

BETWEEN: Benatly Samuel, Wycliff Karae, Donald Jeremiah, Nicola Simo
Appellants

AND: Big Bay Coast Custom Area Land Tribunal
First Respondent

AND: Customary Land Management Tribunal
Second Respondent

AND: Solomon Tavue
Third Respondent

Date of Hearing: 30TH November 2023

Date of Decision: 11th December 2023

Before: Judge Oliver A Saksak

Appearances: Mr James Tari for the Appellants

Mr Freddie Bong for the First and Second Respondents

Ms Laniana Raikatalau and Viska Muluane for Third Respondent

DECISION

Introduction

1. At the hearing on 6th December 2023 I heard the Third Respondent's application to strike out parts of the evidence of the appellants together with the appellant's appeal.
2. I allowed the application by the Third Respondent and dismiss the appeal for the appellants.
3. I now provide the reasons.

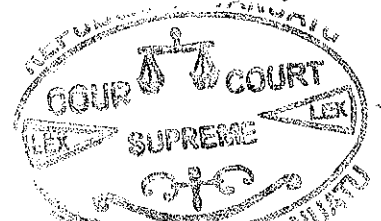
The evidence objected to

4. The Third Respondent objected to the sworn statements of Benatly Samuel dated 7th September 2023 and to that of Dr Andrina Thomas dated 4th September 2023.
5. The Third Respondent submitted that those statements were irrelevant, were hearsay and were personal opinions and speculations and should be inadmissible.

The Law

6. Section 45 of the Act provides for review of decisions of nakamals or custom area land tribunals on certain grounds:

*"45 Review of decisions of nakamals or cust 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 accordance with 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) Not applicable

(5) Not applicable

(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 nakamal or custom area land tribunal (whichever decision has been reviewed), with such directions as it considers appropriate.

(7) Not applicable.....”

7. Section 47 of the Act states:

“47 Supervisory powers of the Supreme Court on limited grounds

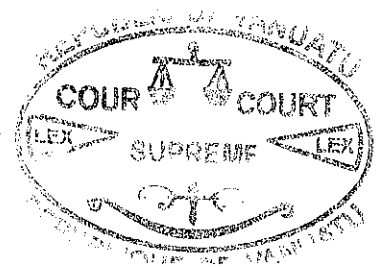
(1) If a person, who is not qualified to be a member of an Island Court (Land), participates in a proceeding or influences, or attempts to influence the proceedings of an Island Court (Land), a party to the dispute may apply to the Supreme Court for an Order:

(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 the Island Court (Land) fails to comply with any procedures prescribed in this Act.”



Submissions

8. Mr Tari submitted that the Island Court (Land) had erred when it based its decision on the Consent Order dated 15th March 2019 which he argued was void abinitio. Counsel placed reliance on Aore Island Limited v Vaturul [2013] VUCA 16.
9. Further Mr Tari submitted that the Island Court (Land) had erred when it referred the case or dispute back to the Custom Area Tribunal when it should have been to the nakamal.
10. The respondents objected to the appeal. The Republic submitted that section 47 of the Act provides only for a limited powers of the Supreme Court. Further they submitted that as the Island Court (Land) was not named as a party to the appeal to properly respond to the allegation raised against it. They placed reliance on Kalsuak v Tungulmanu & others CC 23/1197.

Consideration

11. I accepted the submissions of the respondents. First I agreed that for the appellant to seek to cancel the decision under challenge, it should have named the appropriate tribunal as a party to the proceeding.
12. Here, the challenge is to the decision of the Island Court (Land) and yet the appellants failed or omitted to name the Island Court (Land) as a party. The case of Kalsuak v Tungulmanu CC 23/1197 lends support to this view.
13. Next, this is an appeal brought under section 47 of the Act. Clearly section 47 is only about the limited supervisory powers of this Court in the circumstances in subsection (1) and (2). There is no specific right of appeal in section 47 of the Act.
14. The Act only provides for a right of review under section 47 of the Act, but that is done in the Island Court (Land).
15. The parties to the dispute sought a review under section 45 of the Act to the Island Court (Land). In that Court a Consent Order was reached dated 15th March 2019 referring the case back to a properly constituted Custom Area Land Tribunal.
16. The parties having reached consensus, now with the appellants regrouping have filed an appeal to the Court under section 47 (2) of the Act, appealing the same points they pursued in the Island Court (Land) as a review under section 45 of the Act. This is an abuse of process.
17. the appellants argued that the Consent Order dated 15th March 2019 was void abinitio. I fail to understand that argument when they were represented by Mr Gregory Takau as legal counsel.
18. The principles of abinitio recognised in the Aore Island case and the Willie case are trite but they do not assist the appellant in this appeal.



19. For those reasons the appeal was dismissed.

20. The appellants must pay the respondent's costs of the appeal on the standard basis as agreed or taxed.

Dated at Port Vila this 11th day of December 2023

BY THE COURT

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Oliver A Saksak
Judge

