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

Civil Case No. 208 of 2010

IN THE MATTER OF: **Customary Land known as SARAKOKONA LAND on West Ambae.**

BETWEEN: **FAMILY HIVOLILIU represented by CHIEF ABEL NAKO HIVOLILIU**
Claimant

AND: **AMBAE ISLAND LAND TRIBUNAL**
First Defendant

AND: **JOHN ROLL TARIHEHE**
Second Defendant

Coram: *Justice D. V. Fatiaki*

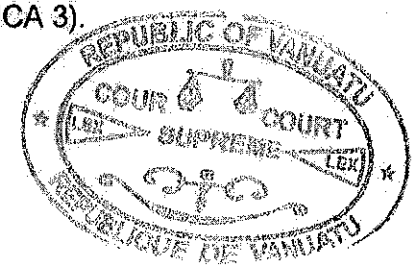
Counsels: *Mr. F. T. Laumae for the Claimant*
Mr. S. C. Hakwa for the First Defendants
Mr. A. F. Obed for the Tribunal

Date of Ruling: *3 February 2017*

JUDGMENT

1. This is a claim for judicial review under Part 17 of the Civil Procedure Rules brought pursuant to Section 39 now repealed Customary Land Tribunals Act. The claim has advanced beyond Rule 17.8 and was adjourned for hearing. Both counsels have indicated their desire to cross-examine deponents who filed sworn statements. On further questioning counsel for the Second Defendant indicated that he wished to cross-examine the claimant's witnesses on the allegation(s) of bias against the chairman of the defendant Tribunal and other members.

2. Although Part 12 of Civil Procedure Rules dealing with trials has application to a judicial review claim (*see:* Rule 17.3) cross-examination is rarely permitted or required in a claim for judicial review which mainly looks at the process and procedure of the lower adjudicating body rather than its merits. For instance a successful allegation of perceived bias affects the composition of the tribunal rather than the merits of the impugned decision (*see:* Matarave v. Talivo [2016] VUCA 3).



3. In the present case the Court did not consider that cross-examination should be allowed given the numerous other grounds of complaint which were upheld by the Court in its judgment below.

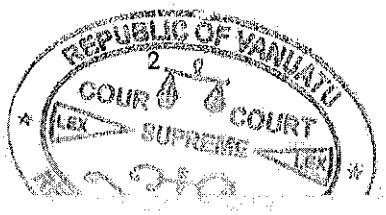
4. In the absence of the original Land Tribunal records which was the responsibility of the defendant tribunal and its counsel to produce, this Court is unable to go beyond the decision of the West Ambae Tokatava Area Lands Tribunal in late February 2008 which determined an appeal by the Second Defendant against an earlier Tangialo Village Land Tribunal decision in December 2007 declaring the claimant customary owner of "*Sarakokona land*" situated at West Ambae.

5. The Tokatava Area Land Tribunal dismissed the Second Defendants' appeal and confirmed the claimant's custom ownership of "*Sarakokona land*". Additionally, the Tokatava Area Land Tribunal declared the Second Defendants custom owners of four (4) pieces of land – "*Lo Matamata*"; "*Lo Tung Matandondo*"; "*Lo Ngelato*" and "*Lone Ngwarava*".

6. On 10 March 2008 the Claimant lodged an appeal with the chairman of the Ambae Island Council of Chiefs. Principal amongst the grounds of appeal was a complaint that the 4 identified customary lands granted to the Second Defendant were never the subject matter of any determination of the earlier land tribunal being appealed from to the Tokatava Area Land Tribunal and therefore the declarations in regard to the said 4 lands were beyond jurisdiction.

7. Likewise the Second Defendant lodged an appeal against the declaration of "*Sarakokona land*" in the Claimant's favour as well as two of the declarations in his favour concerning: "*Lo Matamata land*" and "*Lo Tungumatandonda land*". In this latter regard, if these latter 2 lands are part and parcel of "*Sarakokona land*" as defence counsels appeared to suggest, then why was there a need to make separate custom owner declarations in respect of them ***ie.*** apart from the declaration of custom ownership of "*Sarakokona land*" as occurred in the decisions of the Tokatava Area Land Tribunal and the defendant Tribunal?

8. Be that as it may the Second Defendant's typewritten appeal notice is incorrectly dated "*21 Dec. 2007*" and bears no receipt stamp or indication of when it was lodged with or received by the chairman of the Ambae Island Council of Chiefs. The appeal raises numerous breaches of the provisions of the Customary Land Tribunals Act ("*CLT Act*") as well as the misapplication of fundamental principles of customary law applicable to land ownership on Ambae including the qualification of members of the Tokatava Area Land Tribunal who sat and determined the earlier appeal.



9. By an undated and unsigned notice of hearing, both appellants against the Tokatava Area Land Tribunal decision was informed that the Ambae Island Land Tribunal would be hearing their appeals concerning "*Sarakokona land*" on Monday 25 October 2010 at Ambore and they were to attend with their (unquantified) hearing fees.

10. Section 25 of the CLT Act sets out the cumulative mandatory ("*must*") requirements of a notice of hearing as follows:

    (1) That it be given by the secretary of land tribunal;
    (2) That it be in writing in Bislama;
    (3) That it specify the date and time of the hearing;
    (4) That it specify the place of the hearing;
    (5) That it specify the name and address of the secretary of the land tribunal; and
    (6) If applicable – specify the grounds of appeal.

11. On the face of the notice of hearing in this case requirements (2), (3) and (4) are fulfilled but requirements (1), (5) and (6) are not. The notice of hearing is therefore non-compliant with the mandatory requirements of Section 25.

12. Be that as it may, despite having properly lodged an appeal with the Ambae Island Council of Chiefs, the Claimant nevertheless filed a judicial review against the Tokatava Area Land Tribunal decision in Civil Case No. 121 of 2008 on 25 July 2008. That was premature as all appeal avenues under the CLT Act had not yet been exhausted. What followed can only be described as an unfortunate turn of events.

13. In the absence of the Claimant or his counsel Civil Case No. 121 of 2008 was dismissed with costs on 12 February 2009 at a conference hearing before Dawson J. On 25 May 2009 the then Master assessed the second Defendant's costs at VT192,800. Instead of appealing the dismissal order or seeking its reinstatement in the same case, on 23 July 2010 the Claimant issued a fresh claim in Civil Case No. 103 of 2010 seeking a stay of the costs order and an order reinstating the earlier dismissed claim *ie.* Civil Case No. 121 of 2008.

14. In October 2009 the Ambae Island Land Tribunal despite being informed of the Claimant's pending judicial review proceeding in Civil Case no. 121 of 2008, went ahead and heard the "*Sarakokona land*" appeal on 29 October 2009 after adjourning the hearing twice. In the absence of the Claimant's spokesman who had withdrawn from the hearing under

protest, the Ambae Island Land Tribunal determined the appeal in the Second Defendant's favour.

15. By 21 December 2010 events had clearly overtaken Civil Case No. 103 of 2010 which remained extant until its dismissal by Spear J. on 24 March 2011. The Claimant then filed the present case seeking to judicially review the decision of the Ambae Island Land Tribunal.

16. From the foregoing it is clear that the Claimant's problems with his earlier abortive cases was a result of a misunderstanding of the provisions and procedures underlying the CLT Act which inter alia set up a 3–tier appellate process ending with the Island Land Tribunal.

17. Section 39 also provides a supervisory jurisdiction in the Supreme Court if unqualified persons participate in land tribunal proceedings or if a land tribunal fails to follow procedures under the CLT Act. The jurisdiction is unlimited as to when it may be invoked but is confined to: "*... a party to the dispute*". Unfortunately Section 39 is silent on the exercise of the Court's supervisory power during the pendency of an appeal before an appellate land tribunal and that lacuna has been the cause of much of the Claimant's problems.

18. With the above background it is possible to return to the present matter before the Court which concerns the procedure under Part 17 of the Civil Procedure Rules in a claim for judicial review and in particular Rule 17.8(3) which provides:

"*The judge will not hear the claim unless he or she is satisfied that:*

(a) The claimant has an arguable case; and
(b) The claimant is directly affected by the ... decision; and
(c) There has been no undue delay in making the claim; and
(d) There is no other remedy that resolves the matter fully and directly".

19. Two features are prominent in the above Rule – firstly, the rule deals with whether or not a judicial review claim should be allowed to proceed to a full hearing and secondly, the claimant has the burden of satisfying the Court of all four matters (conjunctive "*and*") set out in subparas. (a) to (d). Failure to do so on any sub-para would be fatal to progress of the claim [**see**: 17.8(5)].

20. In so far as subpara. (a) requires the establishment of "*an arguable case*" the question is to be approached on the basis of the materials and any opposition that may be made to the application. At this preliminary stage the Court need not be satisfied that the claim is fully justified or even likely to succeed, rather, the Court only needs to be satisfied that there is

a prima facie case raised on the claimant's materials worthy of further consideration at a full hearing.

21. In this regard the claimant's grounds for judicial review includes – a challenge to the qualification of the members of the First Defendant Tribunal; non-compliance with the requirements of Sections 25 to 29 of the Act; making ultra vires declarations concerning lands that were never the subject matter of the dispute between the parties which was confined to "*Sarakokona land*"; and several allegations of apprehended bias.

22. Before discussing the grounds further this Court records its satisfaction that the Claimant has established subparas. (b); (c) and (d) of Rule 17.8(3) in so far as he is directly affected by the decision of the Defendant tribunal which ordered his eviction from "*Sarakokona land*" after the challenged decision was made and since the Defendant tribunal is the final appellate Tribunal under the CLT Act, therefore the only remaining avenue available to the Claimant to challenge that decision is by way of an application invoking Section 39 and finally, the claim having been lodged within 6 months of the defendant Tribunal's formally recorded decision is within the time limit prescribed in Rule 17(5) of the Civil Procedure Rules.

23. Returning to subpara (a), although it is common ground that the Claimant's spokesperson knowingly absented himself from further attendance at the hearing of the appeal by the First Defendant tribunal that does not constitute a waiver of the Claimant's challenge to the qualification of the membership of the Defendant tribunal (***see:*** Taliban v. Worworbu [2011] VUCA 31 esp. paras. 5, 6 and 7).

24. In the Taliban case (ibid) the Court of Appeal also relevantly observed:

> *"8. When a Court is faced with such an objection to the constitution of a land tribunal, it is necessary to have regard first and foremost to sections 35, 36 and 37 of the Customary Land Tribunal Act.*
>
> *9. By those sections, the council of chiefs for a particular area (whether a custom area or custom sub-area) is required first to determine the boundaries of the area under its customary regulation (to adopt the terminology employed by s.3 of the Act). That council of chiefs is then required to approve a list of those chiefs and elders who are considered qualified (as defined) and acceptable to adjudicate on disputes as to the boundaries or ownership of custom land within that area.* ***These are mandatory requirements preliminary to but also essential to the establishment of any village land tribunal under ss 7 - 9.***
>
> *10. There are other requirements on the council of chiefs including: (1) to forward the list of approved adjudicators to the Secretary of the Island council of chiefs (for a custom sub-area, a copy is also to be sent to the secretary of the*

council of chiefs for the custom area to which the sub-area belongs); and, (2) the annual revision of that list. The importance of those two steps to the legitimacy of a particular land tribunal will depend on the circumstances of the individual case.

11. In order to determine whether this Land Tribunal was lawfully constituted, and accordingly whether its decision is valid, it will be necessary for the Supreme Court first to ascertain which particular council of chiefs had "customary regulation" over the land in question. Once that is established, it will then need to determine whether the members of the land tribunal in question were, in each case, drawn from the list of approved adjudicators compiled by that particular council of chiefs. Finally, it must be satisfied that the necessary procedural steps (the giving of public notice and suchlike) have been taken pursuant to ss 7 - 9. This is a different issue to whether a land tribunal has conducted itself correctly under Part 6 of the Act."

(my emphasis)

25. In the case of an Island Land Tribunal Section 23 relevantly provides:

"(1) The chairperson of the island council of chiefs must convene a meeting of the council within 21 days after receiving a notice of appeal under section 22.

(2) The island council of chiefs must establish an island land tribunal to determine the appeal.

(3) If the land the subject of the decision being appealed against is situated wholly within one custom area, the island land tribunal consists of:

(a) subject to subsection (4), a chairperson who is to be the chairperson of the custom area council of chiefs if he or she is qualified under this Act to adjudicate the dispute and is willing to do so; and

(b) 4 other chiefs or elders from the custom area appointed by the island council of chiefs; and

(c) a secretary appointed by the island council of chiefs.

(4) If the chairperson of the custom area council of chiefs is not qualified under this Act to adjudicate the dispute or is not willing to do so, he or she must appoint another chief or elder from the custom area as the chairperson."

(my underlining)

26. In brief, although it is the Ambae Island Council of Chiefs that must establish the Ambae Land Tribunal, nevertheless, the chairman and members of the Tribunal, where the land is situated wholly within one custom area, must come from "*that custom area*" where the land is situated.

27. In the present case the members of the Ambae Island Land Tribunal are comprised of 5 members each drawn from the four different wards

constituting the whole island of Ambae which "*ex facie*" is in breach of the above provision. Counsel also submits without objection that the correct and lawful chairperson of the relevant custom area where "*Sarakokona land*" is situated is: **Chief Charley Takaro** and not Chief Tom Grant who originates from a different ward and custom area.

28. Although Chief Tom Grant explains in his sworn statement the reason why he was appointed in place of Chief Charley Takaro (not confirmed by him) the fact that Chief Tom Grant was appointed, on his own sworn admission, by the West Ambae Island Council of Chiefs is itself a breach of Section 23(4) in that the appointing authority is not the Island Council of Chiefs as a body but the chairperson of the relevant custom area as an individual ("*he or she*") namely Chief Charley Takaro.

29. In its defence, the Defendant tribunal says that its members were qualified and appointed as willing members to sit on a land tribunal under Section 35 and 36 of the CLT Act. In support thereof the Chairman of the Ambae Island Council of Chiefs, Chief Tom Grant, deposed a sworn statement attaching what is claimed to be an approved list of adjudicators for land tribunals sitting to hear customary land disputes for Ambae (**TG '*1*'**) together with handwritten minutes of the Defendant tribunal hearings on 25th, 28th and 29th October 2010 (**TG '*2*'**) and a prescribed KASTOM ONA BLONG KRAON Form recording the decision of the Defendant tribunal (**TG '*3*'**).

30. Several features are evident from a consideration of the "***TG***" attachments:

    (1) The so-called list of adjudicators (**TG '*1*'**) is unsigned and undated nor does it bear any stamps or indication that it has been complied by or approved by the Ambae Island Council of Chiefs;
    [see: s. 23(4)]

    (2) The handwritten minutes (**TG '*2*'**) of the aborted hearings on 25th and 28th October are not countersigned by the Chairman of the Defendant tribunal as they should have been to avoid any possible disputes;

    (3) The prescribed decision Form (**TG '*3*'**) does not have attached to it a copy of the sketch map of the boundaries of the land(s) the subject matter of the decision.

31. Likewise no record or minutes of the decisions of the Tangialo Village Land Tribunal or the Tokatava Area Land Tribunal was ever produced to the Court by the parties or by the Director of Lands or the officer in charge of the Customary Lands Tribunal Office within the Department of Lands as might be expected and considering the statutory duties

imposed on the Director under Section 40(1)(d) (to preserve and secure records) and (e) (to compile a register of decisions).

32. The absence of such records and information prompted the Court of Appeal to observe in Tavue v. Joint Village Land Tribunal Court [2013] VUCA 34:

> *"1. This appeal highlights two things:-*
>
> *2. **First**, it is vitally important that the processes under parts 6 and 7 of the Customary Land Tribunal Act [CAP 271] are complied with so that the boundaries and lists are clear, including the annual review of lists of approved adjudicators. **Furthermore, that the Department of Lands through the Customary Land Tribunals Office keeps proper records of the Land Tribunal decisions and processes** and ensures that the Council of Chiefs for each custom area annually review the list of approved adjudicators.*
>
> *3. **Secondly, when cases like this arise, the State Law Office should be able to produce to the Supreme Court the proper records so that there will not be disputes between the parties on conflicting and largely anecdotal evidence**. The State Law Office tries to assist the Court, as it should, in matters like this, but even it as the representative of the land tribunals is not able to say what the record shows.*
>
> *4. If proper records were created and maintained, the number of cases like this before the Supreme Court and the Court of Appeal would, very likely drop dramatically for the benefit of all."*
>
> (my highlighting)

33. As for the complaint that the defendant tribunal was in breach of Section 27(5) of the CLT Act which provides:

> *"A land tribunal must inspect the land in relation to which there is a dispute and, if possible, must walk around the boundaries of the land."*

34. Counsel points to the undisputed sworn assertion of the spokesman of the Claimant, **Oground Hivo**, who attended the hearing on 29 October 2010 and who deposed:

> ***"There was no site visit"***

Counsel also points to the handwritten minutes of the defendant tribunal for 29 October 2010 which nowhere records that the Tribunal complied with the mandatory requirement to "*inspect the land*" or explain why it was not possible to: "*walk around the boundary of the land*".

35. The sworn assertion of Oground Hivo is contained in his sworn statement dated 30 May 2012 and is not referred to or denied in the later sworn statement of Chief Tom Grant which was deposed on 13

September 2012. Counsel for the defendant tribunal also conceded the defendant Tribunal's failure during his oral submissions and the hearing timeline of the defendant tribunal (**see:** para. 40 below) does not in my view, allow sufficient time for such an inspection or walk to take place.

36. Then there is a serious allegation of "*apprehended bias*" on the part of the Chief Tom Grant and some members of the defendant Tribunal. The allegations include a close familial relationship and association between him and the Second Defendant; a tribunal member was seen socializing and drinking kava with the Second Defendant and an assertion that the tribunal members were seen riding in the same truck as the Second Defendant to go to and from the hearing venue. Other allegations were also raised by the spokesman of the Claimant during the hearing on the 25th and 29th October 2010 but these were rejected by the chairman: "*se ol objection ia ino hevy inaf*" (whatever that may mean) without any reasons or clarifications.

37. In this particular regard Section 37(2) of the CLT Act sets out several disqualifying grounds to membership of a land tribunal including:

> "*... having such business or financial interests or social, religious, political or other beliefs or associations that will prevent* (the member) *from applying custom honestly and adjudicating impartially*".
>
> An identical disqualification exists in respect of the secretary of a land tribunal [**see:** Section 38(4)(c)].

38. It is clear that "*social*" and "*political*" "*beliefs*" and "*associations*" are capable of disqualifying a member of a land tribunal if it prevents the member from applying custom honestly and adjudicating impartially.

39. Given the above and the undisputed evidence of the close social association between members of the defendant tribunal and family members of the Second Defendant, the summary and perfunctory rejection of the Claimant's allegations is, in my view, at least doubtful. As for the Claimant's allegations against the chairman Chief Tom Grant himself, there is no doubt in my mind that the rejection uttered by Chief Tom Grant (without an adjournment and without excusing himself) was in breach of the mandatory requirements of Section 26(4) in so far as he was a "*judge in his own cause*".

40. Finally there is counsel's complaint that the Defendant tribunal "*... heard and decided* (the appeal) *within 8 hours*". Counsel for the Second Defendants submits in opposition that there is nothing in the CLT Act giving time limits for a land tribunal to decide and, in this case, the

defendant tribunal was quite entitled to decide the appeal immediately after the hearing was completed, given the Claimant's withdrawal and non-participation in the proceedings.

41. I accept that there are no exact time limits prescribed in the CLT Act as to how soon after a hearing, a decision may be given by a land tribunal, but, in my view, the provisions of Section 27(6) and Section 29 are relevant to this complaint. Section 27(6) requires a land tribunal hearing a dispute: "*... to do so in such a way that is fair and reasonable in all the circumstances to the parties*" and Section 29(1) clearly requires a land tribunal decision to be given: "*... within 21 days after the completion of the hearing*" (***ie.*** maximum time limit). The Section also dictates:

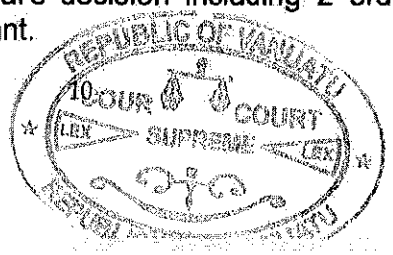
"*after the hearing ... is completed, the chairperson must adjourn the meeting of the land tribunal to enable the members to make their decision*".

(my emphasis)

42. The intention and purpose of the section is clear and that is to ensure that after the hearing is completed, the land tribunal "*must adjourn*" the proceedings to allow sufficient time for its 5 members to consider the evidence and deliberate on a decision both individually and collectively in order to arrive at a "*consensus*". It would also allow the land tribunal time to inspect and walk the boundary of the disputed land with the assistance of the parties and time for the land tribunal to recall the parties and their witnesses should further clarification be required about the evidence or relevant customary rules or to consider what other additional orders are sought or should be made under Section 30.

43. In this regard the recorded timeline in the handwritten minutes of the defendant tribunal hearing on 29 October 2010 shows the following:

8.55am	-	members of the public are allowed to enter the hearing room;
9.00am	-	the members of the defendant tribunal enter the hearing room and the chairman gives a welcome speech after which there is an opening prayer;
10.30am	-	the hearing of the second defendant's appeal concluded and the chairman adjourned to make a decision;
2.45pm	-	the tribunal and the public reassemble and the chairman proceeds to announce the defendant Tribunal's decision including 2 orders against the claimant.



44. It is clear from the timeline that the defendant tribunal took barely 4 hours to decide the appeal after it had concluded the hearing of the evidence on the same day. Furthermore given the provisions of Section 29(2) it is unfortunate that the defendant tribunal did not indicate whether the decision was unanimous or a majority decision or one which required a casting vote.

45. The question that arises is: was there an adjournment of the proceedings within the terms of Section 29(1)?

46. In my view given that a land tribunal is comprised of 5 members and given that no less than 5 witnesses were called and testified before the defendant tribunal and given the fact that the defendant tribunal had not yet inspected or walked the boundary of "*Sarakokona land*" which was some distance from the hearing venue and finally, given the maximum period of 21 days prescribed in Section 29, the adjournment of the defendant tribunal after the hearing of the evidence for barely 4 hours before delivering its decision was not in keeping with the intention and purpose of the mandatory requirement of the section. It is unnecessary however to conclusively answer this question as I am satisfied that the decision of the defendant tribunal must be quashed for the reasons earlier set out in this judgment.

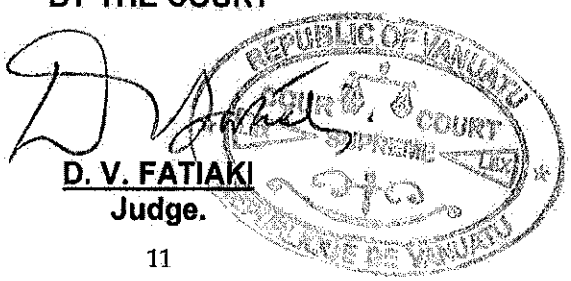
47. The defendant Tribunal's two consequential orders are set aside and I order standard costs of this court and before the defendant tribunal to be borne by the Second Defendant to be taxed if not agreed.

48. In view of the passing of the new Custom Land Management Act I make no order for a rehearing instead leave it to the parties to pursue their interests as they consider appropriate.

49. The VT500,000 bond posted by the Claimant as "*security for costs*" is also ordered to be returned to the Claimant forthwith from the Chief Registrar's Trust account.

DATED at Port Vila, this 3rd day of February, 2017.

BY THE COURT



D. V. FATIAKI
Judge.