



IN THE SUPREME COURT OF
THE REPUBLIC OF VANUATU

Civil

Case No. 23/1197 SC/CIVL

IN THE MATTER OF: **Leosa Customary Land Lelepa Island**
AND IN THE MATTER OF A DECISION OF: **Island Court (Land)- Judgment dated 2nd June 2023**

AND IN THE MATTER OF: **An Application pursuant to Section 47 of the Custom land management Act No. 33 of 2013**

BETWEEN: Philip Kalsuak

Applicant

AND: Billy Kalmaly Tungulmanu

First Respondent

AND: (Tugulumang) Albert Manuare

Second Respondent

AND: North West Efate Area Council, Havana Harbour

Third Respondent

Date of Hearing: 27th November 2023

Date of Decision: 28th November 2023

Before: Hon. Acting Chief Justice

Appearances: Mr Edward Nalyal for the Claimant/ Applicant

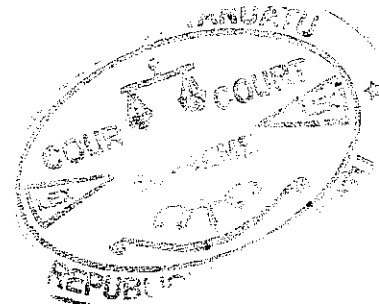
Mr Silas Hakwa for First Respondent

Mr Daniel Yawha for Second Respondent

Mr Lennon Huri for Third Respondent

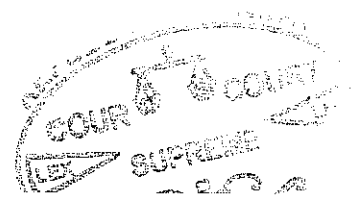
DECISION

1. The application by the First Respondent for an order to strike out the application of the applicant Philip Kalsuak is allowed.
2. The applicant will pay the First, Second and Third Respondent's costs on the standard basis as agreed or taxed.



Background

3. The application by Philip Kalsuak was filed under section 47 of the Custom Land Management Act (the Act).
4. It sought Orders that-
 - a) The decision of the Island Court (Land) dated 2nd June 2023 in relation to the Leosa Land, at Lelepa Island be cancelled,
 - b) The judgment of North West Area Land Tribunal (the tribunal) in relation to Leosa Land dated 29th December 2005 be maintained and upheld.
 - c) The judgment of the tribunal dated 13 May 2022 be upheld.
 - d) In the alternative, that the Court refers the matter back to a differently constituted, Island Court (Land) for determination.
5. Mr Hakwa and Mr Yawha for the First and Second Respondents filed separate applications opposing the application by Philip Kalsuak.
6. The Solicitor General filed a response to the strike out application in support of the applications by the First and Second Respondents.
7. The grounds in support of the application by the First Respondent are that-
 - a) It was an appeal in disguise and that section 47 does not give the applicant any right to invoke the provision to seek the reliefs they are seeking, and/or to appeal the decision of the Island Court (Land).
 - b) The application is a non-suit because it is complaining about the decision made by the Island Court (Land) which is not named as a party to the application.
 - c) The application lacks the evidence by sworn statements to support the facts alleged.
 - d) The applicant has misconceived sections 43 (2) and 45(5) and 47(1) of the Act.
 - e) The applicant has waived his right to raise objections to the composition of the Efate Island Court (Land).
8. It was submitted by both Mr Hakwa and Mr Yawha that the application is without foundation, is vexatious and is an abuse of process, having no merit, and should be dismissed with costs.
9. Mr Nalyal argued and submitted that section 47 (1) and (2) give the applicant the right to make the application. He argued there were valid grounds alleging breaches of sections 37 (1), 45(1)



and (5) of the Act and that the Court should exercise its inherent jurisdiction under section 65 of the Judicial Services and Courts Act to allow a full hearing of the application.

10. Mr Nalyal relied on the Court of Appeal case of Naru Kalbeau Kalsakau v Jongkook Hong and others [2004] VUCA 2.

The Law

11. Section 37(1) of the Act states:

37 Secretary of custom area land tribunal

(1) A secretary of the single custom area land tribunal established by a custom area council of chiefs or a secretary of a joint custom area land tribunal established by custom area councils of chiefs is to be appointed by:

(a) for a single custom area land tribunal established by a custom area council of chiefs—the custom area council of chiefs or if the council is unable to appoint a secretary, by a custom land officer of a province;

(b) for a joint custom area land tribunal established by custom area council of chiefs—the custom area council of chiefs or if the council is unable to appoint a secretary, by a custom land officer of a province.

12. Section 45 of the Act states:

45 Review of decisions of nakamals or custom area land tribunals on certain grounds

(1) If it is alleged by a custom owner, a member of a nakamal or a disputing group that a decision of a nakamal or custom area land tribunal to determine the custom owners:

(a) has been made by a nakamal or custom area land tribunal that was not constituted in according to the provisions of this Act; or

(b) has been made in breach of the process described in this Act; or

(c) has been procured by fraud,

the custom owner, the member of the nakamal or the disputing group may lodge an application for review with the Registrar of the Island Court (Land) or with the National Coordinator within 30 days from the date of the original decision and provide evidence to support the allegation.

(2) The application for review must clearly state why the nakamal or custom area land tribunal:

(a) was not composed in accordance with this Act; or

(b) has not proceeded in accordance with the provisions of this Act; or

(c) was procured by fraud.

(3) Upon receipt of an application which complies with this section, the Registrar of the Island Court (Land) must, if there are insufficient Justices of the Island Court who are qualified to sit to hear the dispute, request the council of chiefs of the area where the land is situated to nominate persons knowledgeable in the custom of the area to be members of the Court, and is to inform the Judicial Services Commission of the names of those persons in accordance with subsection 43(3).

(4) The Registrar of the Island Court (Land) is to inform the National Coordinator and the Office of the Land Registry when an application for review of a decision of a nakamal or custom area land tribunal has been filed.

(5) The Island Court (Land), after hearing such witnesses as are available and reviewing the circumstances of the decision subject to review, may affirm or set aside the decision of the nakamal or the decision of the custom area land tribunal, as the case may be.



(6) 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 subsection (1), the Court must set aside the decision and refer the matter back to either tkamal or custom area land tribunal (whichever decision has been reviewed), with such directions as it considers appropriate.

(7) A copy of a decision of an Island Court (Land) made under this section is to be provided by the registrar of the Island Court (Land) to the National Coordinator and the Office of the Land Registry.

13. Section 47 of the Act states:

47 Supervisory powers of the Supreme Court on limited grounds

(1) If a person, who is not qualified to be a member of an Island Court (Land), participates in a proceeding or influences, or attempts to influence the proceedings of an Island Court (Land), a party to the dispute may apply to the Supreme Court for an Order:

(a) to discontinue the proceedings; or

(b) to cancel the decision of the Island Court (Land); or

(c) to direct that an Island Court (Land) composed of different members is to determine the dispute.

(2) A party to a dispute may also apply to the Supreme Court for any of the Orders set out in subsection (1) if an Island Court (Land) fails to comply with any procedures prescribed in this Act.

(4) To avoid doubt, pursuant to Art 78 of the Constitution, the Supreme Court and all other Courts have no jurisdiction to determine matters related to land ownership or land disputes.

(5) All matters related to land ownership or land disputes must be referred to a nakamal or a custom area land tribunal for determination in accordance with the provisions of this Act.

14. Section 65 of the Judicial Services and Courts Act states:

65. Inherent powers of Supreme Court and Court of Appeal, and custom

(1) The Supreme Court and the Court of Appeal have such inherent powers as are necessary to carry out their functions. The powers are subject to:

(a) the Constitution; and

(b) any other written law; and

(c) the limitations of each Court's jurisdiction.

(2) For the purpose of facilitating the application of custom, a provision of any Act or law may provide that it may be construed by the Court of Appeal, the Supreme Court or the Magistrates' Court with such alterations and adaptations as may be necessary.

(3) The Supreme Court and the Court of Appeal have the inherent and incidental powers as may be reasonably required in order to apply custom.

(4) The Magistrates' Court has the incidental powers as may reasonably be required in order to apply custom.



15. Article 47 of the Constitution states:

47. The Judiciary

(1) The administration of justice is vested in the judiciary, who are subject only to the Constitution and the law. The function of the judiciary is to resolve proceedings according to law. If there is no rule of law applicable to a matter before it, a court shall determine the matter according to substantial justice and whenever possible in conformity with custom.

(2) Except for the Chief Justice the judiciary shall be appointed by the President of the Republic acting on the advice of the Judicial Service Commission.

(3) All members of the judiciary shall hold office until they reach the age of retirement. They shall only be removed from office by the President of the Republic in the event of—

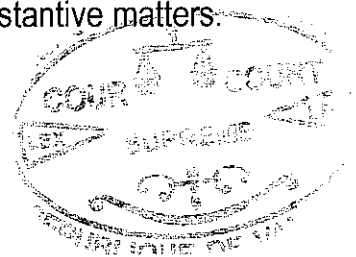
(a) conviction and sentence on a criminal charge; or

(b) a determination by the Judicial Service Commission of gross misconduct, incapacity or professional incompetence. (4) The promotion and transfer of members of the judiciary may only be made by the President of the Republic on the advice of the Judicial Service Commission.

(5) Parliament may provide for the appointment by the President of the Republic, after consultation with the Judicial Service Commission, of acting judges for such periods as may be set out in their instruments of appointment. (6) Sub article (3) so far as it relates to the removal from office shall apply to acting judges.

Consideration

16. The issue is whether the applicant has standing to invoke section 47 of the Act to seek the orders in paragraphs 1,2,3 and 4 of the application?
17. Section 47 of the Act provides for limited supervisory powers of this Court but only in relation to processes in an Island Court (Land). Subsections (4) and (5) specifically exclude the exercise of this power for all other Courts including the Supreme Court from the determining substantive matters related to land ownership or disputes.
18. The application by Philip Kalsuak specifies the subject matters being Leosa Customary Land on Lelepa Island, and the Island Court (Land) judgment dated 2nd June 2023.
19. The problem with the application is that instead of naming the Island Court (Land) as the Third Respondent, it names the North West Efate Area Council Havanah Harbour which falls outside the ambit of section 47 of the Act.
20. Mr Nalyal submitted in paragraph 5 of his submissions dated 23rd November 2023 that the Island Court (Land) erred in fact and in law in its paragraph 17 of the judgment by holding that the appointment of the panel were not done according to the provisions of section 37 (1) of the Act.
21. This is an appeal ground about the composition of the North West Efate Area Council Havannah Harbour which is not an Island Court (Land) within the ambit of section 47 (1).
22. And section 47 of the Act does not provide any right of appeal to any aggrieved party. It provides only a supervisory power of the Supreme Court in relation specifically to decisions of an Island Court (Land) and which are related only to process, not substantive matters.



23. If the applicant intended to challenge the findings of the North West Efate Area Council about breaches of the processes under the Act, the only course open to him was to seek a review of the tribunal's decision under section 45 of the Act.
24. And pursuant to section 45 (1) (c) of the Act the applicant should have lodged his application with the Registrar of the Island Court (Land) or with the National Coordinator within 30 days from 13 May 2022. This was not the case.
25. If the applicant had desired to proceed under section 47 of the Act, then it would have been proper to file a judicial review claim to review the decision of the Island Court (Land) and to have the Efate Island Court (Land) as a party. This was not the case.
26. Mr Nalyal relied on the case of *Kalsakau v Jong* [2004] VUCA 2 to argue that because the First respondent did not appeal against the decision of the 2005 Efate Island Court judgment, there should be finality to the dispute by the Court exercising its inherent jurisdiction to allow the application under section 47 (1) and (2) of the Act.
27. The case of *Kalsakau v Jong* is clearly distinguished. That case concerned section 22 of the Island Court Act which is all about appeals from the Island Court. This case is not about an appeal. It is a complaint about breaches of processes by an Island Court (Land) and it is a wrong approach to come by way of a normal application, when it should have been by way of a judicial review.
28. It is not a case which requires the exercise of the Court's inherent jurisdiction pursuant to section 65 of the Judicial Services and Courts Act. This could be so only if section 47 of the Act was not in existence.
29. It is for those reasons, I allowed the applications by the First and Second Respondents as supported by the Third Respondents.
30. The Respondents have been put to costs as a result of the application by the claimant. I Order that the applicant pays the First, Second and Third Respondent's costs of and incidental to the application on the standard basis, as agreed or taxed.

Dated at Port Vila this 28th day of November 2023

BY THE COURT


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Hon. Oliver A Saksak
Acting Chief Justice

