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

Civil Case No. 66 of 2009

BETWEEN: SOLOMON SAIPIR AND WILLIAM KALOTITI MATAKUTALO
Applicants

AND: SIVIRI/SUNAE JOINT VILLAGE LAND TRIBUNAL
First Respondent

AND: KALKAUA LAUMANU
Second Respondent

AND: OBED PAKOA
Third Respondent

AND: HARRY GILBERT
Fourth Respondent

AND: ANDREW POPOVI
Fifth Respondent

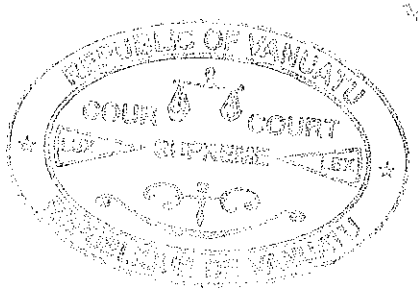
Before: ***Justice D. V. Fatiaki***

Counsel: *Mr G. Nakou for the Applicants*
Ms J. Harders and Mr G. Avock for the First Respondent
Mrs. M. Noel Patterson for the Third Respondent
No appearance for Second, Fourth and Fifth Respondents

Date of Ruling: *4 July 2014*

RULING

1. By a decision dated 9 January 2008 the **SIVIRI/SUNAE Joint Village Land Tribunal** ("*the Tribunal*") determined the customary ownership of land known as "*Udaone*" in North West Efate. The applicants had been claimants to "*Udaone*" land and parties to Claim No. 1 of 2006, but the tribunal did not uphold their claims. Aggrieved by the result, the applicants commenced this proceeding in the Supreme Court on 10 June 2009 (ie 18 months after the decision) seeking orders under **Section 39(1) & (2)** of the **Customary Land Tribunal Act** [CAP. 271] ("*the Act*") that the decision be set aside, and that the Tribunal be ordered to convene and re-determine custom ownership of "*Udaone*".



2. In Solomon v. Turquoise Ltd. [2007] VUCA 9 the Court of Appeal relevantly observed of the system provided under the Act for resolving customary land disputes as follows:

> *"... Parliament specifically set up a multi-layered system where a party has the right to argue his case about the vitally important and sensitive issue of land ownership up to 5 separate times (inclusive of an Island Tribunal rehearing) in tribunals consisting of local chiefs and elders before the point of final resolution is reached. Subsection (1) of ss. 10, 15 and 20 are an integral part of a custom based system of dispute resolution based upon lengthy, even protracted, discussion and deliberation resulting, if possible, in a decision which takes its authority in part from its acceptance by the parties."*

3. The supervisory power of the Supreme Court although seemingly available to be invoked at any stage of the process, is nevertheless, discretionary. The power is contained in Section 39 of the Act which provides:

> ***"Supervision of land tribunals by Supreme Court***
>
> ***39.*** *(1). If a person who is not qualified to be a member or a secretary of a land tribunal participates in the proceedings of the tribunal, a party to the dispute may apply to the Supreme Court for an order:*
>
> *(a) to discontinue the proceedings before the tribunal or to cancel its decision; and*
>
> *(b) to have the dispute determined or re-determined by a differently constituted land tribunal.*
>
> *(2). If a land tribunal fails to follow any of the procedures under this Act, a party to the dispute may apply to the Supreme Court for an order:*
>
> *(a) to discontinue the proceedings before the tribunal or to cancel its decision; and*
>
> *(b) to have the dispute determined or re-determined by a differently constituted land tribunal.*
>
> *(3). The Supreme Court in determining an application may make such other orders as it considers necessary.*
>
> *(4). Subject to the Constitution, the decision of the Supreme Court on any application:*
>
> *(a) is final and conclusive; and*
>
> *(b) is not to be challenged, appealed against, reviewed, quashed, set aside or called in question in any court on any ground."*

In my view, the fact that the court's supervisory jurisdiction is optional for the disputing parties is a factor to be considered in the exercise of the court's discretion in section 39(3).

4. This present application is brought by the Attorney General on behalf of the Tribunal to strike out these proceedings in its entirety. The strike out application is supported by the third respondent. I propose in this ruling, to retain the description of the parties as entitled.

5. Section 39 of the Act permits a party to invoke the jurisdiction of the Supreme Court where it is alleged that:

   - *a person who is not qualified to be a member or a secretary of a land tribunal participated in the proceedings of the tribunal* [*see:* Section 39 (1)];

   - *a land tribunal has failed to follow any of the procedures under the Act;* [*see:* Section 39 (2.)]

6. In the present case the Attorney General contends that it is plainly not necessary to invoke the power of the Supreme Court as all the matters complained about could and would have been fully addressed on an appeal to the relevant custom sub-area land tribunal by the aggrieved parties.

7. In this latter regard Rule 17.8(5) of the Civil Procedure Rules which applies to applications under Section 39 of the Act, (*see:* the observations of the Court of Appeal in West Tanna Area Council Land Tribunal v. Natuman [2010] VUCA 35), directs the Court to "*decline to hear the claim and strike it out*" if the Court is satisfied amongst other things, that there exists another "*remedy that resolves the matter fully and directly*".

8. Saipir and seven other parties aggrieved by the decision of the tribunal have already instituted an appeal to the relevant custom sub-area land tribunal.

9. Although the Attorney General contends that the applicant William Kalotiti Matakutalo has no standing to bring these proceeding as he walked away from the village tribunal proceeding part way through the hearing, following the decision of the Court of Appeal in the West Tanna Area Council Land Tribunal case (ibid) he is still considered "*a party to the dispute*" and could have participated in the appeal to the custom sub-area land tribunal.

10. From the mass of materials filed in opposition and in support of the application it is possible to distill four (4) broad grounds that are advanced in support of the orders sought by the applicants. Those grounds may be summarised as follows:

(A) **Alleged Breaches of the Customary Land Tribunals Act**

- *Alleged non-compliance by the Tribunal with provisions of the Act;*
- *Failure to properly inspect the land as required by Section 27(5) of the Act;*
- *Members of the Tribunal were not qualified as required by Section 35 of the Act;*
- *The members had not taken the appropriate oaths;*
- *Notices as required by Section 7 had not been given.*

(B) **Members of the Tribunal were "biased"**
because of their familial relationship to parties contesting the custom ownership.

(C) **Lack of or excess of jurisdiction**
The complaint in this regard is that:

- *Tribunal members were not properly appointed as required by Section 35 (2) (a) (b) of the Act as the village boundary was not properly determined;*

- *The Tribunal purported to determine ownership of land beyond the custom boundary of "Udaone" land.*

(D) **The Tribunal was not properly constituted**
As the relevant Council of Chiefs did not meet and take the necessary steps required by Section 35 to identify Chiefs and Elders with sufficient knowledge to adjudicate disputes relating to the boundary of Sunae/Siviri villages.

11. In the strike out application the Attorney General contends that none of the above grounds is made out on the evidence that has been produced by the applicants and, in any event, at a more fundamental level, the proceedings are an abusive process.

12. Before turning to consider the arguments advanced on this strike out application it must be clearly stated that the utility of this proceeding has been largely overtaken by the recent reforms to this procedure for settling disputes over custom ownership of land introduced by the **Custom Land Management Act No. 33 of 2013** (*"The Management Act"*) which came into force on 20 February 2014.

13. Section 5 of the Management Act relevantly provides:

> *"**5. Pending court or tribunal proceedings***
> *(1) If:*
> *(a) a person is a party to a proceeding before the Supreme Court or an Island Court relating to a dispute over custom land; and*

(b) *the person applies to that Court to have the proceeding withdrawn and the dispute dealt with under this Act; and*

(c) *the other party or parties to the proceeding consent to the withdrawal and to the dispute being dealt with under this Act; and*

(d) *that Court consents to the withdrawal and to the dispute being dealt with under this Act;*

the dispute must be dealt with under this Act.

(2) The Supreme Court or an Island Court may:

(a) *order that any fees paid to that Court in respect of such proceedings be refunded in full or in part to the applicant or any of the other parties; and*

(b) *make such other orders as it thinks necessary.*

(3) To avoid doubt, if, at the time of this Act comes into force, proceedings are pending before the Supreme Court or an Island Court relating to a dispute over a custom land, the dispute cannot be dealt with under this Act without the agreement of all parties to the dispute.

(4) If proceedings relating to a dispute over a custom land are before a single or joint village Customary Land Tribunal, a single or joint sub-area Customary Land Tribunal, a single or joint area Customary Land Tribunal or an island Customary Land Tribunal when this Act comes into force, such proceedings will be suspended, and the dispute will be referred by the custom land officer to the appropriate nakamal or custom area land tribunal for decision under this Act."

14. By virtue of the above provisions, if the strike out application succeeds, there will be no proceeding in the Supreme Court, and the underlying dispute between the groups contesting custom ownership of "*Udaone*" land now under appeal to the custom sub-area tribunal will be suspended, and the dispute will be referred under Section 5(4) of the Management Act by the relevant "*custom land officer*" to the appropriate nakamal or custom area land tribunal for decision under the Management Act. However if the strike out application fails, and the substantive proceeding brought by the applicants goes to trial, whatever the outcome of the trial will still fall, in the end, to be referred for decision under the Management Act.

15. If the substantive claim succeeds, the decision of the tribunal would be set aside and the parties to the dispute would be back to square one. The unresolved dispute would then fall to be determined under the Management Act. On the other hand, if the substantive proceedings in the Supreme Court fails, and the decision of the tribunal remains under appeal to the custom sub-area tribunal, it would still be dealt with under the Management Act [*see also:* Sections 47(4) & (5) read with Section 58].

16. This result may at first sight appear harsh to the parties who were successful in the first instance in the tribunal under the decision of 9 January 2008. However, even if that decision had been upheld on appeal by the custom sub-area tribunal, that decision would now be open to be challenged in an "**Island Court (Land)**" under Section 58 (1) of the Management Act. One of the grounds for challenge under Section 58 (3) is that the decision of the customary land tribunal "*was wrong in custom law*".

17. Notwithstanding the overwhelming impact which the Management Act will undoubtedly have on the continuing unresolved dispute on the custom ownership of "*Udaone*" land, in deference to the submissions, I shall briefly address the issues raised in the strike out application.

18. I propose to consider the specific complaints raised by the applicants (earlier identified) as the nature of these complaints is important in considering the Attorney General's argument as to the exercise of this court's discretion under Section 39 of the Act. Before doing so however, something needs to be said about the amount of documents filed in this claim.

19. The mass of papers filed by the applicants which ran into hundreds of pages included unsolicited sworn statements filed indiscriminately by the applicants without the court's direction or approval. A very large number of the sworn statements were deposed by persons in the format of answering "*pre-set*" questions on the establishment and membership of two unrelated land tribunals.

20. Similarly, there were several interlocutory applications filed by the applicants including an application annexed to a letter dated "*May 4, 2010*" which sought a stay of the strike out application and other "*orders*" that can only be described as highly irregular in that it sought the court's direct involvement in the inner-workings and implementation of the Act whilst a ruling on the strike out application was still pending.

21. There was also an unusual application filed on "*November 2009*" to file "*interrogatories*" directed to the Director of Lands (who was not a party named in the proceedings) which was subsequently answered in a sworn statement deposed by a senior official of the Customary Lands Unit filed on 23 February 2010. Interestingly and rather poignantly one of the so-called "*orders*" sought in this application was worded as follows:

> "*order that the court accepts written answers to set of questions belonging to other members of Sunae/Malafau land tribunal and also Tanoliu/Tassiriki land tribunal* (not the named defendant tribunal) *although*

there is no permission or leave from the Supreme Court for answers to be provided or filed in Court in a form of sworn statement".

22. By way of general observation, given the limited ambit and confined nature of the Court's supervisory powers under Section 39, the circumstances where the court would permit "*interrogatories*" would in my experience, be rare.

23. Furthermore in a claim for judicial review under Part 17 of the Civil Procedure Rules, Rule 17.4 (3) expressly requires the claim to "*(b) have with it a* (single) *sworn statement in support of the claim*" (my underlining for emphasis). Similarly, where the claim is opposed, the defence must have filed with it "*a sworn statement supporting those grounds*" [*see:* Rule 17.7(4) (b)].

24. In my view subject to the express requirements in the Civil Procedure Rules for the filing of a sworn statement, there is no "*carte blanche*" for the parties in a proceeding to file sworn statements as many and as often as they desire. The existing practice so evident in the present claim of filing unsolicited sworn statements without prior leave of the court, is irregular, costly and time-consuming and will not be allowed to continue. Counsels are reminded that the court has express powers under Rule 18.10(2) to "*declare a document ... ineffectual*".

GROUND (A)

25. The alleged non-compliance by the tribunal with "*Section 27(5)*" to walk the boundary of the land "*if possible*" is disputed by the respondents as a matter of fact. The respondents have adduced evidence that the procedure adopted by the tribunal to walk the boundary was "*agreed by the parties*" and accordingly could not now be open to challenge. However, even if there was any substance in the alleged non-compliance with Section 27 (5), Section 27 (6) enables on an appeal, the appellate tribunal itself to walk the boundary in determining the appeal. It follows therefore that any failure at first instance to comply with Section 27 (5) could be readily cured on appeal.

26. The argument that the members of the tribunal were not properly qualified under "*Section 35*" of the Act is misconceived. The applicant's case advances a complex argument to the effect that section 35, at least in spirit, required that the council of chiefs for the villages of Siviri and Sunae should have met to approve the appointment of the members of the tribunal after determining the boundaries of each village. This argument overlooks the fact that Section 35 relates only to the determination of boundaries for custom area and custom sub-area tribunals [*see:* Section 35 (1)].

27. Section 35 has no application to the appointment of a village land tribunal which is dealt with in Part 2 of the Act and, more specifically, in Section 9 (2) in the case of a joint village land tribunal where the "*principal chief of each village*" has an exclusive role to play.

28. The complaint that the members of the tribunal were not duly qualified under "*Section 37*" alleges that the members of the tribunal had not properly taken the oaths prescribed by Section 37 (3) of the Act. The argument asserts that the members did not take oaths before a person duly authorized by the **Oaths Act** [CAP. 37]. The evidence does not establish that the persons who administered the oaths were not duly authorized to do so, and the first respondent's evidence is that the oaths were properly administered. But in any event, this argument goes nowhere from the applicants view point, because Section 8 of the Oaths Act provides that a failure by any person to take an oath of office will not render invalid any act done by that person in the execution of his official duty.

29. Needless to say I reject the applicant's submission that the tribunal members are required to take oaths other than that provided for under Section 37(3) of the Act including a judicial oath and an oath of allegiance.

30. The alleged failure to give all necessary notices under "*Section 7*" is not established as a matter of fact. The decision of the tribunal records the giving of notices. The fact that the applicants can obtain sworn statements from some people who say that did not see the notices does not disprove that the notices were not "*given*".

31. In this regard the only notice envisaged under the section is that which must be given by the person or group in dispute about the boundaries or ownership of customary land, and, where the land extends over the boundaries of two villages, "*to the principal chief of each village*" [*see:* Section 7(1) and (2)]. Nowhere in Part 2 or Section 7 is there a requirement of a more general public notification of a village or joint village land dispute and the necessarily confined and localized nature of such a dispute would in my view, obviate any need for wider publicity.

32. I note the provisions of Section 25 only requires service of the notice of hearing on "*the parties to the dispute*".

33. The complaints relating to the "*qualification*" of the members of the tribunal and to the "*giving of notices*" are each matters that would be overtaken and necessarily cured on appeal to the next level of customary tribunal. The custom sub-area tribunal must itself again give notices and the members who will comprise the appellate tribunal will be new qualified independent adjudicators who will address the substance of the disputed claim afresh [*see:* Sections 25 and 27].

GROUND (B)

34. Likewise with the complaint of "*bias*", even if the complaints were established they would not carry through to the next level of hearing. The allegations of "*bias*" by the applicant however, faces two (2) main difficulties. The first, is that the allegations are denied as a matter of fact. The second is that Section 26 of the Act appears to vest the responsibility for dealing with this type of objection by a party, on the tribunal members themselves, and the Supreme Court would not likely interfere with that aspect of the tribunal's responsibility [*see:* Sections 26 (3) and (4)].

GROUND (C)

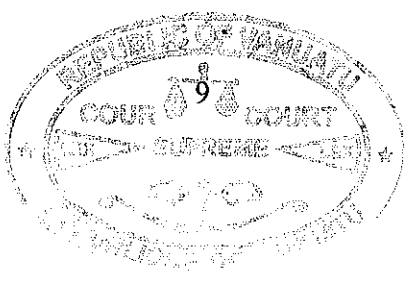
35. The complaints of "*lack of jurisdiction*" are also misconceived. In substance they rest on alleged non-compliance with Section 35. As already noted Section 35 has no application to village land tribunal. In so far as the tribunal may have purported to determine custom ownership of land beyond the custom boundary of "*Udaone*", that aspect of its determination would be severable and would not invalidate the decision in so far as it related to land within "*Udaone*" boundary. And again, if this complaint had any substance, it is the very kind of complaint that would be addressed on appeal and would be cured by the decision of the next tribunal in the hierarchy.

GROUND (D)

36. The final ground raised by the applicants as to the composition of the tribunal, again rests on the premise that the establishment of a joint village land tribunals attracts the provisions of Section 35 of the Act. That assumption is wrong and there is no substance in the complaint that the tribunal was not properly established.

GENERAL DISCUSSION

37. Quite apart from the merits of the grounds advanced by the applicants, they are all grounds that would be readily addressed and corrected in the appeal that has already been lodged with the custom sub-area tribunal. The supervisory jurisdiction of the Supreme Court is clearly a discretionary one. The Supreme Court on a judicial review application will ordinarily not exercise its review jurisdiction where the applicant has failed to exhaust all available processes under the Act or has an alternative remedy.



38. In the present case, Section 39 expressly provides that the supervisory power may be exercised if the court considers it is covered by Section 39 (3) which provides:

> "*The Supreme Court in determining an application may make such other orders as it considers necessary*".

39. This immediately raises a requirement of "*necessity*" and whether the application invoking Section 39 might be dealt with by an order other than those provided for in subsections (1) and (2).

40. In this case I am firmly of the view that there is no necessity for the Supreme Court to intervene.

CONCLUSION

41. If I may say so the large quantity of material which the applicants have filed in this claim a quite improper contains invitation for the Supreme Court to micro-manage every aspect of the procedures of a customary land tribunal. At a practical level, to do so would be beyond the resources of the Supreme Court, and could not be the intention of the Act. On the contrary, the Act makes it quite clear that disputes about customary land ownership are to be resolved by a system based on custom applied in land tribunals, not by a system based on introduced law in the Supreme Court.

42. I am satisfied that the Supreme Court proceedings were wholly inappropriate and misconceived.

43. For the above reasons I consider the application to strike out the substantive proceedings succeeds. Accordingly Civil Case No. 66 of 2009 is struck out. The applicants must pay the cost of the respondents on a standard basis.

DATED at Port Vila, this 4th day of July, 2014.

BY THE COURT

D. V. FATIAKI
Judge.