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

Civil Case No. 188 of 2009

BETWEEN: AUGUST TALIBAN
Claimant

AND: BATENJA VILLAGE LAND TRIBUNAL
Defendant

AND: FAMILY WORWORBU
Interested Party

Coram: ***Justice D. V. Fatiaki***

Counsels: *Mrs. M. G. Nari for the Claimant*
Ms. J. Harders for the Defendant
Mr. C. Leo for the Interested Party

Date of Decision: *19 July 2011*

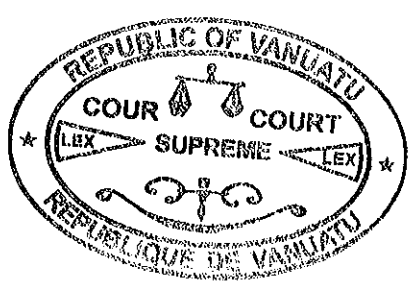
RULING

1. This case concerns a contested claim over customary land called '***Batenja***' or '***Batenda***' located in **West Ambrym** and on which **Craig Cove** airport is built ('*the land*'). The claim was heard by the **Batenja Village Land Tribunal** ('*the Tribunal*') which delivered its decision on 15 June 2009 declaring **Family Worworbu** as the true custom owner of the land.

2. A day short of the 6 months procedural time limit, on 14 December 2009 the claimant issued an application pursuant to **Section 39** of the **Customary Land Tribunal Act** No. 7 of 2001 challenging the Tribunal's decision on the dual grounds that the Tribunal was improperly constituted, and, had determined the matter in the absence of all the claimants to the land ('*the S.39 application*').

3. The State Law Office appeared for the Tribunal and opposed the application in a response filed on 21 May 2010 supported by sworn statements from **Mathew Leingkone** and **John Stephen** who were the Chairman and Secretary respectively of the Tribunal that rendered the decision under review.

4. On 22 June 2010 the State Law Office sought to strike out the S.39 application on the sole ground that the claimant lacked '*locus standi*' as he was **not** a party in the Tribunal proceedings.



5. On 10 June 2010 **Family Worworbu** the successful claimant before the Tribunal, sought to be joined in the S.39 application as an interested party. This was granted unopposed at a conference on 24 June 2010 and written submissions were ordered on the Tribunal's strike-out application.

6. State counsel's short submission is as follows:

> "*4. The proper parties to an application under Section 39 of the Act are the party invoking the jurisdiction, the relevant land tribunal, and all the parties in the land tribunal case.*
> *Jack Umou v Erromango Island Land Tribunal [2008] VUSC 65 CC93 of 2007; Family Rongo v Lap [2005] VUSC 118 C13 of 2005*
>
> *5. It is clear that the right to invoke section 39 is not unlimited. It is a remedy to which only a 'party' may be entitled.*
>
> *6. There is no definition of 'party' in the Act. It is clear, however, that such word refers to parties to the original decision.*
>
> *7. It is clear that the applicant was not a party to the proceeding before the Respondent. Accordingly, the applicant cannot invoke section 39. Such remedies as he may have lie elsewhere.*
>
> *8. A party to the proceedings before the Respondent could appeal the decision.*
>
> *Section 12 of the Act*
>
> *9. Even if the Applicant was a party to the proceeding before the Respondent, which is denied, he failed to appeal the decision in accordance with the Act.*"

7. The claimant's equally brief response is:

> "*The Applicant is named on the said judgment of 15 June 2009 as a disputing party on page 1. It is also stated that the tribunal had received a claim from the Applicant. The notice of hearing also included the Applicant's name.*
>
> *The tribunal order stated that "evri man or woman inkludim famli* ***Taliban****, Famli George Maxime, Famli Haoul Pierre, Tama Sam Dalisa mo ol pipol blong Wuro, Fali, Boho blong stap anda long Famli Worworbu olsem kastom ona blong Batenja land".*
>
> *By their own recognition of the names of the parties to the proceeding, the Applicant and his family are included in the judgment as parties to the proceeding.*
>
> *The Applicant has standing to bring this action under Section 39 of the Act.*"

8. The longer submission of the interested party **Family Worworbu** supports the strike out application on the alternative basis that the claimant with full knowledge of the Tribunal proceedings, had refused to attend the hearing and raise his objections before the Tribunal, and therefore, he cannot now be heard to complain. The submission also questioned the "*locus*" of the claimant in bringing the application in his own personal name without any indication of a representative capacity.

9. Finally, in reply, State Counsel submits that the Tribunal was properly constituted and "*in the event that Mr. Taliban and his family had objections to the constitution of the Tribunal, they could have raised those objections at the hearing in accordance with Section 26 of the Act, but they did not.*"

10. Whilst awaiting the Court's ruling on the strike-out application, the Court of Appeal delivered its judgment in **West Tanna Area Council Land Tribunal v. Natmaning Natuman and Others** Civil Appeal No. 21 of 2010. In discussing the question of who might be parties to an application under **Section 39** of the **Customary Land Tribunals Act**, the Court relevantly observed:

> "*18. On a judicial review application under s.39 of the Act, clearly the parties should include the person or persons in whose favour the Land Tribunal made an order for custom ownership. This is because the judicial review application might adversely affect those persons' interest. In this instance, that is Nakou Yawha. In that way, there is a party taking one position before the Court and another party taking the opposite position so the Court is best placed to make a just decision. That also means the Land Tribunal can adopt a neutral position, as discussed above.*
>
> *19. The parties should also include any other persons who were parties to the dispute when it first arose. The first notification of a dispute under the Act is given under section 7 of the Act by the person or group of persons who have the dispute about the ownership or boundaries of custom land. That will lead to a single village or joint village land tribunal hearing. It makes a decision. Although it is not explicit, obviously all "parties" to the dispute are expected to participate, so the dispute is resolved fairly. Any party to the dispute may appeal to a custom sub-area land tribunal, or to a custom area land tribunal, under Parts 3 & 4 of the Act (depending on which Part applies). Those decisions may then be appealed to an island land tribunal, whether it is hearing an appeal under s.23 or rehearing it under s.24 must give notice to the parties to the dispute under section 25, and give all parties to the dispute the chance to be heard under section 27.*
>
> *20. The term "the parties to the dispute" is not defined. Clearly any person to the initially-notified dispute will be a party. The term is not intended to be a restrictive one. Otherwise it would not be consistent with the way the various tribunals are to operate. However,*

especially because section 27 provides for all parties to be given a full and fair hearing, it is clear that the "parties" may include any party whose proper interest may be affected by the resolution of the dispute. Those parties will depend on the circumstances of the particular case. In certain circumstances, as the primary judge observed, those persons may include persons who under custom law may have an interest in the land in dispute even though they are not named in the original notice of dispute.

21. *As the primary judge also observed, apart from the parties to the dispute in relation to customary land, there may be others with interests in the customary land granted under the Land Leases Act [CAP. 163] or in some other way. If their interests were potentially adversely affected by a decision of Land Tribunal, they may be entitled to have those rights preserved if they are recognized by section 79 of the Constitution of the Republic of Vanuatu."*

(my underlining)

11. In summary, the Court of Appeal said (at para. 23):

> "*The original notice of dispute and the identity of any persons who appeared, or were given the opportunity to appear, at any of the four levels of decision-making provided for by the Act, will primarily indicate who are the parties to the dispute.*"

Given the above dicta, counsel for the tribunal was plainly correct in withdrawing the application to strike out the appeal on the basis that the appellant was not a "*party*" in the tribunal proceedings and therefore lacked the necessary capacity to bring the appeal.

12. To add to the complications, a second application to be joined as an interested party was made by **Alexander Kaum Batick** ('*Batick*') on 1 September 2010 on the basis that "*after hearing of my claim, history and family tree,* (the Tribunal) *declared that I am the custom owner of Batenta land*".

13. This joinder application was vigorously opposed by **Family Worworbu** on the basis that "*Batick only acted in a representative capacity on behalf of the declared custom owner Family Worworbu*" and further, "*Batick's presence as a party will prejudice Family Worworbu's position as Batick continues to hold himself out as the declared custom owner of Batenta land in total contravention of the overriding provisions of the Constitution*".

14. For completeness, I record that the claimant also opposes the joinder of Batick as an interested party "*... as (**Batick**) was the representative of Family Worworbu before the (*Tribunal*) and therefore does not have any interest in the matter now before the Supreme Court as Family Worworbu is already named as interested party in this proceeding.*"

15. On 31 January 2011 Batick's joinder application was refused for the brief reasons that I now provide:

(a) The inherent inconsistency in the joinder application where Batick claims, on the one hand, to be "*the declared custom landowner of Batenta land*" and, on the other hand, "*... as the lawfully and recognized representative of the Worworbu Family*";

(b) The fact that the relevant tribunal **Notice of Dispute** hearing is solely directed to Family Worworbu;

(c) The undeniable fact that the Tribunal's judgment only refers to Batick as the representative of Family Worworbu and the fact that Batick is not named as a claimant in contrast to Family Worworbu which is named;

(d) The fact that Batick was constrained to amend his original application to be joined as an interested party, to one seeking an order that he "*become Family Worworbu's representative in the action*";

(e) The fact that Batick's authority to act as the representative of Family Worworbu was limited to appearing before the Tribunal and, in any event, has now been withdrawn;

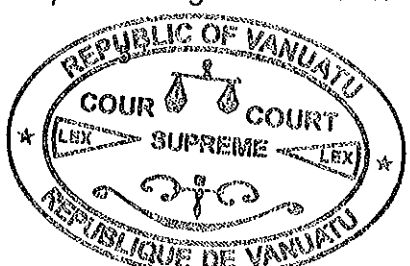
(f) **Rule 3.12** of the **Civil Procedure Rules** is clear in its requirement that the appointment of a person to be a representative of another person in a proceeding is limited to "*... persons having the same interest in the subject matter of the proceeding*" which is certainly **not** now the case, between Batick and Family Worworbu; **and**

(g) Finally, unlike in a Lands Tribunal proceeding where legal practitioners have no right of audience, Family Worworbu is represented by legal counsel in the present proceedings before the Court;

16. Returning to the Tribunal's strike-out application, after considering the decision of the Court of Appeal in **Natuman's** case (*op. cit*), State counsel withdrew the application leaving a similar application by **Family Worworbu** which I now proceed to determine.

17. The submission of counsel for **Family Worworbu** is based on the following grounds:

> "*1. The Applicant, August Taliban has no legal standing to invoke Section 39 of the Customary Lands Tribunal Act in circumstances where Family August Taliban was served with the Tribunal proceedings but voluntarily refused to*



appear for hearing before the Bantenta Village Land Tribunal ("the Tribunal").

2. *Alternatively, even if Family Taliban was a party in the Tribunal proceedings (which is vehemently denied), August Taliban has no legal standing to initiate this proceeding in his own exclusive name as it violates the very spirit of Article 73 of the Constitution.*

   Article 73 – Land belongs to custom owners
   'All land in the Republic of Vanuatu belongs to indigenous custom owners and their descendants.'

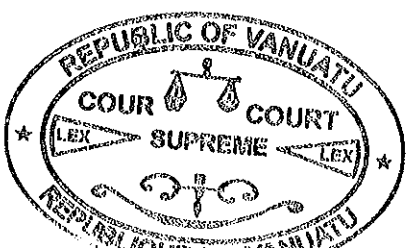
3. *That the Applicant's Judicial Review Application lacks precision and clarity as it fails to detail the exact provision and its remedy under Section 39 of the Act.*

4. *Alternatively, Judicial Review Application relates exclusively to a person who is affected by a decision to which he/she has fully litigated his/her rights before a competent Court of law and not otherwise."*

18. As for **ground (1)** counsel drew the Court's attention to the provisions of **Section 26** of the **Customary Land Tribunal Act** which provides that at the hearing of a matter before the Land Tribunal, after introductory remarks, the chairman "*must ask if there are any objections to the qualification of the chairperson or any of the other members or the secretary*" and if there are, then the objection must be considered and, if upheld, then the hearing must be adjourned to allow for the member (including the chairperson if objection is made and upheld against him) to be replaced.

19. The wording of **Section 26** clearly imposes, in my view, a positive duty and a right on the disputing parties appearing before a Lands Tribunal, to take an objection to the qualification of any of the Tribunal members and whatsmore, to take the objection at the first hearing, when asked by the chairperson **before** the actual hearing of the dispute commences. If a party chooses or, having had notice does not appear before the Tribunal and does not raise objection to the member(s) of the tribunal, then, he cannot be heard to complain later that the Tribunal heard and determined the case without considering the objection that he could have, but did not raise at the relevant time.

20. In the present case it is common ground that because of their non-appearance before the Tribunal, **no** objection was ever taken or made by the applicants to the qualifications of any of the members of the Tribunal which might have prevented them from continuing to sit and hear the dispute before the Tribunal. In particular, the claimant despite being



served with the requisite **Notice of Hearing**, chose not to appear because as he deposes in his sworn statement:

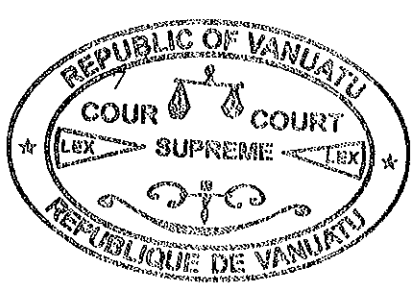
> *"My family and I did not go to the Batenja Village Land Tribunal because we were not happy with the members of the Tribunal. All the members were from North Ambrym and there was no chief from West Ambrym from our area to hear the dispute."*

Given the courts earlier expressed view about **Section 26** the conscientious and deliberate decision of the applicant in **not** attending the tribunal hearing (and therefore in not objecting to the tribunal members), constitutes, in my view, a waiver of the applicants' right to object to the qualifications of the members of the Tribunal.

21. Furthermore in **Matarave v. Talivo** [2010] VUCA 3 the Court of Appeal relevantly observed (at p.8):

> *"The general law relating to apprehended bias is well established. If a party with knowledge of the circumstances said to give rise to the apprehension of bias chooses for whatever reason not to raise the issue promptly, the Court is entitled having regard to all the circumstances to refuse to exercise its power to declare that the resulting decision is void or voidable. This is frequently the outcome where a party knowing of the circumstances which that party later seeks to rely upon to establish apprehended bias, chooses to allow the proceedings to go ahead in the hope that a favorable judgment will be received.*
>
> *In this present case even if circumstances had been established against the assessors which could give rise to a reasonable apprehension of bias, those circumstances were known to Family Rasu at the out set, and Family Rasu chose not to further challenge their appointment. An application could have been made for a declaration that the appointment of the assessors or one of them was invalid by reason of apprehended bias, but that did not occur ...*
>
> *... In deciding whether the Court should exercise its discretion to grant a remedy by way of declaration the delay in this case by the applicants must be brought to account...."*
>
> (my underlinings)

22. Needless to say I am not attracted to the proposition that the provisions of **Section 26** and the hearing of matters before a land tribunal can be so easily thwarted or frustrated merely by a claimant party absenting itself from the proceedings and then later, complaining to the Supreme Court that it had not been heard.



23. In summary, the claimant's particular complaint or objection concerned the origins and knowledgeability of the members that constituted the Tribunal hearing the matter.

24. In **Family Molivakarua v. Family Worahese** [2011] VUCA 9 the Court of Appeal in rejecting a similar objection to the assessors in that case said in relation to **Section 3 (a)** of the **Island Courts Act** as follows:

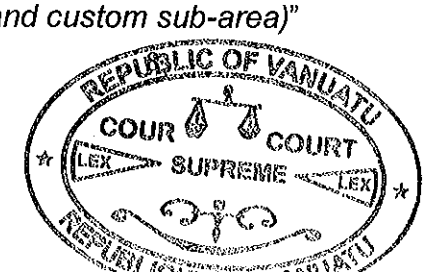
> *"It is not a requirement under section 3(1) of the Act for an Island Court Justice to "have knowledge in custom" of a particular area within the territorial jurisdiction of the Island Court, that is of a particular part of the Island Court area. There can be many sub-areas of custom within an Island Court area, and it would be quite impractical to have to find three knowledgeable justices for each of them. Section 3(2) means what it says. The three justices must be knowledgeable in custom for the Island Court area, and that is sufficient. If the particular sub-area is not the area that they are from, then it can be expected that they will take the necessary steps to gain familiarity of the area that is not their home area before the hearing....."* (my underlinings)

and later the Court noted:

> *"....if the skills and knowledge in custom of an Island Court justice becomes an issue, they are matters to be addressed by the Judicial Service Commission and by the President of the Republic pursuant to s.3(1) of the Act. Ultimately, it is for the President to make appointments to the Island Court."*

25. I accept however, that there is a slight difference in the relevant wording of the **Island Courts Act** and the **Customary Land Tribunal Act** regarding the knowledgeability of custom required of an Island Court justice and a member of a land tribunal. Whereas, an Island Court justice is only required to be "*... knowledgeable in custom for each Island Court* (and) *at least one of whom shall be a custom chief residing within the territorial jurisdiction of the Court*", the member of a Land Tribunal under the **Customary Lands Tribunal Act** is required to be on an approved "*... list of chiefs and elders who have sufficient knowledge of the custom of the custom area (or custom sub-area) to adjudicate disputes relating to the boundaries or ownership of the customary land in the custom area (or sub-area)*". [*see:* **Section 3** of the **Island Court Act** and **Section 35 and 36** of the **Customary Land Tribunal Act**].

26. As a general observation I would say that the qualification of a member of a Land Tribunal is more localized and circumscribed than that of an Island Court justice and, it might be, that the **Family Molivakarua** judgment (op. cit) may not apply to members of a Land Tribunal constituted under the **Customary Lands Tribunal Act**. But as the Act makes clear, the sole arbiter(s) of who should be on the approved list is "*... the council of chiefs of each custom area (and custom sub-area)*"



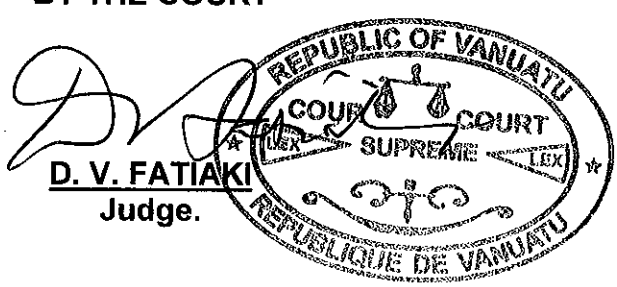
27. Having said that, a nigh impossible burden is cast upon an applicant who seeks to challenge the qualifications of a member of a Land Tribunal whose name is included in an approved list and, in respect of which, there is, in my view, a presumption of regularity.

28. The above observations have no real bearing on the present case however, as **no** objection was actually taken or made by the applicants at the relevant time, to any of the members of the Tribunal that heard the customary land dispute in this case.

29. For the foregoing reasons the application of **Family Worworbu** is upheld and the application by the Claimant under Section 39 of the Customary Land Tribunal's Act is dismissed with costs to be taxed if not agreed.

DATED at Port Vila, this 19th day of July, 2011.

BY THE COURT



D. V. FATIAKI
Judge.