IN THE ISLAND COURT (LAND) OF THE REPUBLIC OF VANUATU – Lakatoro, Malekula
(Custom Land Jurisdiction)

Case No. 17/140 IC/CUST

IN THE MATTER OF: **Section 45 of Custom Land Management Act No. 33 of 2013**

IN THE MATTER OF: **Ameliah, Naha and Alahamo Customary Land, Malekula**

IN THE MATTER OF: **Decision of Leviamp Nakamal, dated 10 March 2016**

BETWEEN: **Family Kilman**
North West Malekula
First Applicant

Family Natnaur
Family Kalnata
Family Tavdey
North West Malekula
Second Applicant

Harry Karma Fare
North West Malekula
Third Applicant

AND: **Leviamp Nakamal Meeting**
Malekula
First Respondent

AND: **Abel Vinbel**
Malekula
Second Respondent

Coram:
Senior Magistrate B. Kanas Joshua, Chairlady
Justice Douglas Fatdal
Justice Patisson Peter
Justice Joses Lingi
Justice Presilla Susurup

Counsels:
Mr E. Nalyal for the First Applicant
Mr E. Molbaleh/Ms A. Sarisets for the Second Applicants
Mr P. Fiuka for the Third Applicant
Mr S. Aron, for 1st Respondent
Mr D. Yawha, for 2nd Respondent

Republic of Vanuatu
MALEKULA ISLAND COURT LAND
République de Vanuatu

DECISION ON THE APPLICATION TO STRIKE OUT

1. This matter is a consolidation of Case No. 17/140 and 22/3425 where in the first case the first and second applicants lodged a review against the decision of the first and

second respondents. The third applicants also lodged an application for review against the same decision by the first and second respondents. In consolidating the matter, the applicants in the second case became the third applicants.

2. On 18/9/23 the second respondent filed an application to strike out the application for review that was filed on 24/1/17. The grounds for the application were:
   a. That the application for review is out of time;
   b. That this matter was already heard in the Supreme Court to the Court of Appeal, so it cannot be reheard again as the decision was made final where the res judicata principle now applies; and
   c. That this is an abuse of court process.

3. On the first ground, it was submitted that the applicants filed their applications for review out of time. The first applicants filed their application on 28/3/16[1] and the second applicants filed their application on 30/3/17. The third applicants filed their application on 12/5/17. The decision that is being challenged was delivered on 10/3/16. According to Section 45 of the Customary Land Management Act[2] (**"CLMA"**) a member of a nakamal who disputes a decision must lodge an application within 30 days from the date of the decision. In this case, 30 days from the date of the decision would be on 11/4/16. The Court is satisfied that the first applicant was within the 30 days, not the second and third applicants. However, the Court must be seen to act in a fair and just way, so, as in some previous cases, it has used its discretion to consider the reasons submitted before it to arrive at a decision.

4. The case of *Laho Ltd v. QBE Insurance Ltd*[3], outlines four factors as a guide for the Court to use for applications that are filed out of time. It was argued by the second respondent that this case was dismissed in the Court of Appeal and should not be applied in this Court. This point is dismissed. Although the appeal was dismissed the four factors are not. It was also argued by the second respondent that in the case of *Florian Ngwele v. NOKA Area & Moli Tamata Area Joint Village Land Tribunal*[4], the Island Court (Land) (**"ICL"**) did not apply Part 17 of the Civil Procedure Rules[5] (**"CPR"**) where it allows a Court to extend time. Part 17 can only apply to cases that are not customary land matters. The procedures from the CPR are used by the ICL to carry out its function, however, the CLMA governs the review process for the ICL[6]. The ICL uses its discretion to use the CPR to manage its cases. If it were to apply the CLMA strictly, it should not accept any applications except for applications for review. However, in this hearing, it has used its discretion to allow these preliminary applications as their decisions will affect the application for review. Thus, the four factors will used.

5. The first factor in the *Laho* case that is considered is the length of delay. This factor ties in with the first ground in the application. Although the submissions did not zero in on the specific grounds, the submissions highlighted this aspect. For instance, the second applicants filed their application on 30/3/17 and the third applicants filed their application on 12/5/17. They were clearly out of time by a few months.

[1] Civil Case No. 17/3373, para 5
[2] Act No. 33 of 2013 (Consolidated as at 2019)
[3] Civil Appeal Case No. 15 of 2003
[4] Case No. 23/788 IC/CUST
[5] Act No. 49 of 2002
[6] Section 1(3), CLMA

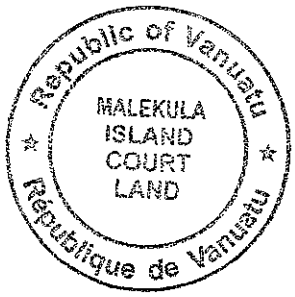
6. I turn to the second factor to assess the reasons for the delay of the second and third applicants. The reason given by the second and third respondents was that the written judgment was given to them in 2017. The decision was made on 10/3/16. They argue that they could not have filed within 30 days then as the ICL was not established. Although this may be so, there is no paper trail of correspondences to show that they took steps to address their grievances as did the first applicant. In the case of *George Tavuti v. Malo Island Land Tribunal and Jackson Vutihese & 4 others*[7] the ICL allowed the parties to file 2 years outside of the 12 months' timeframe as the Registrars of the ICL were not appointed yet. Similarly, in the case of *Chief Tarinuamata v. Forari Village Land Tribunal and Kennedy Matokuale Tariwer*[8] the Court accepted that the length of delay was caused by the delay of establishment of the ICL. The gist of the two cases mentioned is the extension of time allowed to the applicant to file out of time due to the delay of the establishment of the ICL. The 30 days' timeframe in Section 45 can be extended if an applicant can show that they made attempts to address their grievance. The Court accepts that the cases before the Supreme Court towards the end of 2016[9] and in the first half of 2017[10] show that second and third applicants attempted to address their issues albeit using the wrong avenues. Their reasons for delay is accepted.

7. In considering the third factor, the correspondence by CLMO on 07/3/16 stated that a joint nakamal meeting must be held, as per the Supreme Court decision in 2013. When the meeting was held on 10/3/16 it was held by a single nakamal. What occurred on 10/3/16 clearly went against the Supreme Court decision in 2013. There is prima facie evidence that shows likelihood of success of the application for review.

8. The fourth factor begs the question, whether the second respondent will be prejudiced if the application for review is successful. The answer is no. If the application for review is successful, the matter can only be referred to the nakamal level to be re-heard. If it is unsuccessful, the second respondent will enjoy the fruits of the decision of the nakamal.

9. The second ground looks at the principle of *res judicata*. The Court was referred to a Minute of the case of *Kilman, Paul Peter, Frankey Tavdei v. Abel Vinbel Habihapat*[11]. The applicants in the current case are the same claimants in that case. In that case the claim was discontinued. In another Minute of the case of *Harry Kama Fare v. Abel Vinbel*[12] the Court struck out an application that was filed in 2016 due to the lack of steps taken in the proceeding. Mr Harry Kama Fare matter is the third applicant in the current case. The principle of *res judicata* indicates when a final judgment is made based on merits another claimant cannot relitigate the same matter for the same cause of action[13]. When a case is adjudicated based on merits it means a ruling, judgment or decision is made after all the proper procedures of trial is completed. The two cases referred to did not go through the proper procedures of a trial. They were discontinued and struck out in the preliminary stages of the claim. It appears that this was around

[7] Review Case No. 17/2010 SC/CUST
[8] Case No. 22/2718 IC/CUST
[9] Judicial Review Case No. 16/1830 SC/JUDR
[10] Judicial Review Case No. 16/3662
[11] Civil Case No. 17/438 SC/CIVL
[12] Civil Case No. 16/3876 SC/CIVL
[13] https://www.law.cornell.edu/wex/res_judicata



the time when the application for review in the ICL. Thus, the argument on *res judicata* is not satisfied.

10. Given the above, the Court finds that the grounds for strike out have not been satisfied and that the application for review in the ICL is not an abuse of process.

11. The application for strike out is denied.

Dated in Lakatoro, Malekula on this 10th day of June, 2024

BY THE COURT

B. Kanas Joshua (SM)
CHAIRLADY

Justice Douglas Fatdal

Justice Patisson Peter

Justice Joses Lingi

Republic of Vanuatu
MALEKULA ISLAND COURT LAND
République de Vanuatu

Justice Presilla Susurup