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

Civil Appeal
Case No.23/1481 COA/CIVA

BETWEEN: ROLLAND TURA
First Appellant

AND: MARCO TAMATA, BERTRAND TURA, SERGIO KOROKA, ELIANNE KOROKA, JAMES KOROKA, ALFOSINE JEANNOT, STEVEN BOE and JOHANE LAWAC
Second Appellants

AND: TAFTUMOL FAMILY represented by Victor MOLTURES
Respondents

Dates of Hearing: ***8 May 2024***

Coram: ***Hon. Chief Justice V. Lunabek***
Hon. Justice J.W. von Doussa
Hon. Justice R. Asher
Hon. Justice O.A. Saksak
Hon. Justice V.M. Trief
Hon. Justice E.P. Goldsbrough
Hon. Justice W.K. Hastings

Counsel: ***J. Masao for the First Appellant***
E. Molbaleh and A. Sarisets for the Second Appellants
A Godden and D. Liu for the Respondents

Date of Decision: ***17 May 2024***

JUDGMENT OF THE COURT

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1. On 18 August 2023 this Court gave the present appellants leave to appeal out of time against a summary judgment entered on 9 March 2021 which ordered their eviction from the Belmol lands in Santo. That order was made on the application of the present respondent, Family Taftumol, who are the declared custom owners of lands including the Belmol lands with primary custom ownership rights. The appellants claim as members of Family Tura to hold secondary rights in custom to live on the Belmol and to pursue gardening activities.

2. The Court's reasons for granting leave to appeal are reported in *Tura v Taftumol* [2023] VUCA 35 which record the background to this litigation and this Court's concern that the proposed appeal exposes fundamental questions concerning the interaction of two very different legal systems for establishing rights recognised under the Constitution of the Republic of Vanuatu.

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3. After announcing that leave to appeal was granted, the Court adjourned the further hearing of the appeal to give the parties the opportunity to consider the questions raised by the Court and to provide further information for the Court to better understand the secondary custom ownership rights claimed by the appellants. As we then observed, interests in custom land acquired according to custom are complex and include layers of secondary rights to use and enjoy land; see *Family Kaltabang Malastapu v Family Kaltonga Marabongi and Ors.* (Land Appeal Case No.58 of 2004), cited at length in *Kalwatsin v Willie* [2009] VUCA 47 at [32], and *Iaus v Noam [2017] VUCA 40* at [34].

4. Between the hearing on 18 August 2023 and the appeal being re-listed the appellants have restructured the way in which they wish to prosecute the appeal. The first appellant Rolland Tura is now separately represented from the other eight appellants. The court has been informed that this is the result of a meeting of members of the Family Tura who have appointed the first appellant to be the spokesman for the Family. From statements filed by the respondent we infer that the separate representation is also the result of the respondent asserting that some of the appellants are not members of Family Tura. We treat this change in structure as simply a matter of form, not of substance, as the proceedings both in the Supreme Court and in this Court have been conducted on the basis that the named parties are suing and are being sued in a representative capacity for Family Tura and Family Taftumol.

The Constitutional Issues

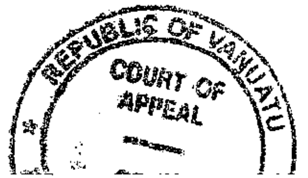
5. When giving leave this Court referred to provisions of the Constitution as it existed before the Sixth Amendment of the Constitution which was assented to on 20 December 2013 and came into force on 21 January 2014. We did so as the proceedings which had declared the rights and interests of Family Taftumol and Family Tura in the subject lands were instituted in the Santo/Malo Island Court before the Amendment, and the proceedings leading up to the eviction order granted on 9 March 2021 had taken place under the regime established under the Constitution before the amendment.

6. In these reasons we go on to consider the Sixth Amendment as the outcome of this appeal will likely lead to the dispute between the parties being resolved under the *Custom Land Management Act* No. 33 of 2013 (the CLMA) which followed the Amendment.

7. Before the Sixth Amendment, Chapter 8 of the Constitution established two Court systems. Those systems are very different in nature, but the Constitution assumed that they were to operate side by side.

8. Article 47(1) of the Constitution provides:

> ***"47. The Judiciary***
>
> *(1) The administration of justice is vested in the judiciary, who are subject only to the Constitution and the law. The function of the judiciary is to resolve proceedings according to law. If there is no rule of law applicable to a matter before it, a court*



shall determine the matter according to substantial justice and whenever possible in conformity with custom".

9. Article 49 establishes the Supreme Court with unlimited jurisdiction to hear and determine any civil or criminal proceedings.

10. Article 51 empowered Parliament to provide for the manner of the ascertainment of the relevant rules of custom. Under Article 52 Parliament shall provide for the establishment of village or island courts with jurisdiction over customary and other matters and shall provide for the roles of the chiefs in such courts. Parliament in exercise of this mandatory power established the Island Courts under the *Island Courts Act* [CAP 167]. In some of their functions the Island Court also constituted a customary institution to resolved disputes concerning the ownership of custom land, as required by Article 78 of the Constitution.

11. An important function of the Supreme Court in exercise of its jurisdiction to hear and to determine civil matters is to resolve disputes arising under the British and French laws inherited under Article 95 of the Constitution, and after Independence the written laws of Vanuatu. In doing so the practices of the Supreme Court have firmly entrenched rules of civil procedure that have evolved mainly from the British Supreme Court Rules. Those rules are now embodied in the *Civil Procedure Rules* (No.49 of 2002). The strictness of these rules has dominated events in the latter stages of the litigation between the parties.

12. Equally important to the *Civil Procedure Rules* is the direction under Article 95(3) of the Constitution that custom law shall continue to have effect as part of the law of the Republic of Vanuatu. Further, in matters concerning land Chapter 12 of the Constitution is paramount. By Article 73 all land in Vanuatu belongs to the indigenous custom owners and their descendants. By Article 74 the rules of custom shall form the basis of ownership and use of land and by Article 75 indigenous citizens who have acquired their land in accordance with a recognised system of land tenure shall have perpetual ownership of the land.

13. Before the Sixth Amendment under these provisions the determination of legal rights was vested in one or other of the two court systems. The Island Courts had the exclusive jurisdiction to resolve disputes concerning ownership of custom land subject only to a limited right of appeal to the Supreme Court thereby establishing the rights and obligations of the parties in relation to ownership and interests in the land. The rights of the parties in all matters apart from custom land ownership and the enforcement of those rights fell to be determined under the general jurisdiction of the Supreme Court and the application of the laws of the Republic.

14. By the Sixth Amendment, Article 51 was altered to exclude the power of Parliament to make provision for the manner of ascertainment of the relevant rules of custom relating to the ownership of custom land, and Article 78 was altered to require Parliament to formalise the recognition of appropriate customary institutions or procedures to resolve land ownership or any dispute over custom land. These alterations led to the enactment of the CLMA which was assented to on 16 January 2014. The CLMA enacted an entirely new legal system for the

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resolution of disputes relating to custom land ownership and thereby the establishment of the rights and obligations of parties to the dispute, including as to the rights and obligations of holders of secondary rights. Subject only to the transitional provisions, the CLMA entirely replaced the determinative role previously exercised by the Island Court. The Sixth Amendment did not alter Article 75 of the Constitution.

15. Under Part 4 of the CLMA the primary institution for the resolution of land disputes is the nakamal local to the area of the land in question. A nakamal as described in the definitions in s.2 of the CLMA as:

> *"a customary institution that operates as the seat of governance for a particular area. Members of a nakamal include all men, women and children who come under the governance jurisdiction of that nakamal. A nakamal may be related to a single custom owner group or extended family group, or may be related to a number of custom owner groups or extended family groups living in a village or larger area. The vernacular language terms for the customary institutions termed 'nakamal' in this Act are different in different localities across Vanuatu and include Farea in parts of Efate, Gamal in parts of Malekula, Naumel in Motalava and Jaranmoli in parts of Santo."*

16. If the land dispute is not resolved by the relevant nakamal it can then be considered by a custom area land tribunal under Part 6 of the CLMA which comprises the chairperson or chairpersons of the council of chiefs of the relevant area and two persons knowledgeable in custom from the custom area. The decision of a custom area land tribunal is to be made according to the rules of custom: s.34(3), and the decision is final: s.34(8). The decisions of both nakamals and custom area lands tribunals can be reviewed by an Island Court (Land) under Part 7, but only on very limited grounds of procedural error or fraud: see s.45.

17. The Sixth Amendment reinforces the position that under the Constitution rights and obligations in relation to ownership and use of customary land must be determined by customary processes, now enshrined in the CLMA. Not until the right and obligations in relation to custom land are so established can of the enforcement procedures of the Supreme Court be invoked.

18. The determination of a right in custom land requires three components to be identified. First, the beneficiary of the right, for example identification by individual name or family or group. Secondly, identification of the area of land concerned, for example by a sketch map showing the boundaries or ideally by a survey plan. Thirdly, there must be a meaningful description of the right to be enjoyed, for example as the primary interest holder as custom owner[1] or as the holder of secondary rights of occupation or use or as the case maybe[2]. That these three components are necessary for the determination and recognition of rights is reflected in provisions in the CLMA concerning the recording of decisions, see for example ss.26, 32, 39 (2) and 50 (2).

19. As will appear in the factual discussion below the appellants' claim to be holders of secondary rights was defeated by the premature application of procedures in the civil jurisdiction of the

[1] *As to the statutory meaning of "custom owner" see Kalsakau & Ors. v Director of Lands [2019] VUCA 70.*
[2] *A disputed claim for secondary rights constitutes a "land dispute" by claimants within "membership of the custom group" under the CLMA. See also Malasikoto v Vatoko [2019] VUCA 65.*

Supreme Court before the customary processes under the legal system for determining such a claim had been completed.

The present Appeal – factual discussion

20. The originating proceedings in the Santo/Malo Island Court were commenced in 1992 and culminated in a decision given on 12 June 2015, later varied by decision of the Supreme Court on appeal on 29 September 2020 in Land Appeal Case No. 05 of 205: *Motamaute v Taftumol* [2020] VUSC 128 (the Land Appeal decision). Family Taftumol was declared the primary custom owner and Family Tura and their descendants as holding in custom secondary rights and interests over the Belmol land. The Supreme Court made the following determination:

> *"Therefore, the Findings of facts, customs and declarations of customary ownership and interests of the lands which are the subjects of this dispute made on the 12th of June 2015 by the Santo Malo Island Court are confirmed except for the following corrections and amendments:*
>
> a. *Family Taftumol and their descendants are declared custom owners with primary interests over the land of Tambotal, Belmol and Beleru;*
>
> b. *Family Loiror Lin and Family Taftumol and their descendants are declared custom owners both with primary and equal rights over the land of Sevua;*
>
> c. *Family Warawara and Varavara and their descendants are declared custom owners with primary rights and interests over the land of Belvos;*
>
> d. *Family Tura and their descendants are declared custom owners with only secondary rights and interests over the land of Belvos and Belmol.*
>
> *This means that their rights are not equal but subject to the rights and interests of family Vavara on Belvos;*
>
> *And for the land of Belmol and Beleru, it is for Family Taftumol to decide which part of the Belmol land to allocate to Family Tura for their use in recognition of their secondary right."*

(Emphasis added)

21. Following the Supreme Court Land Appeal decision Family Tura were offered 50 hectares of land within Belmol by the respondent on which to pursue their secondary rights. That offer was rejected and Family Tura were then informed that the previous offer had been reduced to 10 hectares. That and another offer were refused.

22. On 29 September 2020 Family Taftumol commenced Supreme Court civil claim 20/2656 seeking an order for eviction against the present appellants and 50 other defendants, their relatives, servants and agents. The claim alleged all the defendants were trespassers on the land known as Tambotal, Belmol and Beleru, and sought orders against all defendants "to remove their houses, crops, animals and any other property" from the land. In response sworn statements

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from the appellant Rolland Tura deposed that members of Family Tura had occupied the subject land for at least five generations and established houses and gardens there, and sought to defend the proceedings.

23. On 23 November 2020 the Family Taftumol applied for summary judgment against all 59 defendants.

24. On 9 March 2021 that application was granted by a Supreme Court Judge. The Judge after referring to the conclusions of the Land Appeal decision said:

> *"Unless the defendants have permission and authorisation from family Taftumol to remain on the land, they remain as trespassers".*

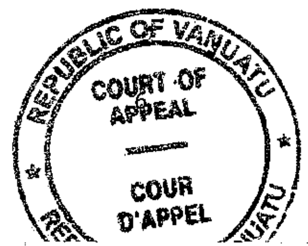
25. There being no evidence of permission or authorisation the Judge ordered that the defendants and their families be evicted by 30 April 2021. This appeal is against that decision in so far as it concerns the present appellants.

26. Thereafter following unsuccessful applications for stay orders an enforcement warrant was executed on 26 August 2022. The present appellants and many others of the original defendants were evicted. Twelve of those other defendants sought to appeal adverse interlocutory orders that led up to the execution of the warrant but the Court of Appeal dismissed their application, holding that the proposed appeal was in reality against the eviction order made on 9 March 2021 and the long delay in seeking to appeal could not be excused: *Bulurave v Taftumol* [2023] VUCA 5.

27. At no stage were the merits of the allegations made by the present appellants that they were members of Family Tura holding secondary custom rights in Belmol considered either in the Supreme Court or in the Court of Appeal.

28. In the Supreme Court the conclusion that the defendants were trespasses is, in the case of Family Tura, clearly a misconstruction of the Land Appeal decision. That decision declares Family Tura and their descendants to be custom owners with secondary rights and interests over the Belmol land and the concluding paragraph of the decision by inference acknowledges their custom right to be lawfully on the Belmol land and to use it.

29. Secondary rights are a reflection of history. They are determined by reference to the customs of the relevant tribe about inheritance and succession, and are usually located by reference to actual historical and present use and enjoyment of particular land. The function of the Island Court, and on appeal to the Supreme Court hearing the Land Appeal, was to identify and declare the existing secondary rights of members of Family Tura. Neither Court had jurisdiction to vary those existing secondary rights by changing the location where they are enjoyed or to impose conditions or limitations on those rights; see *Iaus v Noam* [2017] VUCA 40 at [10]; *Kalsakau v Director of Lands* [2019] VUCA 70 at [27-30].



30. The meaning and intent of the last paragraph of the Land Appeal decision is unclear. As the Supreme Court had no jurisdiction to vary or adjust existing secondary rights we consider it must be assumed that the meaning of the last paragraph was intended to accord with custom and should to be given a meaning that was within its jurisdiction to make. In our opinion the last paragraph should be understood as requiring Family Taftumol to identify and describe the secondary rights which existed.

31. The Island Court concluded its decision by directing that "*every person currently in use of the declared land undertake to cause appropriate arrangements with the declared owners to accommodate their continuous use of the land*". Appropriate arrangements would include describing in a meaningful way the secondary rights and their location. As we construe the Land Appeal decision, it was taking up the same point that the nature and location of secondary rights needed to be settled.

32. As we have earlier stated a declaration of a custom right in land requires the identification of the holder of the right, identification of the area or boundaries of the land in question and a description of the rights in custom that are held. It is understandable that both the Island Court and the Supreme Court in the Land Appeal would in the first instance leave it to the parties to sort out the detail about the scope and boundaries of the secondary rights. However, until this is done and recorded either by order of the court or by binding recorded agreement between the parties, the formal establishment of the right remains incomplete. That is the situation here.

33. Although claims of both the appellants and of the respondents were instituted in the Island Court before the CMLA came into force these proceedings have come to an end on the delivery of the Land Appeal decision. Now if the parties cannot reach agreement to resolve the outstanding matters they will have to be settled through the procedures of the CMLA. Either family group in this dispute can initiate that process: s.24 of the CLMA.

34. At the earlier hearing when leave to appeal was granted we directed the parties to address the question of the status of the appellants as members of the Family Tura and to provide the Court with mapping information that would assist the Court to better understand the argument of the parties. We also strongly urged the parties to confer with a view to reaching agreement as to the nature, location and extent of the secondary rights of Family Tura and to take steps to allow them to be enjoyed without interference.

35. Whilst there have been attempts to meet the Court's directions for which we thank the parties, we are told that agreement about the secondary rights has not been reached.

36. It is fundamental to the appellants' claims that Family Tura are properly before the Court through a representative member of the Family.

37. Extensive material in three sworn statements filed from Bihu Maclen Tura Tamata and one from Rolland Tura intended for use on this appeal have endeavoured to establish an extensive membership of Family Tura. However, this Court has no jurisdiction to declare the membership of a custom family group. Unless membership is agreed with the respondent, determination of

membership is a matter for a customary institution, either an Island Court or under the CLMA. Fortunately, for the purpose of this appeal the respondent has agreed that Rolland Tura and Bertrand Tura are members of Family Tura.

38. However, the nature and scope of the secondary rights held by Family Tura and the location on Belmol where they are permitted to be enjoyed remain to be settled.

39. The sworn statements of Bihu Maclen Tura Tamata and Rolland Tura placed mapping information before the Court and asserted an entitlement to use a substantial area of Belmol for the enjoyment of their secondary rights. The information in these statements is disputed by the respondent. Further there has been no agreement as to the nature and scope of activities that the secondary rights permit, or as to the areas where these rights can be perused. Again these are issues which constitute a "land dispute" which falls into the exclusive jurisdiction of institutions recognised in the CLMA.

40. During the hearing of the appeal there was discussion between the Bench and counsel about the role of a declared custom owner in overseeing the management and enjoyment of secondary rights. We have earlier observed that Courts have no power to vary the location where an established secondary right can be enjoyed or to impose conditions or limitations. However, the appellants must realise that a declared custom owner in the overall management of the land, depending on the customs of the area, may have authority to relocate the site for the enjoyment of those rights or to regulate land use for the common benefit of everyone who has access to the land. If a relocation is disputed by the secondary rights holder that may give rise to a land dispute which the nakamal in the area could be called upon to resolve.

41. This Court has no jurisdiction to resolve the outstanding issues necessary to determine that claimed secondary rights. This Court's function is limited to resolving the appeal against the eviction order made on 9 March 2021. In our opinion that appeal must be allowed for two reasons. The judgment was based on a misconstruction of the concluding paragraph of the Land Appeal decision, and more importantly the decision purported to deny the outstanding claim by the appellants to be holders in custom of secondary rights in the Belmol land when the Supreme Court had no jurisdiction to do so.

42. It follows from the reasons above that the originating proceedings in the Supreme Court cannot succeed, and should be struck out.

43. In the event that the appeal succeeded the appellants sought costs against the respondent. In our opinion there should be no order as to costs. The appellants brought about the need for this appeal as they failed to raise in the Supreme Court the Constitutional issue on which the appeal has now succeeded.

44. The respondent has confirmed before this Court that an offer to Family Tura of 46 hectares of Belmol land identified in a survey remains open. We strongly urge the parties to continue their efforts to settle their differences, and for the appellants to carefully consider this offer in light of the reasons of this Court.

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45. The formal orders of the Court are:

a) Appeal allowed;

b) The summary judgment entered on 9 March 2021 is set aside;

c) The proceedings in the Supreme Court are struck out; and

d) There is no order as to costs.

DATED at Port Vila this 17th day of May, 2024.

BY THE COURT

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Hon. Chief Justice Vincent Lunabek