IN THE COURT OF APPEAL
OF THE REPUBLIC OF VANUATU
(Civil Appellate Jurisdiction)

Civil Appeal
Case No. 18/771 CoA/CIVA

BETWEEN: ALICTA VUTI KWIRINAVANUA
First Appellant

AND: THE REPUBLIC OF VANUATU
Second Appellant

AND: TOUMATA TETRAU FAMILY
Respondent

AND: HENDRY KALTAL SAUREI
Interested Party

Coram: ***Hon. Chief Justice Vincent Lunabek***
Hon. Justice John von Doussa
Hon. Justice Raynor Asher
Hon. Justice Dudley Aru
Hon. Justice David Chetwynd
Hon. Justice Gus Andrée Wiltens

Counsel: *Mr. S. Aron and Mr. L. Huri for the Appellants*
Mr. S. Hakwa for the Respondent
Mr. W. Daniel for the Interested Party

Date of Hearing: *24th April 2018*

Date of Judgment: *27th April 2018*

JUDGMENT

Introduction

1. This is an appeal against the judgment of the Supreme Court in Judicial Review Case No. 17/1816 **Toumata Tetrau v Alicta Vuti Kwiriunavanua & Ors** where the primary Judge declared that the judgment of the Efate Island Court in Land Case No 1 of 1996 (LC 1/96) concerning the Matantopua land was an existing decision for the purposes of s. 57 of the Custom Land Management Act No 33 of 2013 (the CLM Act). The Judge then quashed the decision of the first appellant as National Coordinator of the Custom Land Management Office (the CLMO) to cancel the certificate of recorded interest issued earlier, and directed that the first appellant reissue a new certificate of recorded interest to the respondent.

Background

2. Toumata Tetrau Family who are the respondent were at the outset one of the parties before the Efate Island Court disputing custom ownership of Mantantopua land in LC 1/96. Henry Kaltal Saurei was also one of the parties in LC 1/96 but was not made a party to the judicial review proceedings because the respondent says they were not aware of an appeal by Mr. Saurei against that decision. The respondent now appears and applies to be made an interested party on the basis of declarations made to him in LC 1/96. He was given leave to appear as an interested party.

3. On 24 August 2013 the Island Court gave its decision in LC 1/96.

4. On 3 February 2015, a representative of the Toumata Tetrau family, Mr Tony Kanegai wrote to the first appellant as the CLMO Coordinator to issue a certificate of recorded interest in respect of Matantopua land.

5. On 4 November 2015 the first appellant recorded the decision in LC 1/96, and issued a certificate of recorded interest to the respondent.

6. Following the issuing of the certificate of recorded interest on 4 February 2016 two members of the Toumata Tetrau Family, Mr Tony Kanegai and Mr Itugu Kaltangorau Kanegai, applied to the Minister of Lands and were granted a certificate of registered negotiator for the land known as Matantopua. This negotiator certificate identified the custom owners of the land as Toumata Tetrau Family.

7. On 9 November 2015 the first appellant received notification by letter dated 3 November 2016 from Family Saurei that they had appealed the decision in LC 1/96 enclosing a copy of their notice of appeal.

8. The notification that there was an unresolved appeal led to the certificate of recorded interest being cancelled. On 18 January 2017 the first appellant notified the respondent by letter that the certificate of recorded interest issued to them was cancelled. The letter reads:-

"18 January 2017

Tony Kanegai
South Efate
SHEFA Province

Dear Sir
Re: Cancellation of Certificate of Recorded Interest on Matantopua Land

We write in relation to the above.

The Office of the Customary Land Management would like to make it known that we have issued a certificate of recorded interest on part Matantopua land to Toumata Tetrau Family dated 4 November 2015. This certificate was based on Efate Island Court decision dated 26 August 2013.

After the issuance of the certificate we have been notified by other parties of the case that the case is pending Supreme Court for determination under Land Appeal case No 6 of 2013. Attached is a copy of the Notice of Appeal to the Supreme Court. We are of the view that a decision on appeal does not create a recorded interest in land.

Therefore, we confirm that the certificate of recorded interest on part Matantopua land which was issued on 4 November 2015 is hereby cancelled until the Supreme Court decides on the appeal.
Yours truly
(signed)

Alicta Vuti Kwiriunavanua
National Coordinator"

9. We set out the letter in full as this is the decision which gave rise to the judicial review (JR) proceedings in the Court below.

Issues

10. Three main issues are raised by the appellants in their written submissions for determination by this Court.

    (i) Whether the trial judge erred in fact and law when he ruled that there was no appeal filed by any parties against the judgment of the Island Court? If so, whether the judgment of the Island Court was not the final resolution of the determination of custom ownership of Matantopua custom land and cannot be recorded as a recorded interest in land?

    (ii) Whether the trial judge erred in fact and law when he found no evidence by the appellants showing that the other parties in LC 1/96 filed any proceeding under section 19 (2) of the CLM Act to challenge the registration of the recorded interest on grounds of improper process or fraud?

    (ii) Whether the trial judge erred in fact and law when he held that the national coordinator was not acting reasonably when he cancelled the certificate which he issued to the respondent?

11. There is however a more fundamental issue which must be considered. That is whether the trial judge erred in holding that the Coordinator did not have any

power or authority to set aside a certificate of recorded interest once he had issued it. We shall deal with that question as part of issue (ii).

Discussion

12. Following the grant of leave to Hendry Kaltau Saurei to be an interested party in these proceedings, counsel Mr Daniel informed the Court that his client supports and endorses the submissions made by the appellants.

13. The genesis of the dispute which led to the JR proceedings in the Court below begun in the Island Court as a claim for custom ownership over land known as Matantopua land at Malapoa on Efate. The hearing was before the Island Court as the CLM Act only came into force or commenced on 20 February 2014. The Island Courts Act [CAP 164] (the IC Act) gave jurisdiction to the Island Courts to deal with matters of custom and *"administer the customary law prevailing within the territorial jurisdiction of the Court "(s10).*

14. The Island Court gave its decision in LC 1/96 on 26 August 2013. The declarations made in favour of the respondent and the interested party were:-

> *"(i) DEKLESRESEN BLONG KOT*
> *Kot i declare se Family Saurei nao hemi kastom owner blong land ia Matantopua be ikat sam pieces or area inside we I bin kat land tenure system itek ples insaed long hem bae Saurei family and descendants ino save outem olgeta long land ia .*
>
> *(ii) RAITS BLONG KASTOMARY LAND TENURE*
> *Olgeta narafala parties oli gat olgeta following raits ia*
>
> *Counterclaimant 2 – kot hemi deklerem se hemi kat rait blong ownem mo continue usum graon folem kastom practice blong kastomari land tenure system we hemi pumaso we I bin done between hem mo original claimant insaed long graon we original claimant hemi acquirem through long wan kastom fine. Bae Saurei family mo descendants oli no save putum aot Kanagai long graon ia."*

15. The Island Court declared the interested party as the custom owner of Matantopua land but recognised that the respondent as counterclaimant 2 had some rights under the customary land tenure system to use parts of the land.

Issue (i); Right of appeal under s22 of the IC Act

16. The primary Judge at paragraph 22 of his judgment said:-

"Land Appeal Case No 13 of 2013 has been re numbered as Land Appeal Case No 2157/17. It has been managed by Judge Aru and is yet to be allocated to a docket Judge for hearing. Mr Hakwa may need to make the same submissions regarding the appeal when the appeal is heard the other parties could be given the opportunity of being heard. But since the issue was raised before me in this case, I cannot help but answer the issue very simply."

17. And concluded that:-

"...the simple answer to the issue raised by Mr Hakwa is "No", there is now no right of appeal (in view of the Amendment Act No 15 of 2001) direct to the Supreme Court after 25 February 2002 by an aggrieved party."

18. Section 22 of the IC Act provides the right to appeal from decisions made by an Island Court. Before the Court, the respondent argued that there was no right to appeal to the Supreme Court. Although it existed previously, it was argued that such a provision was repealed by a later amendment to the IC Act. It was drawn to Mr Hakwa's attention that the provision which is s 22 (1) (a) is still preserved as part of the law. The omission was made by the consolidation of the legislation and can be easily identified by the reading of subsection (4) which still refers to subsection (1) (a). Following exchanges with the bench, Mr Hakwa readily accepted that the right of appeal to the Supreme Court still existed and that it was an oversight on his part.

19. The appeal period is 30 days and although Mr Hakwa says that they were not aware that an appeal was filed, Mr Daniel on behalf of the interested party informed the Court that they filed the appeal within time but could not locate Mr Hakwa's office to serve the documents on him.

20. We accept that there is an appeal on foot and are of the view that the primary Judge was misdirected and proceeded on the incorrect assumption that there is no longer a right of appeal.

21. This then leads to the second part of the first question as to whether declarations made by the Island Court in LC 1/96 were final. We are of the view that that simply cannot be the case as there is an appeal on foot. A final decision can only be made once the appeal is determined in the Court below. And it can either uphold the Island Court decision or remit the matter back to the Island Court for re hearing (s23 IC Act). The need for the decision to be a final one is discussed as part of issue (ii).

Issue (ii)

22. A certificate of recorded interest is a document of limited importance in the scheme of the CLM Act. It is a document that has an evidential function and only for the purposes mentioned below.

23. A "recorded interest in land" is defined in s.3. The definition reads:-

Recorded interest in land is a decision made by a customary institution as to who the custom owners of an area of land are which when recorded, will be used by the National Coordinator as a basis for:

(a) The identification of custom owners for the purposes of a negotiator's certificate application under the Land Reform Act [CAP 123]; or

(b) The rectification of lessors in leases in existence prior to the commencement of this Act,

and to avoid doubt a Supreme Court or Island Court decision made prior to the commencement of this Act is deemed to create a recorded interest in land.

24. The recorded interest may be used for either of the two purposes in (a) and (b). Section 57 which deals with existing decisions of Island Court and Supreme Court also provides that the recording of those decisions under the CLM Act is only for those same two purposes. 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 he determined by going to the decision of the customary tribunal or Court, not to a certificate issued by the Coordinator.

25. Section 19 and 57 deal with recording of custom ownership interests. Those sections provide:-

"19 Creation of a recorded interest in land

"(1) Where the custom owners are determined by a nakamal, the custom land officer must ensure that the written record of the determination is filed with the office of the National Coordinator.

(2) When a determination is filed with the office of the National Coordinator, the written record of the custom owner determination and the area of land that is owned by the group will become a recorded interest in land that may not be challenged except on the grounds of improper process or fraud.

(3) The National Coordinator is responsible for maintaining a list of all of the decisions that have become recorded interests in land and where requested by a custom owner will provide a certification of the names of the custom owners and the representatives of the custom owners."

57 Existing decisions of Island Court and Supreme Court

Decisions of the Supreme Court and an Island Court which determine the ownership of custom land and which were made before the commencement of this Act are deemed to create a recorded interest in land in respect of the person or persons determined by such Court to be the custom owners and will enable the custom owners so recorded to be identified for the purpose of consenting to an application for a negotiator's certificate or a lease, or is to provide the basis for rectification of an existing lease instrument."

(emphasis added)

26. Section 57 needs to be read with s 5 which deals with pending Court or tribunal proceedings. Section 5 (3) reads:-

> *"(3) To avoid doubt, if at the time that 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."*

27. This provision makes it clear that only a final decision of an Island Court can create a recorded interest.

28. The power in the CLM Act for the Coordinator to issued a certificate of recorded interest is to be found in s 19 (3). If the custom owner requests a certificate the Coordinator will provide it.

29. Having regard of the purposes of a certificate issued by the Coordinator under s 19 (3) it would be astonishing if the Coordinator did not have the power to correct errors if they occur in the content of a certificate. Indeed Part 11 contains directions and powers requiring the Coordinator to ensure lists of custom owners are updated as required to ensure the accuracy of the records. By implication any certificate issued by the Coordinator is required to be up to date and accurate.

30. We have no doubt that the coordinator has power to cancel a certificate if he discovers the information in it is not correct, or that it was for any other reason wrongly issued.

31. The primary Judge at paragraph 26 of the judgement says:-

> *"26. Having found as I have, the First Defendant's action in cancelling the Claimant's Certificate issued in November 2015 was unlawful and ultra vires his powers, duties and responsibilities under the Customary Land Management Act. The purported appeal filed on 25th September 2013 could not be the valid grounds for cancelling the Certificate. Once the Certificate was issued and registered on 4th November 2015 it could not otherwise be cancelled, let alone be reviewed, by the Co-ordinator except by a proceeding instituted under section 19 (2) of the Act and*

after a competent Court had heard and found the registration to have been made on grounds of improper process or fraud."

32. As the coordinator was purporting to act on the basis of a final decision of the Island Court the relevant section would have been s 57. Section 19 could have no relevance to the circumstance of this case, and the trial judge was in error in taking it into account.

Issue (iii)

33. This raises the question whether the coordinator was or was not acting reasonably when he cancelled the certificate.

34. If follows from what we have already said that the certificate was wrongly issued. As the decision of the Island Court was under appeal there was no final decision that could create a recorded interest under s 57, and in any event the CML Act had no application in the circumstance: s 5(3).

35. There was nothing unreasonable or unfair in the Coordinator cancelling the certificate. On the contrary we think he was duty bound to do so.

36. The only possible conduct by the Coordinator that arguably could be unreasonable was his failure to forewarn the respondent that he intended to do so, and to give the respondent the opportunity to argue against the cancelation. However we think there is no substance in that possible argument as there could be no basis for preserving the certificate.

37. It now appears that the certificate was issued in consequence of misleading information contained in the respondent's request for the issue of the certificate, and there is nothing unfair or unreasonable in the coordinator acting as he did when he learned the correct situation.

38. For these reason we consider the appeal should be allowed, and the judgment of the Court below set aside.

39. We think it would be inappropriate to make any costs order in the circumstances of this case.

40. The next step is for the parties to get on with determining the substantive appeal, which is being managed by Aru J.

Result

41. The final orders of the Court are:-

REPUBLIC OF VANUATU COURT OF APPEAL COUR D'APPEL REPUBLIQUE DE VANUATU

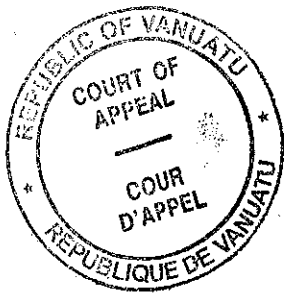
i. Leave is given to Hendry Kaltal Saurei to appear as an Interested Party.

ii. Appeal allowed;

iii. Orders of the Supreme Court are set aside;

iv. Judicial Review Application 17/1816 is dismissed;

v. No order as to costs.



DATED at Port Vila this 27th day of April, 2018
BY THE COURT

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Hon. Vincent Lunabek
Chief Justice