IN THE SUPREME COURT OF
THE REPUBLIC OF VANUATU
(Civil Jurisdiction)

Civil Case No. 222 of 2006

BETWEEN: FAMILY NAIWAN NOMPUWO
Claimant

AND: THE ATTORNEY GENERAL
Defendant

Coram: ***Justice D. V. Fatiaki***

Counsels: *Mr. S. Joel for the Claimant*
Mr. F. Gilu for the Defendant

Date of Decision: *29 April 2011*

JUDGMENT

1. In this matter the Claimant/Applicant seeks a ruling on whether its application for judicial review under the Civil Procedure Rules should be allowed to continue in the absence of any appeal being lodged by the Claimant against the decision of the Tafea Island Court over customary land entitled: "***Nompunlou***" and "***Nompunwose***" located in the Dillons Bay area of West Erromango Island (the said customary lands).

2. The relevant Tafea Island Court cases are: **Nos. 4 & 5 of 2000** in which customary ownership declarations over the said customary lands were made in favour of Family Aviong ("*Nompunwose*") and Family Wolu ("*Nompunlo*") delivered on 27 October 2003 (the successful claimants).

3. For present purposes it is common ground that the present applicant was neither a party nor a competing claimant of the said customary lands in the claims before the Tafea Island Court. Furthermore the applicant on first learning of the decisions had attempted to be joined as a party in a pending Land Appeal Case No. 53 of 2004 between the successful claimants and another party and, presumably, involving the said customary lands. This joinder application was eventually withdrawn and the applicant filed the present application for leave to apply for judicial review on 27 November 2006. The application sought leave to file a claim for judicial review out of time and incorrectly, named the Attorney General as defendant. It has since been corrected and now names the Tafea Island Court.

4. On 2 June 2008 the Solicitor General filed a written submission opposing the application for an extension of time to file the claim for judicial review

on the basis that 5 years had elapsed since the Tafea Island Court determinations and 2 years after the applicant became aware of the determinations. The applicant had also failed to explain the lengthy delay or to satisfy the heavy burden required to move the court's discretion in his favour. In his written submission the Solicitor General did not in terms address the various matters set out in **Rule 17.8(3)** of the **Civil Procedure Rules** and on which the court must be satisfied before it will hear the claim.

5. On 4 July 2008 the applicant filed a substantive claim for judicial review pursuant to an order of Tuohy J. based on his indication that:

> "*... (the) application for extension of time should not proceed until the claimant has filed the Judicial Review application and sworn statements because the issues referred to in Rule 17.8(3) must be relevant to whether leave should be granted under Rule 17.5 and those issues cannot be properly addressed until the Judicial Review application itself and supporting sworn statement is before the Court.*"

6. By way of contrast the applicant's submissions of 27 March 2009 specifically addressed the matters raised in **Rule 17.8(3)** which includes whether "*there has been no undue delay in making the claim*".

7. After the departure of Tuohy J. the file was reassigned to Dawson J. who fixed the application for extension of time for hearing on 27 March 2009. After hearing the application Dawson J. adjourned the matter for another conference stating *inter alia* in a written ruling:

> "*1. The Applicant in this matter seeks leave to file an Application for Judicial Review Out of Time. After some discussion today in Court it has been clarified by the Applicants that the only matter that is in dispute is the existence of a boundary line between the land that they say is their custom land and the neighbouring land which has been declared customary land by the Tafea Island Court. The Applicants say that when the Island Court declared the neighbouring land as customary land it did so from a map showing a straight line boundary next to the land that the Applicants say is theirs. The Applicants say that it is unusual to declare custom land by the use of straight line boundaries and that boundaries will normally follow natural contours, streambeds or physical land marks of that sort. They say that in drawing a straight line boundary the Island Court has exceeded its jurisdiction and has included some of their neighbouring customary land within the customary land that they have declared.*
>
> *3. The second part of the Applicant's Claim which I should also mention is that they say that the assessors of the Tafea Island Court were incorrectly or inappropriately appointed in that they all came from Tanna and that had at least some of those assessors*

come from Erromango where the land is situated then those assessors would have understood the need to follow natural boundaries rather than drawing straight line boundaries. The Applicants today have not shown any proof or evidence that the assessors were inappropriately appointed or overcome the presumption that the Island Court was appropriately constituted.

4. *Rule 17.8(3) states that "The judge will not hear the claim unless he or she is satisfied that:-*

   a) the claimant has an arguable case; and

   b) the claimant is directly affected by the enactment or the decision; and

   c) there is been no undue delay in making the claim; and

   d) there is no other remedy that resolves the matter fully and directly"

5. *Whether the Applicants have an arguable case depends upon evidence which is not currently before the Court. Two maps have been produced to the Court which the Applicants say shows that the boundaries are inconsistent. However it has been pointed out to the Applicants that this Court does not have qualifications in survey and cartography and the evidence of the Applicants at this stage is insufficient. One map does show a boundary that is not straight and the other map shows a boundary that is straight. However there is no combined map or evidence to show where or how those boundaries are said to overlap and nor is there any evidence indicating what land the Applicants claim had been included in the neighbouring customary land as declared by the Island Court. At this stage the Applicants do not have an arguable case. It is clear under subsection (b) that the Applicants would be directly affected by the decision of the Island Court if their submissions are correct. At this stage it would also seem that there is no other remedy to resolve the matter other than by having the matter considered by way of judicial review. If the Court was to make a decision today that dismissed the Applicant's application for filing a Judicial Review Out of Time it could have the effect of perpetuating a possible injustice. However the Court is not in a position to be able to grant the application at this stage because the Applicants simply fail to produce sufficient evidence to persuade the Court that it should do so. If the Applicant's submissions are correct it could well be that the Tafea Island Court has exceeded its jurisdiction as described in the Loparu v. Sope decision by declaring part of the land that belongs to the Applicants as customary land belonging to somebody else."*

8. The claim was adjourned several times more and on 6 August 2009 the file was place before Clapham J. who dealt with the file on two occasion before leaving the jurisdiction in December 2010.

9. By notice dated 18 August 2010 the file was listed before me for conference in chambers. It was by then almost 7 years after the Tafea Island Court decisions and 4 years after the Claimant first sought an extension of time to apply for judicial review of the Tafea Island Court decisions.

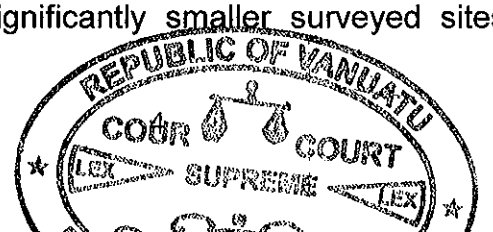
10. At the conference on 25 August 2010 I heard counsels. Mr. S. Joel for the applicant/claimant frankly admitted that the application for judicial review was brought out of time and required an extension. Likewise any appeal that the claimant may have had in terms of section 22 of the Island Courts Act [CAP. 167] had long expired along with any prospect of having the time for appeal extended.

11. Mr. Joel summarized the claimant's concern as the custom owner of customary land entitled: "***Unponkor***" which he claims includes the whole of "***Nompunlou***" and a large part of "***Nompunwose***" within its traditional customary boundary.

12. If I may say so, even if the said customary lands are comprised within a larger customary land area as the applicant claims that alone does **not** preclude them being owned by the successful claimants **nor** conversely does it mean that the applicant's claim or title to a larger, differently-bounded and named customary land, has been expunged or adversely affected by the decisions. In other words, ownership of the larger tract of land does not necessarily mean that smaller tracts within that larger tract cannot be owned by others. The applicants however do not appear to seriously challenge the successful claimants ownership of the said customary land.

13. State Counsel asserted that judicial review was inappropriate as the claimant was never a party to the relevant Tafea Island Court proceedings and whatever grievance that might arise from any overlap (which is not admitted) in the boundaries of the said customary lands determined by the Tafea Island Court's decisions did **not** affect the applicant such as to clothe him with a grievance sufficient to support his claim for judicial review.

14. If however, as the applicant complains the larger boundaries of the maps attached to the Tafea Island Court decisions are the true boundaries settled and determined by the decisions, then the applicant is most definitely affected very adversely by the decisions as his counsel submits "*... it is easy to see that the applicant (has) as a consequence of the decisions lost all his customary land*". On the other hand if the true boundaries are the significantly smaller surveyed sites that were well



known to the applicants then it is unlikely that the applicants would complain.

15. In this latter regard the most recent sworn statement filed on 19 October 2009 by the applicant is deposed by a surveyor and is plainly intended to clarify the "*over-lap*" noted in Dawson J's ruling (op. cit). The surveyor deposes to the following findings:

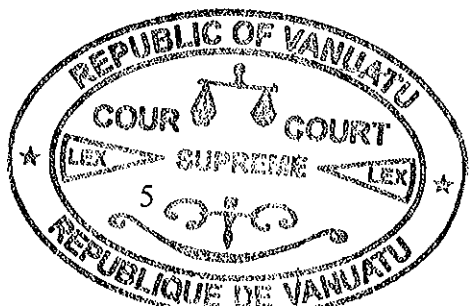
> "*The customary land of 'Nompunwose' as per sketch plan attached to the decision of the Island Court in Tafea Island Court Land Case No. 4 of 2000 does not include the customary land known as 'Nompunwose' found at Latitude 18.45m 50 sec South and Longitude 169.01m 15 sec East. Nompunwose as described in the judgment overlaps into the sketch map of Nompunlo in the decision of the Tafea Island Court in Tafea Island Court Case NO. 5 of 2000 in the Eastern side. Both decisions of the Island Court in Land Case No. 4 and 5 of 2000 overlap into the applicants' land known as Unpunkor or Dillon's Bay and they encroach upon each other in some parts.*"

16. I confess that the survey plan is not easily understood as it appears to identify in the **key** not one, but two (2) areas of customary lands entitled, '***Nompunwo***' and '***Nompunwose***'.

17. There is a large area (coloured blue) indentified as '*Nompunlou*' and an even larger area (coloured yellow) identified as '*Nompunwose*'. Within Nompunlou are 2 small rectangular areas (coloured green) marked as surveyed sites of Nompunlou **(No. 208)** and Nompunwose **(No. 211)**. There is also an area marked '***OVERLAP***' (speckled) on the plan where the large blue and yellow areas intersect. Finally the plan shows the applicant's customary land '***Unpongkor***' which contains within its boundary the entire blue area including the 2 smaller surveyed sites as well as parts of the yellow area.

18. In ***Loparu v. Sope*** [2005] VUCA 4 the Court of Appeal recognized that:

> "*Judicial review under the rules may apply to a decision of a statutory court where that body exceeds its jurisdiction or fails to comply with the appropriate statutory process. In an appropriate case there could be a basis for an application for judicial review of a decision such as this, but any appeal on the merits of the case as to factual findings can only be made under the statutory process of appeal under the Island Courts Act.*"



19. The Court of Appeal also stated in ***Avock v. Government of the Republic of Vanuatu*** [2002] VUCA 44 that:

> "*When there is an application for leave which is at least four months out of time (and may be even longer) there is a heavy onus on the person to explain why they have not commenced the proceedings in the time which is provided. Obtaining finality is always an important ingredient in matters which can lead to judicial review.*"

20. Accepting that the applicant bears a heavy onus to explain the lengthy delay in seeking an extension of time within which to apply for judicial review and the importance of obtaining finality, the court cannot ignore the sentiments expressed by Dawson J. that "*... if the court was to make a decision today that dismissed the application for filing a judicial review out of time it could have the effect of perpetuating a possible injustice*".

21. In this regard I am satisfied from the undisputed evidence, that the applicants who live at a remote inaccessible location some 46kms away from the place where the Island Court hearing notices were posted at Dillon's Bay, were **not** aware of the respective hearings or claims to the said customary lands and, even if they were aware of the radio broadcast messages (which is denied), they would still have had **no** idea of the size of the areas being claimed pursuant to the notices. Indeed, it is distinctly probable that the applicant would have wrongly assumed from what was common knowledge, that the areas claimed "*... (were) quite insignificant pieces of land about a hectare each*".

22. In determining this application I note that most of the evidence in this claim has been filed by the applicant and is undisputed. It is also significant that the Tafea Island Court hearings and decisions under challenge, took place at Isangel, Tanna and were unopposed at the time.

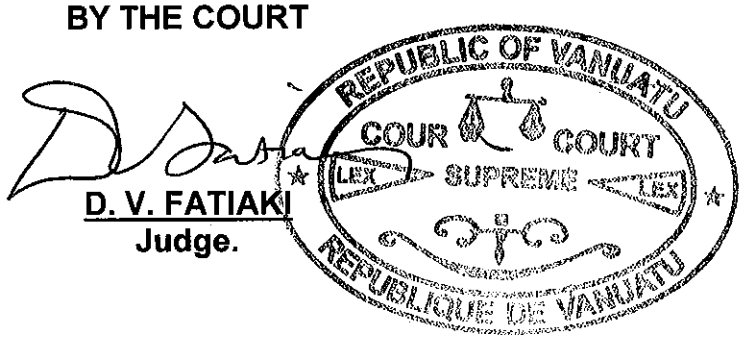
23. Doing the best I can after considering all of the evidence in the case I am satisfied that the application should be granted. I am also satisfied that the applicants complaint boils down to a boundary dispute. I am also satisfied that the actual physical boundaries of '*Nompunlou*' and '*Nompunwose*' customary lands were **not** the subject matter of a specific determination by the Tafea Island Court.

24. Accordingly the application is granted and pursuant to **Rule 17.9(1)(b)** of the Civil Procedure Rules, the Tafea Island Court cases Nos. 4 and 5 of 2000 are ordered consolidated and returned to the Tafea Island Court to consider the matter and determine the respective physical boundaries of '*Nompunlou*' and '*Nompunwose*' in accordance with this decision and the provisions of the Island Courts Act. Needless to say at the determination hearing the applicants must be given the opportunity to call evidence and make representations as it considers necessary.

25. The applicants are granted their costs to be taxed if not agreed.

DATED at Port Vila, this 29th day of April, 2011.

BY THE COURT



D. V. FATIAKI
Judge.