IN THE ISLAND COURT (LAND) OF THE REPUBLIC OF VANUATU
(Custom Land Jurisdiction)

Review
Case No. 18/884 IC/CUST

IN THE MATTER OF: **Section 58 of the CUSTOM LAND MANAGEMENT ACT**

IN THE MATTER OF: **"*APSETU LAND*", Ambrym Island**

IN THE MATTER OF: **A decision of the APSETU LAND TRIBUNAL dated 9th March 2009**

BETWEEN: **ANDRE MELATNAIM and FAMILY**
Applicants

AND: **APSETU COUNCIL LAND TRIBUNAL**
First Respondent

AND: **SAM KENNETH and FAMILY KENNETH**
Second Respondents

Date of Review: ***24 May 2019***

Before: ***Justice Fatiaki***

In Attendance: *Counsel – Rollandson Willie for the Applicants*
Counsel – Adeline Bani for the First Respondent
Counsel – Tom J. Botleng for Family Kenneth

RULING

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1. On 09 May 2009 the Apsetu Council Land Tribunal ("***the Tribunal***") declared Sam Kenneth and Family Kenneth the customary owner of "***ULIH LAND***" situated at South East Ambrym Island ("***the said land***").

2. On 20 March 2018 the applicants filed in the Ambrym Island Court registry, an application under the Custom Land Management Act ("***CLMA***") to review the decision of the Tribunal on the grounds that the Tribunal had not proceeded in accordance with the relevant provisions of the now-repealed Customary Land Tribunal Act ("***CLTA***") and the Tribunal's decision was procured by fraud. In particular, the applicants complain that the decision was given without a hearing and no public notice of the dispute concerning the said land was ever issued.

3. On 21 May 2019 the second respondents filed a response opposing the application in which they assert inter alia:

   (1) "***Ulei land***" and "***Sawei land***" are located in two different villages and do not share the same boundary;

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(2) The applicants did not provide further and better particulars of the fraud alleged; and

(3) The applicants are not a party to the dispute before the Tribunal and do not have "*locus standi*" to bring the application which is an abuse of process.

4. The Tribunal filed a "*defence*" to the application on 23 May 2013 in which it identified several other decisions concerning the said land including a Ministerial Declaration on 13 February 1985 identifying the representatives of the custom owners of the said land; and a Declaration by the Malmel Council of Chiefs on 16 April 2010 declaring several named persons (**not** the applicants) as custom owners of the said land which was later quashed by the Supreme Court on 16 April 2010 (**see**: Tasso v Customary Lands Unit [2016] VUSC 101).

5. Plainly, there are at least two (2) existing Tribunal decisions concerning the said land, the earlier **Apsetu Council Land Tribunal** decision in 2009 in favour of the Second Respondents which is challenged, and, the later **Sawei Village Land Tribunal** decision in 2013 in favour of the applicants which has not been challenged. Significantly, counsel for the Tribunal was unable to provide any record of the proceedings of the Tribunal hearing on 09 May 2009.

6. On the other hand the second respondents deposed and produced a stamped undated typed-written document purporting to set out the process followed by the Apsetu Council Land Tribunal in resolving the dispute before it. I say "*purporting*" advisedly because the heading of the document describes the dispute as: "... ***between Sam Kenneth mo Chief Taso Hed***" (**not** the applicant family). The Tribunal also resolved a dispute concerning: (1) the "*Market House Area*" and (2) The "*Terminal Haos mo area we istap long hem*". No-where in the document is there any mention of nor is there a determination concerning the custom ownership of "***Ulih***" or "***Ulei** land*" or "***Sawei land***". It is also unclear whether they are the same or separate and different lands each with its own distinct boundary.

7. On 08 April 2019 the respondent filed an application to strike out the review Application on the ground that the applicants are "*a wrong party*" in that they are from **Paamal Village** which is far away from the boundary of the said lands and the applicants have failed to provide necessary documents with their applications such as sketch map showing the land boundary, family tree, history statements and formal declarations. The application was not pursued at the management conference hearing before the Court.

8. If I may say so neither ground is a sufficient basis to summarily strike out the review Application in so far as Section 58(3) of the CLMA does not limit applicants to the parties in the challenged tribunal proceeding nor indeed does the challenger have to be adversely affected or aggrieved by the decision. The

second ground as to the contents and form of the Application is also misconceived as the CLMA nowhere provides a statutory Form for an application to the Island Court (Land).

9. At the hearing however, counsel for the applicant produced an unstamped copy of the **FINAL DESISIN FOM** of the Sawei Village Land Tribunal dated 14 August 2013 which declared:

"*Family Andre Melatnaim oli kastom ona blong SAWEI LAND we Ulei Airport istap long hem follem castom raet we Lohmail igivim*".

10. The **Form** does not disclose the name(s) of any "*kaonta klemen(s)*" and the name of the customary land is recorded as: "*SAWEI*" without any attempt to comprehensively describe the physical boundary of the said land beyond saying the airport is within its boundaries. The hand drawn sketch map attached to the decision also locates the three (3) villages of "*Ulei*"; "*Paamal*" and "*Renou*" and the nasaras of: "*Vemali*" close to the airfield and "*Maring*" near Paamal Village but no mention is made anywhere in the sketch map of "*Sawei land*" and its boundaries.

11. In answer to the Court's questions, counsel for the applicants confirmed that the earlier decision of the **Apsetu Council Land Tribunal** was not mentioned, disclosed, or considered by the later **Sawei Village Land Tribunal** when it rendered its "*per incuriam*" decision in the applicants' favour which decision effectively over-turned the Apsetu decision in the respondent's favour. Likewise counsel for the second respondents confirmed that the applicants family was not present before the **Apsetu Council Land Tribunal** nor had any dispute or hearing notice been publicised as required in terms of Section 25 of the CLTA.

12. In this latter regard it is clear that the CLTA is only concerned with the resolution of "... *disputes about customary land*" and in the absence of a counter-claimant to the contested land there is no "***dispute***" to which the provisions of the CLTA can apply including Section 25 which requires the secretary of the land tribunal to give notice of hearing "***... to the parties to the dispute***". Needless to say unless there are competing claimants to the land there is **no** (other) "*party to the dispute*" to whom a hearing notice must be given. Furthermore, the primary duty to identify any counterclaimant(s) or disputing party rests fairly and squarely on the shoulder of the party invoking the provisions of the CLTA [**see:** Section 7 esp subsection (3)(c)].

13. In this latter regard although the applicants purportedly issued a Notice of Dispute concerning "*Sawei land*" dated 01 August 2013, nowhere in the Notice is a counterclaimant or disputing party named as there should have been. In the result although the appointment and establishment of the Sawei Village Land Tribunal appears to follow the provisions of Section 8 of the CLTA, there was no

identified "*dispute*" that needed resolving under the CLTA. Accordingly the decision of the **Sawei Village Land Tribunal** is "*ultra vires*" and a nullity.

14. The decision of the **Apsetu Council Land Tribunal** in favour of the Second Respondents clearly identified a counterclaimant or disputing party. In addition the **Apsetu Council Land Tribunal** was comprised of a chairman and five (5) members and a secretary. Such a large membership is only possible in a joint village land tribunal where the disputed land is "... *situated within the boundaries of more than one village*". This has never been suggested in the Apsetu decision where item 9 of the its decision reads:

    "***9. Graon we oli stap raorao from istap wea? ... Ulei Village South East Ambrym***".

    nor does the relevant sketch plan identify any village other than "*Ulei*" within the hand drawn boundary of the disputed land.

15. Even more problematic is the uncertainty surrounding the customary name and boundary of the land(s) the subject-matter of the apparent conflicting Tribunal determinations. In the **Apsetu Council Land Tribunal** decision the land is described as: "*Ulih land*" in "*Ulei Village South East, Ambrym*" with a comprehensive narrative description of the land boundary, whereas, in the **Sawei Village Land Tribunal** decision, the disputed land is described as: "*SAWEI*" at "*South East Ambrym*" without any detailed narrative description of its boundary. Both names could not be correct in the absence of explanation, albeit that both sketch maps appear to include the "*Ulei Airport*" within the disputed land whatever its correct customary name and boundary might be. That is a wholly unsatisfactory state of affairs and is fraught with uncertainty and confusion and should not allowed to continue.

16. In light of the foregoing, the application is granted and the decision of the **Apsetu Council Land Tribunal** dated 09 May 2009 is quashed. In similar vein the decision of the **Sawei Village Land Tribunal** of 14 August 2013 is also quashed and both parties are directed to the provisions of the CLMA for the future resolution of their dispute.

17. I make no orders for costs.

DATED at Luganville, Santo, this 24th day of May 2019.

BY THE COURT

D. V. FATIAKI
Judge.

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