

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

**Judicial Review Case
No. 22/3399 SC/JUDR**

BETWEEN: **Family Tuforo Mera**
Claimant

AND: **Republic of Vanuatu**
First Defendant

AND: **Erakor Village Mpau Natkon**
Second Defendant

AND: **Jack Harry Kallon**
Third Defendant

AND: **Josiana Ben**
Fourth Defendant

Dates of Hearing: 24 & 30 October 2023
Before: Justice V.M. Trief
In Attendance: Claimant – Mr R. Tevi
First and Second Defendants – Mr J. Wells
Third and Fourth Defendants – Mr S. Kalsakau
Date of Decision: 30 November 2023

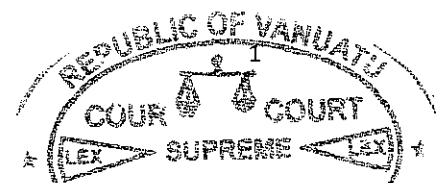
JUDGMENT

A. Introduction

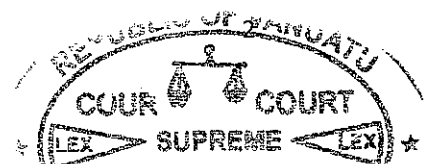
1. This was a claim for judicial review of the Second Defendant Erakor Village Mpau Natkon's decisions dated 29 October 2021 and 8 June 2022 (the latter in respect of a nakamal meeting held on 27 May 2022) declaring the custom ownership Part Emtenmap custom land and Part Etil custom land, respectively.

B. Background

2. The Claimant Family Tuforo Mera ('Mera') filed the Claim for Judicial Review on 14 December 2022. The Claim seeks review of the Second Defendant Erakor Village Mpau Natkon's decisions dated 29 October 2021 and 27 May 2022 on the basis that Mera was a claimant for the custom ownership of the two custom lands determined



- Part Emtenmap custom land and Part Etil custom land – but was not informed to appear at the meetings at which those decisions were made.
3. The Sworn statements of Joseph Tuforo Mera, Junior Mahit and Stanley Lango and the Further Sworn statement of Mr Mera were filed in support of the grounds of the Claim.
 4. Copies of Mr Mera's completed Claim Forms that he lodged with the Custom Land Management Office ('CLMO') in respect of the subject lands were attached to the Sworn statement of Joseph Tuforo Mera filed on 14 December 2022. The Claim form in respect of Part Emtenmap custom land dated 1 July 2021 was attached as **Attachment "JT2" (first 2 pages)** and the Claim form in respect of Part Etil custom land was attached as **Attachment "JT2" (pages 3 and 4)**.
 5. Mr Mera's case is that he never received the notice of nakamal meeting following which the 29 October 2021 decision was made, but his son Junior Mahit received on 25 May 2022 the notice of nakamal meeting dated 23 May 2022. He handed it to his father and subsequently Mera attended at the nakamal but there was no hearing there. He subsequently became aware that the decision dated 8 June 2022 had been made without his claim having been heard.
 6. The decision dated 29 October 2021 states that '*i nokat cross-claim*' meaning that there was no cross-claim. The decision dated 8 June 2022 recorded that '*Cross-claim – ino kat*' meaning that there was no cross-claim.
 7. The Claim is opposed: First and Second Defendants' Defence filed on 29 May 2023 and Third and Fourth Defendants' Defence filed on 7 July 2023.
 8. The Sworn statements of Daniel Lukai, Nixon Patunvanu and Marik Kalopong were filed in support of the grounds of the First and Second Defendants' Defence.
 9. The Sworn statements of Jack Harry Kallon and Josiana Ben were filed in support of the grounds of the Third and Fourth Defendants' Defence.
 10. The First and Second Defendants, the State and the Erakor Village Mpau Natkon respectively, admit in their Defence that Mera is a claimant for the custom lands and alleged that the notices of the nakamal meetings were served on Mr Mera's son who works at the Reserve Bank of Vanuatu.
 11. The Third and Fourth Defendants, Jack Harry Kallon and Josiana Ben respectively, alleged in their Defence that they only became aware that Mera had a claim to their respective custom lands at the first nakamal meeting but that he did not attend to advance any counter-claim in opposition to their claims. Further, that the Claim is barred by the Constitution and by subs. 47(4) of the *Custom Land Management Act* 2013 (the 'Act'), and that the Court does not have jurisdiction to hear the Claim as the Third and Fourth Defendants have been declared custom owners by written decisions of the Nakamal and been issued Certificates of a Recorded Interest in



Land ('green certificates'), citing *Kwirinavanua v Toumata Tetrau Family* [2018] VUCA 15.

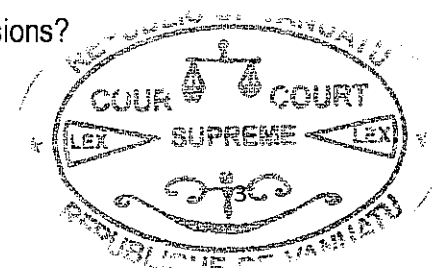
C. Consideration

12. Marik Kalopong deposed in his Sworn statement filed on 11 August 2023 that he served the Nakamal's letter dated 13 October 2021 giving notice of the nakamal meeting to determine the custom ownership of Part Entenmap custom land by depositing it to Mera's Post Office Box 3357 as advised by the CLMO. Mr Mera denied ever receiving that letter. There is no evidence that he received it.
13. Mr Kalopong also deposed that he understood that the Nakamal's letter dated 23 May 2021 giving notice of the nakamal meeting to determine the custom ownership of Part Etil custom land was served by CLMO staff on Mr Mera's son Junior Mahit at his workplace at the Prime Minister's Office. This is accepted. Mr Mera was handed the Nakamal letter the day before the nakamal meeting.
14. The Third Defendant Mr Kallon by his Sworn statement filed on 11 August 2023 deposed that on 29 October 2021, the Second Defendant Nakamal considered his custom ownership claim and resolved that he was the custom owner of Part Emtenmap custom land [decision at **Attachment "JHK1"**]. Subsequently, the National Coordinator issued him green certificates [copies at **Attachment "JHK2"**].
15. The Fourth Defendant Mrs Ben by her Sworn statement filed on 11 August 2023 deposed that her claim was heard by the Second Defendant Nakamal meeting on 27 May 2022. It subsequently made its decision dated 8 June 2022 declaring her as the custom owner of Part Etil custom land [decision at **Attachment "JB1"**]. Third and Fourth Defendants' counsel Mr Kalsakau informed the Court from the bar table that she too had subsequently been issued green certificates.
16. The Court of Appeal held as follows in its judgment in *Kwirinavanua v Toumata Tetrau Family* [2018] VUCA 15 at para. 24:

24. ... The actual event that determines the title of a custom owner is not the recording of an interest, but the decision of the relevant customary institution or Court. If there is a dispute about who is the custom owner, that will be determined by going to the decision of the customary tribunal or Court, not to a certificate issued by the Coordinator.

(my underlining)

17. Mr Kallon and Mrs Ben's title as custom owners has been determined by the decisions made by the Second Defendant Nakamal dated 29 October 2021 and 8 June 2022. Both of these Nakamal decisions are challenged by way of judicial review in the present matter.
18. However, does the Court have jurisdiction to review those decisions?



19. Articles 74 and 78(3) of the Constitution provide as follows:

74. *The rules of custom shall form the basis of ownership and use of land in the Republic of Vanuatu.*

...

78.

(3) *Despite the provisions of Chapter 8 of the Constitution, the final substantive decisions reached by customary institutions or procedures in accordance with Article 74, after being recorded in writing, are binding in law and are not subject to appeal or any other form of review by any Court of law.*

(my underlining)

20. Subsections 47(4) and (5) of the Act provide as follows:

47. (4) *To avoid doubt, pursuant to Article 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.*

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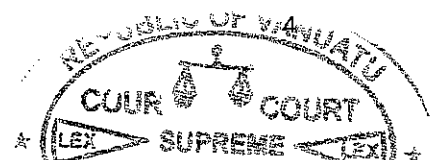
21. Given that the Second Defendant Nakamal has made its decisions which are recorded in writing dated 29 October 2021 and 8 June 2022, these are binding in law and are not subject to review by the Court pursuant to art. 78(3) of the Constitution.

22. However, at the heart of Mera's Claim is his complaint that he had lodged claims for both Part Emtenmap custom land and Part Etil custom land but have not been determined by the Second Defendant Nakamal.

23. It is clear from the evidence that Mr Mera was not served notice of the nakamal meeting to determine the custom ownership of Part Emtenmap custom land as the letter was 'deposited' at a P.O. Box and there is no evidence that he actually received it. Further, it is common ground that Mr Mera's claim was not determined at the Nakamal meeting on 29 October 2021.

24. Accordingly, this Court must now refer Mera's claim in relation to Part Emtenmap custom land to the Second Defendant Nakamal for determination whether or not he and his family have any interests in the land, including ownership and use rights, in accordance with subs. 47(5) of the Act.

25. It is also clear from the evidence that Mr Mera received just one day's notice of the nakamal meeting to determine the custom ownership of Part Etil custom land. I reject Defendants' counsel's submissions that Mr Mera had ample time to prepare his claim in time for the nakamal meeting. The ownership and use of custom land is the defining issue that united the people of Vanuatu (the New Hebrides, at the time) in their struggle for political independence. Giving someone only 24 hours' notice of the



nakamal meeting that will determine their claim to custom ownership and/or use rights over custom land is simply insufficient. Mr Mera must be given a reasonable period of notice of a nakamal meeting, such as 14 days.

26. In any event, it is also common ground that Mr Mera's claim for Part Etil custom land was not determined at or following the Nakamal meeting on 27 May 2022. Accordingly, this Court must also refer Mera's claim in relation to Part Etil custom land to the Second Defendant Nakamal for determination whether or not he and his family have any interests in the land, including ownership and use rights, in accordance with subs. 47(5) of the Act.

D. Result and Decision

27. The Claimant's claim in relation to Part Emtenmap custom land (by way of Claim Form dated 1 July 2021 lodged with the CLMO) is **referred** to the Second Defendant Nakamal for determination whether or not he and his family have any interests in the land, including ownership and use rights.
28. The Claimant's claim in relation to Part Etil custom land (by way of Claim Form dated 4 March 2022 lodged with the CLMO) is **referred** to the Second Defendant Nakamal for determination whether or not he and his family have any interests in the land, including ownership and use rights.
29. The First and Second Defendants are to pay the costs of the Claimant fixed at VT60,000 **by 4pm on 29 December 2023**.
30. The costs of the Third and Fourth Defendants are to lie where they fall.

**DATED at Port Vila this 30th day of November 2023
BY THE COURT**


Justice Viran Molisa Trief

