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

Case No. 18/3420 IC/CUST

IN THE MATTER OF: Section 45 of the Custom Land Management Act

AND IN THE MATTER OF A DECISION OF: Leosa Land Pre Independence Title No. 138 (Described as Fultoka) on Lelepa Island

IN THE MATTER OF A DECISION OF A: North West Efate Area Customary Land Tribunal of North West Efate, made on 27th February 2018 and again on 21st March 2018 not to hear the First, Second and Third Applicants applied to become a party to pending appeal against the decision that favored Family Kalsuak as Custom Owner of Fultok Custom Land on 29th December 2005

BETWEEN: **Johnny Marango**
On behalf of MARANGO Family of Lelepa Island
North Efate, Vanuatu
1st APPLICANT

AND: **Albert Solomon Peter**
Of Lelepa Island, North Efate, Vanuatu
2nd APPLICANT

AND: **North West Efate Area Customary Land Tribunal**
1st RESPONDENT

AND: **Philip Kalsuak**
Of Nalapao Village, North West Efate, Vanuatu
2nd RESPONDENT

AND: **John Kaloroa**
Representing Family LEIVELE of North West Efate, Vanuatu
3rd RESPONDENT

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Date: *3rd December 2022*

Before: *(SM) B. Kanas Joshua – Chairlady*
Justice Thomas Felix
Justic Lutu Sakita
Justice Serah Patan
Justice Roy Tining

Counsel *Mr Doniel Yawha for first ond third Applicants*
Mr Lennon Huri for first Respondent
Mr Edward Nalyal for second Respondent
Mr Silas Hakwa for third Respondent

DECISION ON THE APPLICATION FOR STRIKE OUT

HAVING heard counsels for the parties on the application for strike out, the Court makes the following findings:

Civil Procedure Rules No. 49 of 2002 ("the CPR")

1. On 1 December 2020, the Court heard an application to strike out this matter in its entirety. The application was made under Rule 9.10 of the CPR. This Rule is used in civil cases when the claimant does not take steps in a proceeding and it states that the Court may strike out a proceeding in the following circumstances:
    a. at a conference in the Supreme Court;
    b. at a hearing;
    c. if no steps have been taken in a proceeding for 3 months; or
    d. without notice, if no steps have been taken in the proceeding for 6 months.

2. It must be stated clearly on the outset that the Island Court (Land) ("ICL") is a court established under the Customary Lands Management Act No. 33 of 2013 ("the Act"). It does not have its own set of rules of procedures, however, from time to time it may "borrow" rules that have been established to aide in its operations. Land cases are not civil cases, however, the nature of reviewing decisions on land matters are akin to judicial reviews that the Supreme Court makes to determine the lawfulness of an enactment or a decision[1]. In this sense, the CPR may be applied, until such time that the ICL has developed its own rules for reviewing land matters.

3. The purpose of the ICL is to review decisions of nakamals or custom area land tribunals on three grounds:
    a. if a decision has been made by a nakamal/custom area land tribunal that was not properly constituted;
    b. if there has been a breach of the process; or
    c. if the decision has been procured by fraud.[2]

4. The application to strike out a matter in the ICL is to bring an end to the matter. Such an application indicates that there is no need to review a decision and that the decision in question is upheld. In this circumstance, the ground for this application is that there have

[1] Rule 17.2 of the Civil Procedure Rules No. 49 of 2002.
[2] Section 45(1) of the Customary Lands Management Act No. 33 of 2013.

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been no actions taken by the applicants in the proceedings. This cannot be a ground for strike out if the system has not made it available to the aggrieved parties to seek remedies. Since the establishment of the ICL, there has been some delay in the Court's part to appoint chairpersons to run the Court. Also, when there are chairpersons appointed, court sittings are held only at certain times that is convenient for the chairperson. So, this Court does not sit throughout the year as normal courts and the ground of non-action by the claimant cannot be used, as situations have prevented them from taking action.

5. Due to this, the Court cannot strike this matter out under Rule 9.10.

Locus standi

6. During the hearing of the application the applicant's response was derived from sworn statements of the applicants that were made in support of their application of review. This was objected by the third respondent on the grounds that both applicants do not have locus standi as they were never a party in the Filtoka case right from the start nor did they fall in any of the 3 categoies of aggrieved parties in Section 45(1) of the CLMA – a custom owner, a member of a nakamal or a disputing group.

7. The decision in land case No. 1 of 2004 showed that Mr Jimmy Marango was one of the four parties in the matter. This was shown through the letter he wrote to the Lelema Customary Joen Land Tribunal, on 4 May 2004, giving notice of his appeal to the decision made in land case No. 1 of 2004. Although Mr Jimmy Marango has passed away, his son, Johnny Marango, now represents his father in this matter. An application to this effect was filed on 25 November 2022 pursuant to an order of the Court (23 November 2022). Prior to this application, Johnny Marango and Albert Solomon Peter had been filing the applications on this matter. If objections were to be raised, it should have been done so when the matter was first listed. Even so, the objections would have been dismissed because both applicants fall within the category of "*a member of the North West Efate Area Custom Land Tribunal* ("NWEACLT")".

8. It is worth noting that, the fact that the second applicant had removed the chiefly title from his name, was done by the directions of this Court and not because they are not chiefs. They may be chiefs and custom owners but in any court of law, a party is to use their birth names, as titles and positions insinuates some authority or right over a party who may not have status in the society.

9. For the reasons stated above, the Court is satisfied that both applicants have locus standi and was allowed to proceed with their submissions.

Section 45, CLMA

10. It must be appreciated that there are 2 laws at play in this matter. The Customary Lands Tribunal Act ("old Act") and the CLMA. The old Act was repealed in February 2014 when the CLMA came into effect. The Filtoka land claim was started under the old Act. In the old Act, an aggrieved party can appeal a decision within 21 days[3]. In the CLMA, a 30 days' time frame is given to file an application for review.[4]

[3] Section 22(1) of Customary Land Tribunal Act:
If a person or group of persons:
(a) Is a party to a decision referred to in Section 21(a), (b) and (c); and

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11. An application for strike out can be successful only if the respondent can establish one or all of the three grounds mentioned in Section 45. Section 45 of CLMA is used for decisions that are made in nakamals or custom area land tribunals that have been established under this Act. This section cannot be used for decisions made under the old Act. If Section 45 is to be used, it must be used on a decision that is made by the NWEACLT after February 2014 when the CLMA came into effect. It cannot be used on a decision that was made prior to February 2014.

12. On that point, the Court is not satisfied that the use of Section 45 is relevant for the decision in question.

Section 58, CLMA

13. Section 58 of the CLMA was referred to by the applicants to allow them to file their application. This is relevant to the decision in question, as the decision was made in a tribunal under the old Act. The argument put forward was that the applicants could file their application for review. The Court was referred to Section 58(3) and (4) in particular:

Section 58(3), which states that,

> *"A person may challenge a decision of the [old Act] under this section by filing an application with the appropriate Island Court (Land) that the decision of the [old Act] be reviewed on the ground that:*
> *(a) It has been made at a meeting that was not praperly constituted; or*
> *(b) It has been made in breach of the authorised process; or*
> *(c) It has been procured by fraud; or*
> *(d) It was wrong in custom or law.*

Section 58(4) states that,

> *"The Island Court (Land) after hearing all relevant evidence may dismiss the application for review, or may order that the decision of the Customary Land Tribunal be set aside and direct that the ownership of custom land be determined in accordance with this Act."*

14. On its own, Sections 58(3) and (4) referred to can satisfy the applicant's argument. However, when a section of a law is quoted, all its subsections must be read in conjunction with each other to give a comprehensive meaning to that section. The first 2 subsections, especially subsection (1), must be read with subsections (3) and (4).

Section 58. Existing decisions of single or joint Village Customary Land Tribunal and single or joint sub-area Customary Land Tribunal

*(1) Existing decisions of single or joint village customary land tribunal and single or joint sub-area customary land tribunals that were made before the commencement of this Act and have not been challenged within **12 months** after the commencement of this Act, are*

(b) Wants to appeal against that decision;

The person or group must give a notice of appeal in accordance with subsection (2) within 21 days after the announcement of that decision.

[4] Section 45(1) of CLMA:

[T]he member of the nakamal ... may lodge an application for review...within 30 days from the date of the original decision...

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deemed to create a recarded interest in land to create a recorded interest in land in respect of the person or persons determined by such tribunal to be a custom owner.

(My emphasis)

(2) The creation of a recorded interest in land under subsection (1) will enable the custom owners so recorded to be identified for the purpose of consenting to an application for a negotiator's certificate or a leose, or is to provide the bosis for rectification of an existing lease instrument.

15. Section 58(1) of CLMA sets a time frame for existing decisions under the old Act. In the sequence of events, a notice of appeal had been made by Jimmy Marango 10 days after the decision of Lelema Joint Village Tribunal ("Lelema"). Under the old Act, he was well within the 21 days' time limit for appeal. He did not hear from Lelema until the last day of the appeal time limit, when he was served with an invoice to pay a fee of VT20,000 for his appeal. It was late in the afternoon when he was served this invoice by Naparo Kalsau. Being that it was his sabbath and late in the afternoon, it was clearly too late for him to make the payment. When he went to make payment 2 days later, the tribunal secretary refused the payment as the 21 days had lapsed.

16. Following from that, on 29 December 2005, the NWEACLT declared that Philip Kalsuak is the true custom land owner of Filtoka. The second applicant then took another approach, which was to claim for chiefly title from Chief Tugulumanu in the Efate Island Court ("EIC"). In custom, a chiefly title comes with its governing jurisdiction. He was granted the name Manaure and the parcel of land that goes with the title. This was challenged in the Magistrates' Court and the decision was quashed and Billy Kalmari was recognized as the Tukurao[5] of Tugulumanu at that time. On 23 February 2013, Family Leivele, who was the only party who appealed the decision of NWEACLT, discontinued their appeal against the second respondent. After the appeal was discontinued, nothing else was done until 2017 when consent orders were signed by the second applicant, the second respondent and Simo Kalmalas.

17. In a letter from State Law office (1 March 2018) by the Attorney General, to the National Coordinator, it was stated that Family Leivele had the right to discontinue their appeal. In so doing, the dispute over Leosa/Filtoka custom land is no longer a matter for discussion. The letter also stated that the issue of custom ownership of Leosa/Filtoka custom land is now *res judicata*[6].

18. In another letter by State Law office (15 March 2018) it considered the Court of Appeal judgment in *West Tanna Area Council Land Tribunal v. Natuman & Anors*[7]. ...This letter was by the Solicitor General and it stated that

"...[I]f there are any persons who are adversely affected by the NWE Land Tribunal dated 29 December 2005, or persons who have customary interests in Filtoka custom land can be included as a party in this proceeding. Those parties must be given a full and fair hearing."

[5] A person who carries the authority of a chief for a short period of time, while waiting for the ordination of the rightful chief.
[6] The issue has been settled by judicial decision.
[7] CAC No. 21 of 2010, at pages 6 and 7

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19. The old Act was repealed in February 2014 when the CLMA came into effect. In applying Section 58 of CLMA, the 12 months' time frame would lapse on February 2015. Within that time, the applicant would have had an arguable case for review, had they filed their application, as it is clear that the invoice served on Jimmy Marango was a deliberate move to prevent him from appealing the Lelema decision (24/4/04) and NWEACLT decision (29/12/05). However, it was only on 15 February 2018 that Jimmy Marango paid appeal fees to NWEACLT with 29 others to appeal the decision made in 2004. This is 4 years after CLMA had been in effect – well over the 12 months' time limit.

20. The Court is satisfied that the applicants had filed their application for review well past the 12 months' time frame. However, the two letters from State Law office are conflicting in nature and has caused confusion among the parties. This confusion must be resolved. In the CPR, a party may discontinue their claim at any time and for any reason.[8] If they discontinue, they may not revive their claim. In this case, Family Leivele discontinued their appeal in 2013 and have not revived their claim, so the matter is closed. The case of *Natuman*, referred to by the Solicitor General, is not relevant because it referred to and applied the old Act.

Decision

21. Therefore, based on the findings above, the Court hereby grants the application.

22. The Court orders that this matter be struck out, in its entirety.

23. Each party shall bear their own costs.

Dated at Port Vila on this 3rd day of December, 2022

BY THE COURT

.....
B. Kanas Joshua (SM)
CHAIRLADY

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Justice T. Felix

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Justice S. Paton

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Justice R. Tining

[8] Rule 9.9 of Civil Procedure Rules No. 49 of 2002.