

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

Civil Appeal Case No: 40 of 2012

BETWEEN: JEHU BONGNAIM AND FAMILY, JIMMY JEHU AND FAMILY, BENJAMIN LEWA AND FAMILY, JAMES JEHU AND FAMILY, BATO JEHU AND FAMILY, RICKON SAMSON AND FAMILY, WILLIE SAMSON AND FAMILY, LEONARD LEINKONE AND FAMILY, JESSY HIVIR AND FAMILY Fanjever Village, North Ambrym, Malampa Province in the Republic of Vanuatu
First Appellants

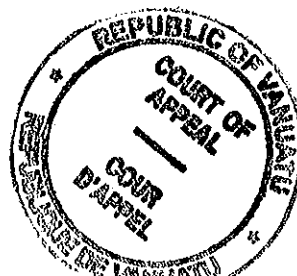
AND: WORWOR GABRIEL AND FAMILY, FREDDY MAXWELL AND FAMILY, JONATHAN HULHUL AND FAMILY, SARIPAN WALWAL AND FAMILY, ALILI MOL AND FAMILY, Fanjever and Faliliu Villages, North Ambrym, Malampa Province, in the Republic of Vanuatu
Second Appellants

AND: ANDREW BEONGKON, JUSTIN RAMEL, BONG MAROM LAAN WILLIE AND ELI TIWOR comprising Area Council of Chiefs North Ambrym, Malampa Province
Third Appellants

AND: ANDREW WELWEL AND FAMILY (FAMILY RORIRI), JEREDLY TATAO AND FAMILY (FAMILY RORIRI), CHIEF LEINGKON GIDEON AND FAMILY (FAMILY RORIRI), represented by Andrew Welwel Fanjever Village, North Ambrym, Malampa Province, Republic of Vanuatu
Respondents

Coram:

Hon. Chief Justice Vincent Lunabek
Hon. Justice Bruce Robertson
Hon. Justice Daniel Fatiaki
Hon. Justice John Mansfield
Hon. Justice Dudley Aru



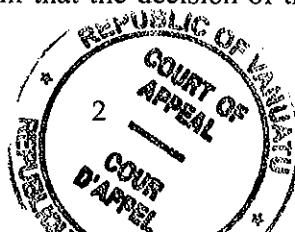
Hearing: 17 October 2012

Appearances : 1st, 2nd and 3rd Appellants: James Tari
Respondents: George Boar

Decision: 25 October 2012

JUDGMENT OF THE COURT

1. On 18 February 2010, the “*Metamli (Fanjever) Land Tribunal*” (the “*Tribunal*”) declared the Respondents (Family Roriri) custom owners of Malwei/Metamli land including the Faliliu and Fanjever villages which are located in North Ambrym.
2. It appears that there was no challenge by way of appeal or review of the Tribunal’s decision of 18 February 2010 by the Appellants or anyone else.
3. The Respondents filed an Amended Supreme Court Claim on 9 March 2012 claiming among other matters, for orders evicting the first and second appellants from Melwei/Metamli Land and damages against the first, second and third appellants for the damage caused to their crops, gardens, houses and personal belongings, a training center and other expenses.
4. On 10 July 2012, the Respondents filed an application for summary judgment on their claim. In particular, they sought an order requiring the first and second appellants to quit the Melwei/Metamli land on North Ambrym. It is understood that the summary judgment application was confined to that part of the claim that seeks orders requiring the first and second appellants to quit the Melwei/Metamli land. In addition, for judgment to be entered on liability only in respect of the claim for damages and that the quantum is yet to be determined.
5. On 14 August 2012, Spear J heard the application for summary judgment and was satisfied on evidence before him that the decision of the Tribunal dated 18 February



2010 has not been challenged on appeal or review. He then accepted it as the final determination of any custom ownership issues in respect of Melwei/Metamli land. He therefore, entered a Summary Judgment for the claimants in the following terms:

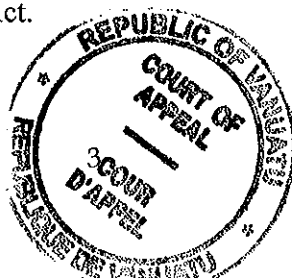
- a) The first and second defendants are to leave Melwei/Metamli land on Ambrym within one month and they are not to re-enter that land except with the express permission of Family Roriri;
- b) The first and second defendants are liable for damages suffered by the claimants as a result of the physical assaults and property damages on 19 August 2012 and of being forced to leave their lands within the quantum of such damages still to be determined.
- c) Costs for the claimants against the first and second defendants on a standard basis to agreed or taxed.

6. The first, second and third appellants appealed against the summary judgment and orders of the Supreme Court issued on 14 August 2012. In their notice of appeal filed 4 October 2012, they seek the following relief;

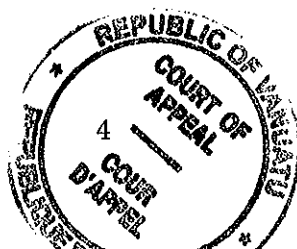
- 1) That the summary judgment be set aside;
- 2) The Supreme Court Civil Case No. 61 of 2011 be dismissed in its entirety;
- 3) Costs of and incidental to this appeal.
- 4) Any other orders as this Court deems necessary.

7. The appeal is advanced on the principal ground that the Court below erred in law and fact in deciding to give summary judgment based on a decision of Fanjever Land Tribunal dated 18 February 2010 whereas the land tribunal system has not yet been set up on the island of Ambrym and in particular there were no appointments of adjudicators in accordance with the provisions of the customary Land Tribunal Act [Cap.171].

8. During the hearing, section 37(1) of the Customary Land Tribunal was identified as the fundamental provision of law relating to the constitution of a Land Tribunal under the Customary Land Tribunal Act.



9. Section 37(1) provides:
- “A chief or elder is not qualified to be a member of a land tribunal unless he or she is included in a list approved under section 35 or 36.”*
10. The only way for a chief or elder to be a member of a land tribunal is to be on the approved list as required under section 37 (1) of the Act [Cap.171]. That matter was not argued before Spear J on 14 August 2012 and the particular section was not drawn to his attention.
11. In Taliban v. Worworbu [2011] VUCA 31; Civil Appeal 17.2011 (25 November 2011), it was stated (at paragraphs 8-11):
- “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.”*



12. In the present case, there was no evidence of an approved list of adjudicators as required under s. 37 (1) of the Act. Mr Boar conceded that there was no such list of approved adjudicators. It is a mandatory requirement. So what appeared to be a Customary Land Tribunal was not so constituted that it could be treated as such.
13. We are therefore of the view that the learned Judge reached his decision on a breach of the law. There was no evidence capable of proving the respondents' interest in the land to entitle them to maintain their claim.
14. Accordingly, the appeal must be allowed and the orders made by the Supreme Court on 14 August 2012 are set aside. The matter is remitted back to the Supreme Court. For this dispute to be resolved, it is important and urgent that the council of chiefs for the particular area of North Ambrym establish a land tribunal and appoint adjudicators in accordance with the relevant provisions of the Customary Land Tribunal Act [Cap.171].
15. Alternatively the respondents could seek to otherwise prove their custom ownership but the sole ground advanced in the Supreme Court was unsustainable under the requirements of the Act.
16. There is no order as to costs.

FOR THE COURT


The Honourable Chief Justice Vincent Dunabek

