the defence was filed. Counsels were directed to file their written submission on or before Wednesday 21 September 2016. That hearing was adjourned on 23 September to 17 October 2016 due to the absence of Mr Daniel with an award of wasted costs in favor or the Defendant (appellant). On 17 October 2016 the judge proceeded to make final orders in favour of Mr. Daniel's client.

31. Rule 17 provides for a process within a judicial review proceeding. It is a process designed to "fast-track" a case. The process requires that as soon as practicable after a defence has been fixed and served the Judge hearing it **"must call a conference"**. And at the conference, **"the judge must consider the matters in subrule (3)"**. From these terms this is a mandatory process. It is argued by the appellant that this did not happen as the judge made final orders of the kind envisaged by Rule 19(1).

32. In most cases there will be a two stage process in a judicial review case. There will first be a consideration by the Court of the issues under Rule 17.3. If the Court considers the requirements of Rule 17.3 are met, the Court will then set another time for a hearing on the merits. However, remembering that Rule 17 is intended to provide a fast track process, there may be occasions where a Court could proceed from the Rule 17.8 considerations immediately to hear and determine the matter with final orders under rule 17.9. The terms of Rule 17 do not prohibit this.

33. If the parties consent to such a procedure the Rule does not prevent the Court from immediately hearing the matter. There may be other circumstances where this would be appropriate. The important consideration however, will be to ensure that an immediate hearing on the merits does not take any party by surprise.

34. The appellant's submissions do not allege that the appellant was taken by surprise by the Court's order on 17 October 2016, and moreover it seems that the Court did consider Rule 17.8 matters on 12 August 2016, and that day directed the hearing of the merits on 23 September 2016.

35. We consider the appellant has not established procedural error by the judge in making final orders on 17 October 2016. But even if there had been error we consider it would be pointless to allow the appeal on that ground and to return the matter to the Supreme Court. We have found that the decision of the appellant to not issue a Certificate of Registered Interest in Land was correct. We consider we should simply allow the appeal, set aside the orders of the Supreme Court and dismiss the JR case. As soon as the relevant Island Court (Land) registrar has taken the required oath, the appellant should lodge the aggrieved parties'

application with the Island Court (Land) and the Island Court (Land) should make arrangements to hear and determine the challenge to the Tribunal's decision.

36. A further issue was raised during argument that the aggrieved parties do not seem to have been served. In this type of case those parties would normally be offered the opportunity to become the real contradictors in the proceedings as they could be directly affected by the Court's decision.

37. There is no information before us whether the aggrieved parties were notified of this appeal and were aware that they could seek to be heard. However, the appellant adopted the role of contradictor and fully argued the merits of the case which the aggrieved parties could have presented. For the reasons we have given we consider the decision of the Custom Land Management Office not to grant the certificate was correct. In the very unusual circumstances of this case which arises in the transition from one custom land recognition system to another we consider this Court should proceed to decide the appeal as the parties are presently constituted, the result being as favourable to the aggrieved parties as it could be.

38. The formal orders of the Court are:

    (1) Appeal allowed;

    (2) Orders of the Supreme Court set aside;

    (3) Judicial Review Case No. 24 of 2015 is dismissed;

    (4) Respondent to pay the costs of the appellant in this Court and in the Supreme Court on the standard basis.

DATED at Port Vila, this 18th day of November, 2016

FOR THE COURT

Hon. Vincent Lunabek
Chief Justice.

REPUBLIC OF VANUATU COURT OF APPEAL COUR D'APPEL REPUBLIQUE DE VANUATU