

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

Case No. 22/1390 IC/CUST

IN THE MATTER OF: Leosa Customary Land Lelepa Island

AND IN THE MATTER OF A DECISION OF: North West Efate Council Havana Harbour
(Single Area Land Management Jurisdiction) –
Decision dated 13th May 2022

IN THE MATTER: An Application pursuant to Section 45 of the
Custom Land Management Act

BETWEEN: Billy Kalmay (Tungulmanu)
Representing People of Leosa Fultoka Vataaraana
North Efate, Vanuatu
APPLICANT

AND: Philip Kalsuak
Of Natapao Village, North West Efate, Vanuatu
1st RESPONDENT

AND: (Tugulumang) Albert Manaure
Of Lelepa Island, North Efate, Vanuatu
2nd RESPONDENT

**AND: North West Efate Area Council Havana
Harbour**
(Single Area Land Management Jurisdiction)
3rd RESPONDENT

Date: 2nd June 2023

Before: Senior Magistrate B. Kanas Joshua – Chairlady
Justice Thomas Felix
Justice Lutu Sakita
Justice Sarah Patan
Justice Roy Tining

Counsel: Mr Silas Hakwa – for Applicants
Mr Edward Nalyal – for First Respondent
Mr Daniel Yawha – for Second Respondent
Mr Lennon Huri – for Third Respondent

RULING



Background

1. This is an application to review the judgment by the North West Efate Area Council Havana Harbour ("NWEACHH"), made on 13th May, 2022, at Tanoliu village, North West Efate. The claimant in the judgment was Albert Manaure Tungulmanu and 32 others from Natapau village on Lelepa island. The first respondent was Philip Kalsuak, also from Natapau village, and the second respondent was Billy Kalmay Tungulmanu who was representing family Leivele.
 2. The application of review was made on two grounds:
 - a. That the nakamal or custom area land tribunal was not properly constituted; and
 - b. That the nakamal or custom area land tribunal did not proceed in accordance with the provision(s) of the Custom Land Management Act No. 33 of 2013 (Amended No.12/2014).
 3. This Court is not an appellate court for land decisions made in the nakamal or custom area land tribunals. The purpose of this Court is to review the decisions of a nakamal or custom area land tribunal on grounds of an incorrect composition, improper process or fraud.¹
 4. For clarity, as the chiefly title of Tungulmanu is disputed by the applicant and second respondent, this Court shall refer to the two parties on their given names to avoid any inferences drawn on who is the rightful one for this chiefly title. The matter of chiefly titles is not for this Court to determine, and until such time that it is determined, the disputing parties shall be known in this Court by their given names only.
 5. In brief, the judgment made on 13/05/22, was an appeal on the decision by the North West Efate Area Customary Land Tribunal made on 29th December, 2005. It was declared in that judgment that Philip Kalsuak was the true custom land owner of Fultoka land. Family Leivele appealed this judgment to the Island Land Tribunal and while it was still pending the Customary Lands Tribunal Act was repealed, giving way to the Customary Land Management Act No. 33/2013. The appealed case was then referred back to the custom area of North West Efate to hear the matter.
- Before the North West Efate Area Council heard the matter, the spokesman for family Leivele discontinued the case on 23/02/18. In law, when a matter is discontinued by the claimant the matter must now be closed as the case belongs to the claimant. Upon a notice of discontinuance, the claimant is stating that he/she no longer has an issue with the decision made.
6. Interestingly, despite the notice of discontinuance, on 28/03/18 chief Kalorua Natamatewia III of Natapau and 32 landowners reinstated the case before the North West Efate Area Council for determination. The parties were Albert Manaure and Philip Kalsuak and tribunal listed the matter for hearing on 6th December, 2021, which was adjourned to 8th December, 2021.
 7. Billy Kalmay was not a party at the commencement of the hearing. He later became a party on 20th December, 2021, and was represented by George Tauanearu. Upon joining the hearing, they were denied the opportunity to make objections by the

¹ Section 1(3), Customary Land Management Act No. 33/2013



chairman, as it was pointed out that the time for making objections have passed at the start of the hearing on 8th December, 2021.

8. In the judgment made on 13/05/22 the NWEACHH made the following declarations:
 - a. That the true custom land owner of the whole of Leosa land is Philip Kalsuak;
 - b. That the boundaries of Leosa land starts at Fale Tapar close to Nangsun Romta on the east to the north, around the point of Nangsun Wodlang, along the west to Akalka which is the common boundary of Leosa and Sukuluk, then crosses the island to Mangrorik and back to Fale Tapar.
 - c. That the decision of North West Efate Area Land Tribunal in 2005 regarding Fultoka land (29/12/05) is quashed.
 - d. That the decision of the nakamal at Natapau (28/03/18) is quashed.

Ground 1: The custom area land tribunal was not properly constituted

9. The applicant stated that members of the panel were disputing parties in unresolved customary land matters. For example, the chairman is involved in the unresolved customary land matter of Meten land Moso mainland. The adjudicator, Kalkaua Jimmy, is involved in the unresolved customary land matter of Udaone land Efate (Samoa Point). He also stated that Kalkaua Laumanu also had biological connections with Minnie who lived with Chief Tungulmanu of Leosa. The second respondent stated that Kalkaua Laumanu is Donald James Aromalo's brother.
10. The panel of adjudicators consisted of the following:
 - a. Chairman, Donald James Aromalo from Tanoliu;
 - b. Adjudicator, David Alikau from Tasiriki;
 - c. Adjudicator, Kalkaua Laumanu from Tanoliu; and
 - d. Secretary, Kaltakau Jimmy from Tanoliu.
11. In support of the application, the second respondent stated that David Alikau was not appointed by the council of chiefs. This appointment was done by the tribunal, instead of the council of chiefs.
12. As the applicant is also a disputing party in the Udaone customary land and Vataaraana customary land Lelepa mainland, it would be prejudicial to him to have Donald James Aromalo and Kalkaua Laumanu sitting in the Leosa proceeding as both of them have interests in the Udaone and Vataaraana case.
13. In the case of *Mataveve v. Talivo*², it states that if there is appearance of bias or personal interest by an adjudicator in a case, then the tribunal decision is tainted and voidable. With a chairman and his brother as adjudicator in a proceeding shows an appearance of bias, and with both of them having personal interest on the mainland boundary claim of Leosa through their Udaone land claim, makes both of them unfit to sit in the panel.
14. Section 48(1) of the CLMA provides that a chairperson and member of a custom area land tribunal can be disqualified if they have other interests that will prevent them to perform their function under the CLMA.

² [2010] VUCA



15. The first respondent submitted that the appointment of secretary and other members of the tribunal were proper and that their application for review was a tactic delay. He submitted that this ground was not valid and irrelevant as the appointments made were done by those who had been trained by the Customary Land Management office.
16. On this ground, the Court finds that:
- There is no record in the judgment as to how Donald James Aromalo was appointed as chairman;
 - The appointment made by the CLO of Kaltakau Jimmy, as secretary, was premature. This appointment should have been made by the council of chiefs, and if they were unable to make this appointment it should be recorded clearly. There was no record of their inability to do so;
 - Donald James Aromalo and Kalkaua Laumanu would appear to be biased in their decision because they had interests connected to the Leosa land, through their claim on Udaone land. By denying the applicant his right to object when he joined in mid-proceeding can be seen as the chairman not performing his function to show fairness.

Ground 2: The nakamal or custom area land tribunal did not proceed in accordance with the provision(s) of the Custom Land Management Act No. 33 of 2013 (Amended No.12/2014).

17. The appointments of the panel were not done according to the provisions of the CLMA. For example, when the outgoing chairman, Wilson Popovi, resigned on 15th December, 2021, he asked the tribunal to proceed with the hearing without him. Following Popovi's resignation, the Customary Land officer ("CLO") appointed a new secretary, Kaltakau Jimmy. Kaltakau Jimmy replaced David Alikau, and David Alikau replaced Wilson Popovi. This reshuffling was carried out in the presence of the CLO.
18. Section 37(1)(a) of the CLMA states that a secretary must be appointed by the council of chiefs of the area. If this cannot be done by the council of chiefs, then the CLO can make an appointment.
19. The judgment does not state how the chairman was appointed. This appointment should be recorded to show if he/she is elected from amongst themselves, according to Section 36(4). If any party disagrees with the appointment of a chairperson, it can be objected to, as provided in Schedule 1 of the CLMA. How Donald James Aromalo was appointed to chairman is not known, however, the applicant clearly did not agree to Donald James Aromalo being chairman. As shown in Ground 1 above, the applicant was denied the right to object when he joined in later in the proceeding.
20. The first respondent stated that if family Leivele were serious with their claim they would have joined the proceeding on 8th December, 2021 because they would have been able to raise their objections then. As it were, they had joined in the proceedings after they had made objections at the start. The first respondent stated that the applicant had participated in the proceeding and was not denied natural justice.
21. The third respondent stated that when the tribunal started proceedings on 8th December, 2021, parties were given the opportunity to make objections, according to Schedule 1 of the CLMA. The applicant joined after the 8th December, 2021, missing this opportunity to raise their objections. Due to this, he submitted that the judgment must be upheld.



22. On this ground, the Court finds that:

- a. The NWEACHH did not proceed in accordance with the CLMA.
- b. The chairman allowed the applicant to join mid-proceeding but denied him his right to object.
- c. The judgment does not show that the council of chiefs had made an attempt to appoint a secretary, before the CLO intervened. The appointment of Kaltakau Jimmy was not according to law.
- d. The decision of the chairman was tainted from the start.

Conclusion

23. The purpose of this Court is to review the decision made in the nakamal or custom area land tribunal. If the Court is satisfied that the decision of a nakamal or custom area land tribunal was made under any of the circumstances set out in Section 45(1) of the CLMA, the Court must set aside the decision and refer the matter back to the nakamal or custom area land tribunal.

24. Based on findings above

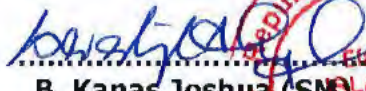
- a. The Court sets aside the judgment made on 13th May, 2022 and refers the matter back to the North West Efate Area Council of Chiefs.

25. The Court further orders that

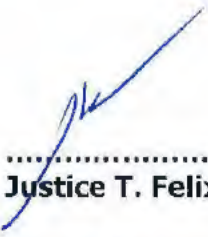
- a. A new chairman, secretary and members must be appointed for this proceeding;
- b. Members in the new panel appointed by the council of chiefs must not have interests on land matters that are connected with Leosa land;
- c. The CLO must ensure that all appointments be recorded;
- d. The CLO must ensure that Schedule 1 of the CLMA is complied with;
- e. The council of chiefs and the tribunal must comply with the procedures of the CLMA;
- f. Any new party that joins mid-proceeding must be given the right to object;
- g. Each party in this proceeding shall bear their own costs.


Dated at Port Vila on this 2nd day of June, 2023


BY THE COURT


B. Kanas Joshua (SM)
CHAIRLADY




Justice T. Felix


Justice L. Sakita


Justice S. Paton


Justice R. Tining