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

Civil Appeal
Case No.23/1481 COA/CIVA

BETWEEN: **ROLLAND TURA, MARCO TAMATA, BERTRAND TURA, SERGIO KOROKA, ELIANNE KOROKA, JAMES KOROKA, ALFOSINE JEANNOT, STEVEN BOE and JOHANE LAWAC**
Appellants

AND: **TAFTUMOL FAMILY represented by Victor MOLTURES**
Respondents

Dates of Hearing:	***8 and 16 August 2023***
Coram:	***Hon Chief Justice V Lunabek*** ***Hon Justice JW von Doussa*** ***Hon Justice R Asher*** ***Hon. Justice OA Saksak*** ***Hon Justice VM Trief*** ***Hon Justice E Goldsbrough***
Counsel:	***E Molbaleh for the Appellants*** ***A Godden for the Respondents***
Date of Decision:	***18 August 2023***

JUDGMENT OF THE COURT

1. The notice of appeal before the Court, filed without leave to appeal, seeks to appeal out of time against a summary judgment entered on 9 March 2021, and against an interlocutory order made on 12 June 2023 which refused leave to appeal against the earlier judgment.

2. The opposing parties in these applications have been in dispute over custom ownership and lesser custom interests in an area of land in Santo for very many years. Attempts to resolve the dispute through the legal processes available in Vanuatu have reached a point which has exposed fundamental questions concerning the interaction of the two very different legal systems recognised in the Constitution.

3. Part 8 of the Constitution establishes two Court systems. Those systems are very different in nature, but the Constitution assumes that they are to operate side by side.

4. Article 47(1) of the Constitution provides:

> ***"47. The Judiciary***
>
> *(1) The administration of justice is vested in the judiciary, who are subject only to the Constitution and the law. The function of the judiciary is to resolve proceedings according to law. If there is no rule of law applicable to a matter before it, a court*

shall determine the matter according to substantial justice and whenever possible in conformity with custom".

5. Article 49 establishes the Supreme Court with unlimited jurisdiction to hear and determine any civil or criminal proceedings.

6. Under Article 52 Parliament shall provide for the establishment of village or island courts with jurisdiction over customary and other matters and shall provide for the roles of the chiefs in such courts. Parliament in exercise of this mandatory power established the Island Courts under the Island Courts Act [CAP 167]. In some of their functions the Island Courts also constitute customary institution to resolved disputes concerning the ownership of custom land, as required by Article 78 of the Constitution.

7. An important function of the Supreme Court in exercise of its jurisdiction to hear and to determine civil matters is to resolve disputes arising under the British and French laws inherited under Article 95 of the Constitution, and after Independence the written laws of Vanuatu. In doing so the practices of the Supreme Court have firmly entrenched rules of civil procedure that have evolved mainly from the British Supreme Court Rules. Those rules are now embodied in the Civil Procedure Rules (No.9 of 2002). The strictness of these rules has dominated events in the latter stages of the dispute between the parties as it has progressed through the legal systems.

8. Equally important to the Civil Procedure Rules is the direction under Article 95(3) of the Constitution that custom law shall continue to have effect as part of the law of the Republic of Vanuatu. Further, in matters concerning land Part 12 of the Constitution is paramount. By Article 73 all land in Vanuatu belongs to the indigenous custom owners and their descendants. By Article 74 the rules of custom shall form the basis of ownership and use of land and by Article 75 indigenous citizens who have acquired their land in accordance with a recognised system of land tenure shall have perpetual ownership of the land.

9. Interests in custom land acquired according to custom are complex and include layers of secondary rights to use and enjoy land; see *Family Kaltabang Malastapu v Family Kaltonga Marabongi and Ors* (the Land Appeal Case No.58 of 2004), cited at length in *Kalwatsin v Willie* 2009 VUCA 47 at [32], and *Iaus v Noam* [2017] VUCA [40 at 34].

10. As appear from the litigation history set out below the respondent is the declared primary custom owner of the land in question and the appellants are, or at least claim to be, holders of secondary rights to reside on and use parts of the land.

11. To this point in time the dispute has been considered first in the customary legal system administered by an Island Court (and on appeal to the Supreme Court exercising an appellate jurisdiction under the Island Courts Act). Those proceedings culminated in a decision made in the Santo/Malo Island Court on 12 June 2015, and later varied by a decision of the Supreme Court on appeal on 29 June 2020 that declared the respondent the primary custom owner, and Family Tura and their descendants holding in custom of secondary rights and interests over the land in question. The appellants bring these proceedings as members of Family Tura.

12. The dispute then moved into the Supreme Court where the respondent sought to evict the appellants and 51 other people from the land. Part of the proceedings in the Supreme Court reached the Court of Appeal on 7 February 2023, in *Bulurave and Ors v Taftumol Family* [2023] VUCA 5.

13. In *Bulurave* the Court held, in effect, that secondary custom land rights said to have been declared in favour of the 12 appellants (some of the defendants in the Supreme Court) had become unenforceable, and therefore lost. This outcome was the consequence of the regular application of the procedural rules of the Supreme Court.

14. The stark reality of the situation now before the Court is that the civil system of law and its procedures appear to have ruled the day over the secondary rights declared to Family Tura.

The litigation history

15. The history starts with a decision made in the Santo Malo Island Court on 12 June 2015. That decision was appealed to the Supreme Court in *Family Moltamaute & others v Family Taftumol & others*, Land Appeal Case No.05/ 15. In its Judgment on 29 June 2020 (the Land Appeal decision) the Supreme Court made the following findings:

> *"Therefore, the Findings of facts, customs and declarations of customary ownership and interests of the lands which are the subjects of this dispute made on the 12th of June 2015 by the Santo Malo Island Court are confirmed except for the following corrections and amendments:*
>
> *a) Family Taftumol and their descendants are declared custom owners with primary interests over the land of Tambotal, Belmol and Beleru;*
>
> *b) Family Loiror Lin and Family Taftumol and their descendants are declared custom owners both with primary and equal rights over the land of Sevua;*
>
> *c) Family Warawara and Varavara and their descendants are declared custom owners with primary rights and interests over the land of Belvos;*
>
> *d) Family Tura and their descendants are declared custom owners with only secondary rights and interests over the land of Belvos and Belmol.*
>
> *This means that their rights are not equal but subject to the rights and interests of family Vavara on Belvos;*
>
> *And for the land of Belmol and Beleru, it is for Family Taftumol to decide which part of the Belmol land to allocate to Family Tura for their use in recognition of their secondary right."*
>
> *(emphasis added)*

16. Following the Supreme Court Land Appeal decision Family Tura were offered 50 hectares of land within the lands of Tambotal, Belmol and Beleru by the respondent. That offer was rejected

and Family Tura were then informed that the previous offer had been reduced to 10 hectares. That offer was refused.

17. On 29 September 2020 Family Taftumol commenced Supreme Court civil claim 20/2656 seeking an order for eviction against 59 defendants, their relatives, servants and agents. The claim alleged the defendants were trespassers on the land known as Tambotal, Belmol and Beleru, and sought orders against all defendants "to remove their houses, crops, animals and any other property" from the land. In response sworn statements from the appellant Rolland Tura deposed that members of Family Tura had occupied the subject land for at least five generations and established houses and gardens there.

18. Some of the named defendants were served and later defences were filed on behalf of some defendants by Mr Tevi.

19. On 23 November 2020 the Taftumol Family applied for summary judgment against all defendants.

20. On 9 March 2021 that application was granted by a Supreme Court Judge. Mr Tevi did not attend the hearing and did not provide any reason for his non-attendance. The Judge after referring to the conclusions of the Land Appeal decision said:

> *"Unless the defendants have permission and authorisation from family Taftumol to remain on the land, they remain as trespassers".*

The Judge ordered that the defendants and their families and relatives be evicted by 30 April 2021. It is against this decision that the present appellants now seek leave to appeal.

21. Subsequently the defendants applied for a stay order which was struck out for non-attendance of anyone on behalf of the defendants. A further conference was listed for 20 September 2021 at which an enforcement warrant was issued. That warrant was endorsed by the Supreme Court Judge on 23 September 2021 authorising the sheriff to "Enter onto Tambotal, Beleru and Belmore Customary land ... currently occupied by the Defendants" and take possession of the lands. The warrant was to expire on 21 December 2021.

22. On 20 December 2021 on application on behalf of one defendant the warrant was extended to 4 August 2022. It seems that the warrant expired without being executed.

23. On 3 February 2022 the respondent filed an application to renew the enforcement warrant, and 5 July 2022 the warrant was renewed to expire one year later. An application to stay the warrant was refused.

24. On 1 August 2022 the Sheriff posted a notice of eviction, and personally served the warrant on some of the defendants.

25. On 11 August 2022 the sheriff carried out checks on the properties. Some defendants where still there. On 25 of August 2022 some of the defendants applied for an urgent stay of the warrant,

but that was refused. Finally on 26 August 2022 the sheriff together with Police Officers executed the warrant, and all defendants were evicted.

26. Twelve of the defendants sought to appeal to this Court against the decision granting the renewal of the enforcement warrant on 5 July 2022 and against the dismissal of the application to stay the warrant on 25 August 2022. This became the *Bulurave* appeal. It was necessary for the appellants to obtain leave to appeal out of time as their papers were filed late. The Court of Appeal held that in reality the appeal was against the original summary judgment given on 9 March 2021. The delay was therefore very long. Leave to bring the appeal out of time was refused. Further, on the substantive ground for the appeal the Court held that although the appellants pointed to irregularities in the method of enforcement, the warrant was spent upon its execution, and the proposed appeal was therefore academic.

The present application

27. The present appellants are 9 of the original 59 defendants in the Supreme Court. The events outlined above concerned them just as they did the appellants in the *Bulurave* decision, and the discussion about delay and the expiry of the warrant supports the respondent's submission that the applications now before the Court should be dismissed.

28. The present applicants come to this Court in desperation as they perceive that the legal system has failed to protect them against the apparent removal of their constitutional rights as holders of interests in custom land in Vanuatu. They have suggested no way forward.

29. The *Bulurave* decision dismissed the applications before the Court on procedural grounds. The Court did not consider the substantive merits of the order of 9 March 2021 which entered summary judgment leading to the eviction of the defendants. We have decided that we should do so in this case, and for reasons which follow we consider that the merits of a proposed appeal against the judgment of 9 March 2021 are such that leave should be given notwithstanding delays.

30. The decision of 9 March 2021 rested on an interpretation which the judge placed on the concluding paragraph of the Land Appeal decision, namely that it was for Family Taftumol to decide which part of the Belmol land to allocate to Family Tura for their use in recognition of their secondary rights.

31. The meaning of that paragraph is unclear. The construction given to the Land Appeal decision by the judge on 9 March 2021 interpret the concluding paragraph as meaning that Family Taftumol has the absolute right to allocate a part or parts of the land wherever in their discretion they choose or to refrain from making any allocation at all. It seems that the judge thought Family Taftumol was entitled to allocate no land at all as the eviction order was in respect of the complete area pleaded in the claim – Tambatol, Belmol and Beleru. This interpretation seems also to be the one adopted by the Family Taftumol.

32. In our opinion that interpretation completed disregards the declaration that Family Tura and their descendants are declared holders in custom of secondary rights and interests.

33. Secondary rights are a reflection of history. They are determined by reference to the customs of the relevant tribe about inheritance and succession, and are located by reference to actual historical and present use and enjoyment of particular land.

34. The function of the Island Court, and on appeal to the Supreme Court hearing the Land Appeal, was to identify and declare the existing secondary rights of members of Family Tura. Those bodies had no jurisdiction to vary those existing secondary rights by changing the location where they were enjoyed or to impose conditions or limitations on those rights; see *Iaus v Noam [2017] VUCA 40 [10]; Kalsakau v Director of Lands [2019] VUCA 70 [27-30].*

35. Secondary rights are not transitory. They are not temporary. They cannot be moved about or adjusted at the whim of the primary custom owner. On the face of it the offer of 50 hectares reduced to 10 hectares and now it seems withdrawn, was beyond the rights of Family Taftumol.

36. As the Supreme Court in the Land Appeal decision had no jurisdiction to vary or adjust existing secondary rights it should be assumed that the meaning of the last paragraph was intended to accord with custom and should to be given a meaning that was within its jurisdiction to make. In our opinion the last paragraph of the appeal judgment should be understood as requiring Family Taftumol to identify and describe the secondary rights as they existed in fact. It seems that had not been done in the Island Court and was something that still needed to be done. There is obvious good sense in requiring that the custom rights not only of the primary custom owner but also of the secondary custom owners be sufficiently described so that everyone knows the extent of the rights and holders obligations that attached to them. Construed in this way the Land Appeal decision of the Supreme Court is within power.

37. We think there is support for the construction we favour to be found in the concluding comments of the Island Court in its decision made on 12 June 2015. The Island Court says:

> *"For ease of clarity to the parties, this declaration does not also affect other property rights on the land, such as rights of claimants or other local occupants to harvest coconuts, garden, graze cattle and other existing development there on the declared land. The losing parties must bear in mind that these rights may be waived or varied by the owners. The exercise of these rights is limited to existing properties prior to this declaration.*
>
> *As such, it is further directed that that every person currently in use of the declared land undertake to cause appropriate arrangements with the declared owners to accommodate their continuous use of the land".*

38. "*Appropriate arrangements*" would include describing in a meaningful way the secondary rights and their location. As we construe the Land Appeal decision, it was taking up the same point that the nature and location of secondary rights needed to be formalised.

39. It follows from what we have written above that the eviction decision of the Supreme Court made on 9 March 2021 is based on a flawed assumption.

40. As that decision purports to deny declared secondary custom rights we consider it is important that it be reconsidered. To that end we grant such leave as it is necessary to allow the appeal against that judgment to proceed.

41. The papers presently before the Court are not sufficient to enable the substantive appeal to proceed immediately. The hearing of the appeal will be adjourned to enable the material before the Court to be supplemented.

42. The leave granted to appeal is conditional upon the following information being provided to the Court:-

a) As the civil action in the Supreme Court has progressed it has become clear that not all the original 59 defendants are members of Family Tura. It is necessary to determine that those who are appellants are members of Family Tura. Mr Molbaleh has informed us that the appellants in *Bulurave* appeal were not members of Family Tura but the present appellants are. Their status needs to be satisfactorily established either by agreement with the respondent, by decision of the Island Court, or by some other satisfactory means of proof.

b) The area where the appellants exercised their secondary rights is not apparent from the very general mapping presently attached to the Island Court decision. The Court requires that there be detailed mapping provided, including, if possible, aerial photographs. The parties should endeavour to agree where Family Tura members were residing and had crops, garden and animals. If agreement cannot be reached, each side should specify the locations they say were the sites where secondary rights were being enjoyed.

43. When this information is available and after consultation with the parties the appeal will be listed at a future session of the Court of Appeal. In the meantime the file is returned to the listing judge for management.

44. We emphasize that the secondary rights declared in favour of Family Tura are constitutional rights in perpetuity. They cannot be defeated by order of a civil court. They must be respected by Family Taftumol and if necessary the civil court enforcement procedures can be invoked to enforce secondary rights of this kind.

45. We strongly urge the parties to confer with a view to reaching agreement as to the nature, location and extent of the secondary rights of Family Tura and to take steps to allow them to be enjoyed without interference. If agreement cannot be reached, those rights can be enforced under the provisions of the Constitution.

46. As the appeal is in progress, there will be no order as to costs.

47. The formal orders are:-

1) Leave granted to the appellants to appeal out of time against the judgment of the Supreme Court dated 9 March 2021, conditional upon information identified above being made available to the Court;

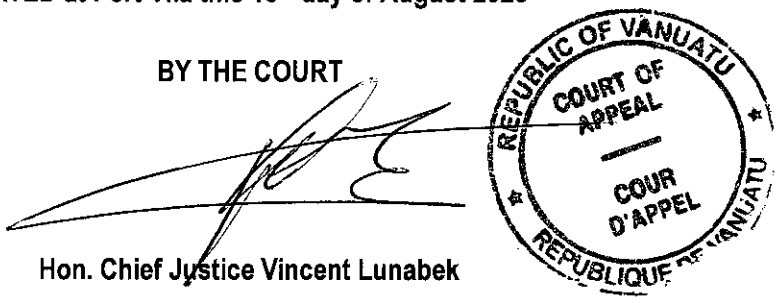
2) The parties are to provide the information to the Court set out at [42] above;

3) Hearing of the substantive appeal adjourned to a date to be fixed.

4) The file is returned to the listing judge for management.

DATED at Port Vila this 18th day of August 2023

BY THE COURT



Hon. Chief Justice Vincent Lunabek