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

Judicial Review Case No. 10 of 2014

BETWEEN: MANASEH NATNAOUR AND TOM ANDREW NATNAOUR
First Claimants

AND: CHRISTIAN OSKA, LUWI SIMEON & NOEL OSKA
Second Claimant

AND: VAHAS VILLAGE LAND TRIBUNAL
First Defendant

AND: GEORGE TOA AND CHARLES TOA
Second Defendants

Hearing: ***19 February 2015***

Date of Judgment: 6 March 2015

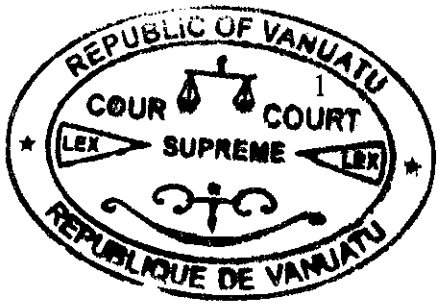
Before: ***Justice Stephen Harrop***

In attendance: ***Jack Kilu for the Claimants***
Jennifer Warren (SLO) for the First Defendant
Daniel Yawha for Second Defendants

RESERVED JUDGMENT OF JUSTICE SM HARROP AS TO PRIMARY GROUND FOR LEAVE TO FILE JUDICIAL REVIEW CLAIM OUT OF TIME

Introduction

1. On 12 June 1990 the Malekula Island Court heard a dispute relating to customary land known as Apendihen. It declared Manaseh Natnaour as custom owner of that land in a decision dated 31 December 1990.



2. In what became known as Land Appeal Case No. 9 of 1998 several affected parties appealed to the Supreme Court against the Island Court Ruling.

3. On 5 July 2004 the Supreme Court (Justice Treston) with the consent of all parties transferred the appeal to a village land tribunal, purporting to do so under Section 5 of the Customary Land Tribunal Act [CAP 271] ("the CLT Act").

4. The first defendant, the Vahas Village Land Tribunal issued a decision on 21 May 2009 declaring the second defendant George Toa to be the custom owner of the land in question.

5. The claimants (in reality it is only the first claimants) applied on 10 June 2014 for leave to file a judicial review claim out of time. This challenges both Justice Treston's decision and, in the alternative, that of the Vahas tribunal. Under Rule 17.5 of the Civil Procedure Rules such a claim must be made within six months of the decision. The court is empowered under Rule 17.5(2) to extend the time for making such a claim "if it is satisfied that substantial justice requires it".

6. In order to assess what "substantial justice" requires in the circumstances, consideration of the merits of the proposed claim is obviously required. On behalf of the first claimants Mr Kilu has filed in support of the application a sworn statement annexing a proposed claim for judicial review. There are two limbs to this. First, the claimants allege that Justice Treston had no jurisdiction to transfer the appeal to the village land tribunal. In the alternative, even if he did, the process followed by the Vahas Village Land Tribunal is challenged in various respects as being in breach of the requisite provisions of the CLT Act.

7. If the claimants are correct that Justice Treston had no jurisdiction to remove the matter from the Supreme Court to the village land tribunal then obviously not only should leave the file to the judicial review claim be granted but the review itself would inevitably succeed. It was therefore considered sensible to convene a chambers hearing for the parties to make submissions on this threshold issue. The defendants to the proposed judicial review claim oppose the application for leave and submit that Justice Treston had

jurisdiction to do what he did and therefore the matter was properly in the hands of the Vahas Village Land Tribunal.

Issue

8. The issue I have to determine in this judgment is whether or not Justice Treston had jurisdiction under the CLT Act (Section 5), with consent of all parties, to transfer the dispute so it would be dealt with under that Act.

Submissions

9. Mr Kilu, no doubt correctly, submits that the appeal before Justice Treston came to the Supreme Court under Section 22 of the Island Courts Act (CAP 167) ("the IC Act") which provides:

"APPEALS

22. (1) Any person aggrieved by an order or decision of an island court may within 30 days from the date of such order or decision appeal therefrom to –

(a) The Supreme Court, in all matters concerning disputes as to ownership of land;

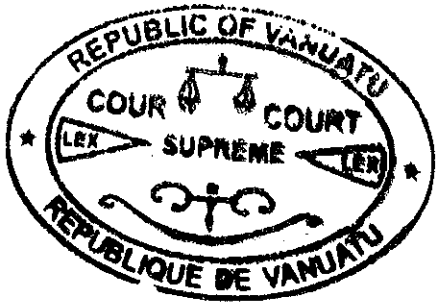
(b) The competent magistrates' court in all other matters.

(2) The court hearing an appeal against a decision of an island court shall appoint two or more assessors knowledgeable in custom to sit with the court.

(3) The court hearing the appeal shall consider the records (if any) and make such inquiries (if any) as I thinks fit.

(4) An appeal made to the Supreme Court under subsection (1)(a) shall be final and no appeal shall lie therefrom the Court of Appeal.

(5) Notwithstanding the 30 day period specified in subsection (1) the Supreme Court or the magistrates' court, as the case may be, may on application by an appellant grant an extension of such period provided the application therefore is



made within 60 days from the date of the order or decision appealed against."

10. Mr Kilu submitted that the options available to Justice Treston were limited to those set out in Section 23 of the IC Act which provides:

"POWER OF COURT ON APPEAL

23. The Court in the exercise of appellate jurisdiction in any cause or matter under Section 22 of this Act may –

(a) Make any such order or pass any such sentence as the Island Court have made or passed in such cause or matter;

(b) Order that any such cause or matter be reheard before the same Court or before any other island court."

11. Mr Kilu submits, and I accept, that there is nothing in the IC Act which gave Justice Treston the option to refer the matter to a customary land tribunal. That is hardly surprising since such tribunals did not exist at the time that the IC Act was passed.

12. From 10 December 2001 the CLT Act was in force. The meaning and effect of Section 5 of that Act is critical to the determination of the issue before me. It provides:

"5. Pending court proceedings

(1) If:

(a) a person is a party to a proceeding before the Supreme Court or an Island Court relating to a dispute about customary land; and

(b) the person applies to that Court to have the proceeding withdrawn and the dispute dealt with under this Act; and

(c) the other party or parties to the proceeding consent to the withdrawal and to the dispute being dealt with under this Act; and

(d) that Court consents to the withdrawal and to the dispute being dealt with under this Act;

the dispute must be dealt with under this Act and one of the parties must give notice under Section 7.

(2) The Supreme Court or an Island Court may:

(a) order that any fees paid to the Court in respect of such proceedings be refunded in full or in part to the applicant or any of the other parties; and

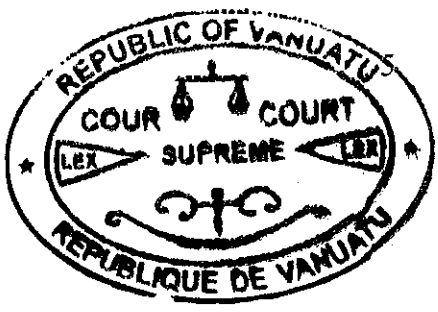
(b) make such other orders as it thinks necessary.

(3) To avoid doubt, if proceedings before the Supreme Court or an Island Court relating to a dispute about customary land are pending, the dispute cannot be dealt with under this Act."

13. Mr Kilu's essential submission is that the appeal before Justice Treston was not "a proceeding before the Court...relating to a dispute about customary land". Rather it was an appeal against what *had been* a proceeding before the Island Court but which had been determined by that Court. In short, an appeal is not a proceeding.

14. When an appeal is lodged it might be said that it is a challenge to the outcome of a proceeding which has proceeded to a conclusion in the court appealed from. It is no longer a proceeding once the court below has concluded it. This is supported by Part 9 of the Civil Procedure Rules which describes ways, such as default judgment, in which a proceeding may be ended early. The Island Court decision of 31 December 1990 can therefore be seen as having brought the proceedings in that court to an end.

15. Mr Kilu submits that because there was no power to send the case to the village land tribunal, the customary land dispute remains in the Supreme Court for determination of the appeal against the Island Court decision and that everything which later occurred before the Vahas Village Land Tribunal also occurred without jurisdiction.



16. Both Mr Yawha and Ms Warren submit that an appeal to the Supreme Court under the IC Act *is* "a proceeding before the Supreme Court relating to a dispute about customary land". They say that Justice Treston was therefore fully entitled to, and indeed was required to, arrange for the dispute to be dealt with under the CLT Act because the four qualifying criteria in Section 5 (1) were all met.

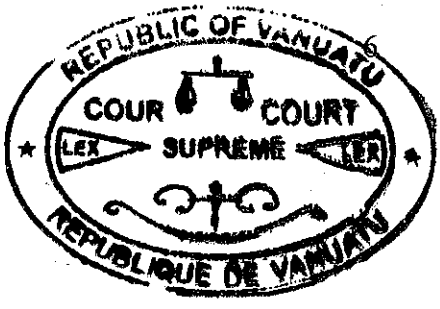
17. In particular Mr Yawha submits that the reference in section 5(1) to "a proceeding before the Supreme Court ....relating to a dispute about customary land" can *only* refer to the kind of appeal with which Justice Treston was dealing. That is because, under the IC Act the only way that the Supreme Court could be dealing with such a dispute was on an appeal under Section 22 of that Act. Therefore, in context, Parliament must have intended "proceeding" to encompass an appeal of that kind.

18. Mr Yawha and Ms Warren referred me to two other Supreme Court judgments, which both happen to have been delivered by Justice Treston (and custom assessors) in November 2004. Like this case, they both related to land in North-West Malekula.

19. The first was *Nathan v. Obed and other* [2004] VUSC 29. In the course of that judgment of the Court said: *"The parties were asked, in accordance with the provisions of Section 5 of the [CLT Act], if they wished this appeal to be withdrawn from the Court and dealt with under that Act. One of the parties did not consent to that course and the matter therefore remained before this Court."*

20. The other case was *Salyor & ors v. Isaiah* [2004] VUSC 32. As in *Nathan v Obed* the parties were asked if they wanted the appeal withdrawn to be dealt with under the CLT Act but again one of the parties did not consent so it stayed in the Island Court.

21. Counsel submit that although these two other cases did not involve a withdrawl from the Supreme Court and a transfer to a customary land tribunal, it is clear that the Court proceeded on the basis that this was an available option if all parties consented. In short,



in response to Mr Kilu's primary argument, they submit that the Court clearly treated the appeal as "a proceeding" for the purposes of Section 5(1)(a) of the CLT Act.

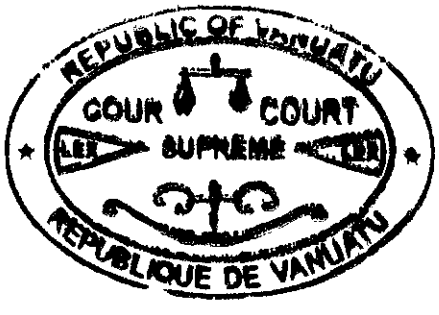
Discussion and Decision

22. After initially being attracted by Mr Kilu's argument because in literal terms it seemed to me that a proceeding is not the usual way to describe an appeal, I have come to the view that the argument of the proposed defendants is correct and that Justice Treston did have the power, indeed was required to exercise it, to withdraw the appeal and to transfer it to the village land tribunal given that all four of the criteria under Section 5(1) were established.

23. As a matter of jurisdiction, it is debatable whether in any event this Court is in a position to deal with an application for judicial review of another Supreme Court judge's decision. This is particularly so given that, at least in principle, the claimants could have appealed against Justice Treston's order if they disagreed with it. While s. 22(4) of the IC Act provides there is no appeal to the Court of Appeal in respect of the Supreme Court's judgment on such an appeal from the Island Court, arguably this is limited to determinations of the merits of the appeal. Regardless, this is academic seeing that I have concluded that Justice Treston was empowered to transfer the matter to the customary land tribunal.

24. Although Mr Kilu is correct that under the IC Act itself the powers of the Supreme Court are limited by Section 23, the coming into force of the CLT Act did give the Supreme Court and the parties to such an appeal another option, provided the criteria in Section 5 (1) were met.

25. In the *Nathan v Obed* and *Salyor v Isaiah* cases those criteria were not met because one of the parties declined to consent so the appeal had to stay in the Supreme Court and to be determined under the IC Act. I consider limited weight ought to be given to those judgments, since if Justice Treston was wrong about his jurisdiction once he is likely to have been wrong on all three occasions. But this is of no consequence because I have concluded his Lordship was right on all three occasions.



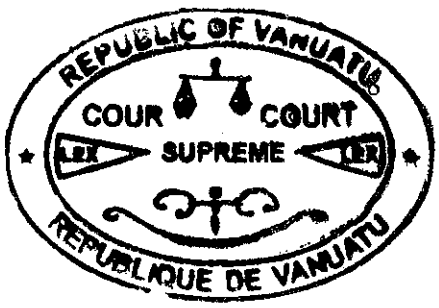
26. I am satisfied that Mr Yawha, whose submission Ms Warren supported, is correct in arguing that Parliament must have been referring to an appeal from the Island Court to the Supreme Court when it mentioned "a proceeding before the Supreme Court....relating to a dispute about customary land" in Section 5(1)(a) of the CLT Act. I am unable to see to what else Parliament could have been referring because prior to the enactment of the CLT Act which in Section 39 gave the Supreme Court a supervisory jurisdiction in respect of land tribunals, the only possible way for the Supreme Court to become involved in customary land disputes was by way of appeal under Section 22 of the IC Act. As far as I am aware there never been original jurisdiction vested in the Supreme Court to deal with customary land disputes. Mr Kilu was unable to explain to what other kind of "proceeding" Parliament could have been referring apart of an appeal to the Island Court under s.22 of the IC Act.

27. I also consider that a proceeding in respect of which an appeal is available ought not to be regarded as fully concluded until any such appeal has been determined or the appeal period has expired without an appeal being lodged. That is because there is always the possibility that an appeal Court may think fit to refer one or more aspects of the case back to the court below to proceed in accordance with its judgment. In those circumstances the court below deals with the case in the context of the original proceeding rather than in a new one.

28. This view can only be reinforced where one of the statutory options expressly available to the appellate court is to send it back to the Court below, as, by way of relevant example, s23 (b) of the IC Act provides.

Result

29. For these reasons I am satisfied that the primary ground on which the claimants seek to file their judicial review out of time cannot succeed and therefore leave to pursue the judicial review application on that basis must be and is declined. In terms of Rule 17.5(2)



substantial justice does not require the extension of time to allow the claimants to pursue a claim based on this ground.

30. As I have noted, there is an alternative basis on which leave has sought to mount a judicial review claim. In brief this relates to alleged breaches by the Vahas Village Land Tribunal of the processes required by the CLT Act.

31. Assuming the first claimants wish to pursue this limb of their application, there will need to be a further hearing in Chambers to determine that aspect of the application for leave, since I know it is opposed by the proposed defendants.

32. Mr Kilu is to file and serve his submissions in support of that limb of the application **by 31 March 2015** with Mr Yawha and Ms Warren to file and serve their submissions in reply **by 22 April 2015**.

33. The Chambers hearing will be **on Monday 27 April 2015 at 2.00 pm.** Should this be unsuitable to counsel they should promptly contact my Asssociate Anita Vinabit to arrange an alternative.

34. The proposed defendants are entitled to standard costs on the aspect of the leave application determined in this judgment. These are to be taxed if not agreed. Any such taxation should await determination of the second aspect of the application.

BY THE COURT

STEPHEN HARROP
Judge

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