

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

Civil
Case No. 24/2059 SC/CIVL

BETWEEN: Family Waltersai Haphapat II Ahelmalahlah
Applicant

AND: Undualao Nakamal
First Respondent

AND: Jack Tomai
Second Respondent

Before: Hon. Justice EP Goldsbrough

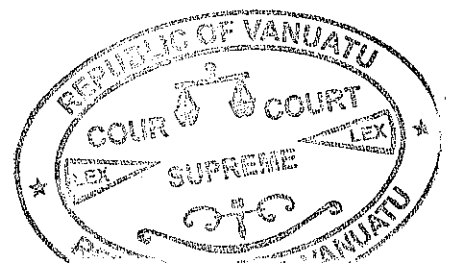
In Attendance: Mr S Kalsakau for the Applicant
Mr S Aron for the 1st Respondent
Mr P Fiuka for the 2nd Respondent

Date of Hearing: 29th January 2025

Date of Decision: 30th May 2025

JUDGMENT

1. It was on 13 December 2018 that the Undualo Nakamal made a decision about the customary ownership of Undualo Custom Land. That decision was made under the Custom Land Management Act No. 33 of 2013 (CLMA). The process out of which a decision will flow is set out in Part 3 of CLMA.
2. This application, filed on the 4th of July 2024, is for a review pursuant to section 47 (2) of the Custom Land Management Act No. 33 of 2013. It concerns a decision of the Malekula Island Court (Land) of the 7th of June 2024. That decision permitted the enlargement of time for an application to review the earlier decision of 13 December 2018.
3. The power of an Island Court (Land) to review decisions of a Nakamal is provided in section 45 of the Custom Land Management Act.
4. The composition of an Island Court (Land) is provided for in section 43 of the Custom Land Management Act.



5. The application for the enlargement of time within which to file a review under s 45 of CLMA review was filed by the present Respondents on 15 December 2023.

Legislation

6. For convenience, the relevant legislation is set out below beginning with the Custom Land Management Act:-

PART 7

REVIEW BY ISLAND COURT (LAND) OF DETERMINATIONS OF CUSTOM LAND OWNERS BY NAKAMAL OR CUSTOM AREA LAND TRIBUNAL

43 Composition of Island Court (Land)

- (1) Each Island Court established by the Chief Justice under the Island Courts Act may sit as an Island Court (Land) to review decisions made by nakamals and custom area land tribunals under this Act.

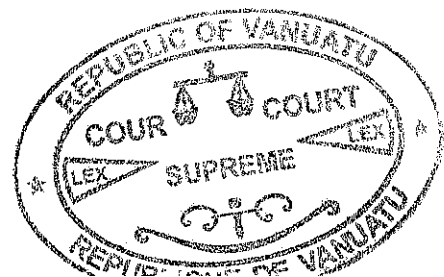
- (2) When sitting as an Island Court (Land) the Court is composed as follows:

- (a) a Judge or Magistrate who is to be appointed by the Chief Justice as the Chairperson;

- (b) four Justices of the Island Court having jurisdiction in the area where the land is located who are knowledgeable in the custom of the area in which the land is situated, are willing to so act, and are not disqualified under this Act.

- (3) If such Justices referred to in paragraph (2)(b) are not available, such other persons who are knowledgeable about the custom of the area in which the land is situated, who are willing to act and are not disqualified under this Act, and who are nominated by the area council of chiefs of the island in which the land is situated and approved by the Judicial Services Commission. and

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 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

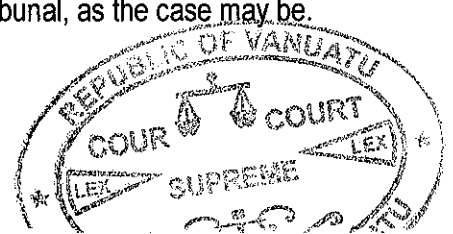
(b) has not proceeded in accordance with the provisions of this Act; or

(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) 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 the nakamal 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. and

PART 8 SUPERVISION OF ISLAND COURTS (LAND) MATTERS BY THE SUPREME COURT

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

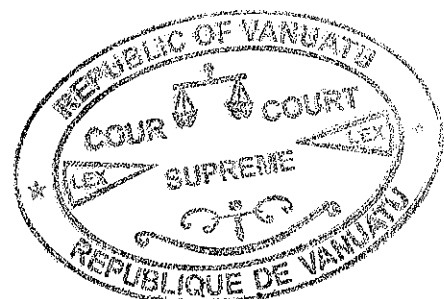
(b) to cancel the decision of the Island Court (Land); or

(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.

(3) A decision by the Supreme Court made under subsections (1) or (2) is final.

(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. And

Establishment of island courts

Island Courts Cap 167

(1) The Chief Justice by warrant under his hand may establish throughout Vanuatu such island courts as he shall think fit which shall exercise within such limits as may be defined by such warrant the jurisdiction therein defined and such jurisdiction as may be conferred by this or any other Act on island courts generally.

(2) The Chief Justice may at any time suspend, cancel or vary any warrant establishing an island court or defining the jurisdiction of any such court or the limits within which such jurisdiction may be exercised.

27. Representation

No legal practitioner shall be entitled to take any part in the proceedings of an island court.

29. Rules

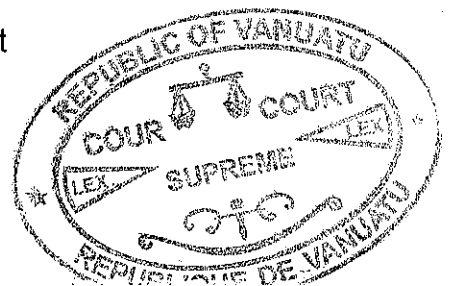
The Chief Justice may make rules governing the procedure and practice of island courts and generally for the effectual exercise of jurisdiction by such courts and may by such rules prescribe the fees payable in such courts, and may prescribe all matters which by this Act are required or permitted to be prescribed or which are necessary or convenient to be prescribed for carrying out or giving effect to this Act. and

ISLAND COURTS (CIVIL PROCEDURE) RULES

No. 28 of 2005

Rule 7 - Judgment of Court

1) Discussions between justices before giving judgment



After the hearing of the evidence and statements of the parties is completed, the justices must discuss what should be the judgment of the court.

Such discussions may take place at the court table, but if the case is difficult, the chairperson should adjourn the court so that the discussions can be held in private in another place.

The clerk must not take part in these discussions, or be present with the justices when those discussions are taking place.

(2) Judgment may be given orally but must be in writing for difficult or land cases

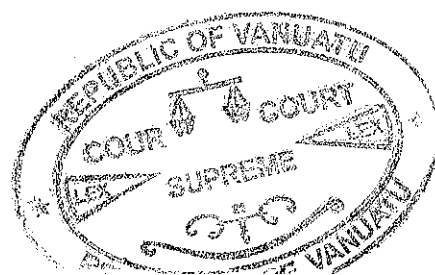
The judgment of a court may be given orally or in writing, but if the claim is a difficult one or relates to ownership or boundary of customary land, the judgment must be given in writing.

Rule 8 - Notification of right of appeal

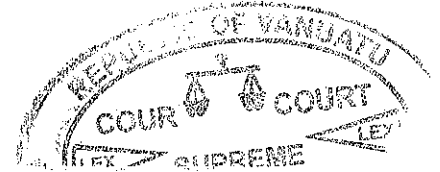
After the chairperson has announced the judgment of the Court, the chairperson must also notify the parties that they have a right to appeal from that judgment to the Supreme Court in cases relating to ownership or boundary of customary land, and to a Magistrate's Court in all other cases, within 30 days from the date of the judgment.

Discussion

7. As can be seen from s 43 of the Custom Land Management Act, when an Island Court (Land) has been constituted to hear and determine a land matter, it is no more than a division of the Island Court established under the Island Courts Act. That is abundantly clear from the words of s43 (1) which provides that an Island Court established under the Island Court Act by the Chief Justice may sit as an Island Court (Land) to hear and determine matters under the Custom Land Management legislation.
8. As it is nothing more than a specially designated Island Court, it must comply with the rules relating to an Island Court, as prescribed in the Islands Court Act and rules made thereunder by the Chief Justice.

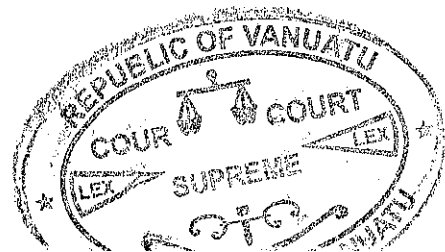


9. Thus, for example, under section 27 of Cap 167, no legal practitioner is entitled to take part in the proceedings before an Island Court. A decision of the Island Court may be given orally but must be in writing if it concerns land. Rule 7 Island Court Rules.
10. The Island Court is established by statute – Cap 167 - with its various amendments. Unlike the Supreme Court and Court of Appeal, both established under the Constitution and with powers provided in addition in the Judicial Services and Courts Act Cap 270, its powers are confined to those give to it under the Island Courts Act and provided by the Rules made under that legislation. Its jurisdiction has been extended by legislation such as CLMA to permit it to deal with land cases.
11. The Island Court (Land), hearing the application for enlargement of time within which to file an application proceeded under s 45 of the CLMA, heard submissions from legal practitioners representing the parties. That is, prima facie, a breach of s 27 Island Courts Act.
12. The s 45 statutory provision provides for a review of a nakamal decision within thirty days from the date of the original decision. There is no statutory power to extend that time.
13. In submissions to the Island Court (Land), counsel for the then applicants submitted that the Island Court (Land) was vested with a discretionary power to extend that time. He referred to a decision of the Court of Appeal in *Laho Ltd v QBE Insurance (Vanuatu) Ltd* [2003] VUCA 26 and also to the Court of Appeal Rules of 1973 and the Civil Procedure Rules of 2002 which apply to the Supreme Court and the Magistrates Courts in Vanuatu.
14. The Court of Appeal Rules provide for a time limit to bring, for example, an appeal against a decision made by the Supreme Court exercising its civil jurisdiction within 30 days of the decision and sets out a discretion that the Court of Appeal may exercise in extending that time. It was that discretionary power that was discussed in *Laho Ltd*. In the decision of the Island Court (Land), the criterion that the Court of Appeal set out to facilitate the power exercise of that discretionary power was correctly set out. However, it was then overlooked that the Island Court (Land) had not been given any discretion to extend the time for an appeal to be filed.
15. Thus, *Laho Ltd* could not be of any assistance to the then applicant as there was no discretion that the Island Court (Land) could exercise.
16. A similar scenario was submitted by counsel for the then applicants based on the Civil Procedure Rules which provide that things which are to be done under the Civil Procedure Rules may be done outside of the permitted time at the court's discretion. Again, the Civil Procedure Rules



cannot assist in this situation as nothing is required to be done under those rules in this case. What is to be done here must be done under the statute, not the Civil Procedure Rules which apply to the Supreme Court and Magistrates Court.

17. When the Island Court (Land) was hearing this application, it was itself, in breach of the law in allowing the parties to appear with the benefit of legal representation. That is contrary to s 27 of the Island Courts Act. That is not a rule made under the legislation that may be set aside, it is a statutory requirement imposed by Parliament when the Island Court was first established. The Island Court cannot itself set aside that requirement even if it considers that there is good reason for it to be set aside.
18. The grounds contained in the application to the Island Court (Land) appeal in the application which is contained in the Appeal Book filed for these proceedings. The grounds may be summarised as follows; that the nakamal was not properly constituted, that the decision was made in breach of the prescribed processes, that the decision was procured by fraud, that a request for a different forum was ignored, and that a letter written to the National Co-Ordinator setting out the reasons why the nakamal was not acting lawfully did not receive any response.
19. There is nothing in those grounds which goes to suggest that the decision of the nakamal was not handed down on 13 December 2018 or that it was not subsequently reduced into writing and given to the National Co-Ordinator. The date of the letter to the National Co-Ordinator complaining about the decision is not specified, nor does it appear on the letter which is also exhibited in this Appeal Book at 31-32.
20. There is provision in CLMA at s 20 to report allegations of impropriety against a nakamal decision. Under that provision, a nakamal may be required to look at the matter again following any directions made by the Island Court (Land) but this application brought to the Island Court (Land) is brought under s 45 and has not been brought under s 20. As the matter is brought under s 45 it must be dealt with according to the procedures prescribed thereunder.
21. The Island Court (Land) had no power to extend the time limit imposed by s 45 CLMA and was therefore in error when it granted the application. It is not necessary to determine the second ground of this application. As there is no power to extend time, no consideration needs to be given as to whether, if there was power, it should have been exercised in favour of the present Respondents.



22. The decision of the Island Court (Land) of 7 June 2024 to extend time within which to file an application for review under s 45 is hereby quashed. Costs of and incidental to this application properly incurred by the Applicants are awarded against the 2nd Respondent, such costs to be agreed or assessed.

Dated at Port Vila this 30th May 2025

BY THE COURT

EP Goldsbrough
Hon. EP Goldsbrough

Judge

