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

Civil Appeal
Case No. 23/199 COA/CIVA

BETWEEN: **REUBEN ESTAPAS, COLLIN HOPKINS & GREATON WEBA**
Appellants

AND: **THE NATIONAL COORDINATOR OF LANDS DISPUTE MANAGEMENT**
First Respondent

AND: **THE GOVERNMENT OF VANUATU**
Second Respondent

Date of Hearing	***12th May 2023***
Before:	***Hon. Chief Justice V Lunabek*** ***Hon. Justice J Mansfield*** ***Hon. Justice R Young*** ***Hon. Justice VM Trief*** ***Hon. Justice EP Goldsbrough***
Counsel:	***G Blake for the Appellants*** ***F Bong for the Respondents***
Date of Judgment:	***19 May 2023***

JUDGMENT OF THE COURT

Introduction

1. This appeal concerns a determination of customary land ownership of Rowa Island (also known Reef Island) located in the Banks Group of islands (the land). The determination was made on 10 March 2012. It was made in favour of the Appellants.

2. There was no appeal from that decision.

3. The legislation then relevantly in force was the Customary Land Tribunal Act 2001 the (Tribunal Act). That Act was replaced by the Custom Land Management Act No. 33 of 2013 (the CLMA) which came into force on 22 February 2014.

4. Under the CLMA, the Appellants attempted to have recorded and to obtain a certificate of registered interest in the land pursuant to the provisions of the CLMA, based upon the decision of 10 March 2012. The National Coordinator of Customary Land Dispute Management, an office established under the CLMA (the Coordinator), refused to recognise the decision of 10 March 2012, but instead initiated a process under the CLMA to have the custom ownership of the land determined.

5. In the Supreme Court, the Appellants sought an order that the Coordinator was not entitled to refuse to record the Appellants' customary ownership interest in the land, based upon the determination of 10 March 2012, or to initiate a process under the CLMA to have the custom ownership of the land determined.

6. It is common ground that the only issue to be determined in that proceeding was whether the decision of 10 March 2012 was a decision of a single village or joint village customary land tribunal properly constituted (as the Appellants contend) or was a Joint Council of Chiefs Court, as the Respondents claim. If it was a customary land tribunal, section 33 of the Tribunal Act allowed an appeal from that decision within 21 days, and after that it became a final decision.

7. It is also common ground that the primary judge in the Supreme Court made a decision in favour of the Respondents based upon the Claim of the Appellants which subsequently had been amended. This meant the validity of the decision of 10 March 2012 was not considered. The consequence is that the foundation for the Appellants' claim was not properly considered by the primary judge, and should be set aside. The parties also agree that, as there was no disputed evidence, this Court should also determine the issue between the parties.

Consideration

8. The issue is a very narrow one. It does not involve either the Supreme Court or the Court of Appeal in determining custom ownership of land. That is determined by the relevant communities formerly under the Tribunal Act and now under the CLMA, in accordance with Article 78 of the Constitution.

9. There was no dispute about the facts as confirmed by sworn statements and the relevant records about the nature of the decision of 10 March 2012.

10. The appellants say the evidence shows that the decision was made by a customary land tribunal under the Tribunal Act, and the respondents say it was a decision of the Joint Counsel of Chiefs Court who were not entitled to make such a decision. Their position is based upon one document recorded with that heading.

11. In the Appellants' contention that if the heading of one document determines the outcome, it will allow form to conquer substance. The Respondents' submission is that in this matter, the form is the substance".

12. To give that dispute context, it is appropriate to record the facts from the uncontested evidence.

13. The land comprises a group of islands that are now uninhabited. The people who lived on the land migrated to the village of Vatop, Vanua Lava Island, the Banks Group.

14. When the claimants learned that a lease over the land (held in the name of other people) was to be sold, they sought advice and asked the head chief of their village, who was also the chairman of the Council of Chiefs of East Vanua Lava, to set up a process to establish custom ownership of the land. After getting advice, that chief decided he should not sit on the Tribunal to be established and appointed 4 Chiefs to determine custom ownership of the land; one of them was the chairperson and another was also to be the secretary.

15. That process is in accordance with section 8 (1) and (2) of the Tribunal Act.

16. The appointed chairperson gave notice of the hearing in accordance with section 25 of the Tribunal Act.

17. The hearing was duly conducted, with the opportunity for all interested person to take part, and then the decision was made on 10 March 2012. The process was consistent with sections 26 to 29 of the Tribunal Act. The secretary recorded the result in writing, headed "*calling of Custom Court*".

18. The decision was that the appellants are the custom owners of the land.

19. After the appeal period of 21 days had passed, the decision became final and binding: see section 33 of the Tribunal Act.

20. Section 34 of the Tribunal Act provides that the duly signed record of the decision is an accurate record of the decision for all purposes. The benefit of bringing finality to disputed land claims is important e.g *Rombu v. Family Rasu [2006] VUCA 22; Vira v. Aru [2016] VUCA 38; Matarave v. Talivo [2010] VUCA 3.*

21. The respondents say that, despite the procedures prescribed by the Tribunal Act being followed, the decision was not a decision under the Tribunal Act because one printed record of the hearing which records its conduct is headed "JOIN COUNCIL BLONG CHIEFS COURT" and dated 10 March 2012.

22. The formal record of the hearing required by the Tribunal Act is schedule 3 (Section 31 Land Tribunal). It is the "Record of Decision Form." It is the form filled out in handwriting. It sets out the name of the Tribunal and its members, and secretary and details of the land. It records the custom owners as the appellants. It is certified to be a true and accurate record of the decision of the Land Tribunal. It is (as recorded) signed and dated by the chairperson and by the secretary.

23. That document was acknowledged by the Customary Land Tribunal Unit by letter of 7 May 2012 with the comments:

"The decision has been done in accordance with section six of the Land Tribunal Act."

24. In our view, the fact a contemporary typed record of the process of the hearing on 10 March 2012 which has the typed heading set out above cannot remove the significance of the decision as officially recorded in Schedule 3 (as set out above). It is the record for the purposes of the Tribunal Act. Additionally, the evidence makes it clear that the processes of the Tribunal Act were followed.

25. To adopt a different course would be a failure to give the finality to such a determination as the Tribunal Act prescribes. The mis-description or loose description on the heading of a typed document cannot change the character of the process or the decision. If the first respondent had reviewed the critically relevant document, the Schedule 3 document, the position was clear, that this was a decision of a Customary Land Tribunal.

Orders

26. The appeal is allowed and the orders of the Supreme Court are set aside.

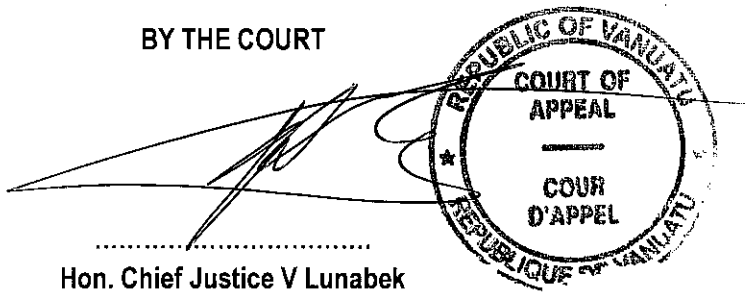
27. The first respondent is directed to record the appellants' customary ownership in the land under section 58 of the CLMA.

28. The actions of the first respondent in undertaking a process under the CLMA to determine the custom ownership of the land are set aside.

29. The respondents are to pay to the appellants' costs of the appeal fixed at VT100,000 and of the proceedings on the Supreme Court as fixed by the primary judge at VT200,000 within 30 days.

DATED at Port Vila, this 19th day of May 2023

BY THE COURT



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Hon. Chief Justice V Lunabek