

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

Civil Case No.89 of 2010

BETWEEN: The Estates of MORRIS TOATURU MOLIVA
represented by Ms FALMA MOLIVA
Claimant

AND: FAMILY TAMATA MOLIURIURI
Defendant

Coram: Justice D. V. Fatiaki

Counsels: Mrs. M. Vire for the Claimant
Mr. C. Leo for the Defendant

Date of Decision: 25 May 2012

RULING

Background

- **20 June 1995** the **Santo/Malo Council of Chiefs** declared Mr. Charley Molivaleleo the "*stret kastom ona blong graon ATARIBOE ATANMAVUN, AWEBE, ABELI, AVIMASA*" situated on the island of Malo. The disputing claimant of the land was "*Tamata*";
- **2 July 1999** the Magistrate's Court, Santo issued an injunction on the application of Morris Moliva restraining Tamata Moliuriuri in the following terms:
 - "(a) Clearing the dark bush remaining on the subject Atariboe land;
 - (b) Planting new coconut and cocoa seedlings on the same;
 - (c) Building houses on the same with permanent materials;"
- **24 April 2006** the **MOL VITI NATAMATA Village Land Tribunal** ("the Tribunal") declared **MORRIS TOATURU MOLIVA** the "*stret kastom ona blong graon ATARIBOE or ATANOWAKA*". The Tribunal also ordered all occupants to peacefully vacate the land and not to cause any damage;
- **2 June 2008** the defendant Tamata Moliuriuri was given a **Notice to Quit** the land by the claimant's solicitor;
- **23 June 2008** the defendant Family replied that it had lodged an appeal against the decision of the Tribunal thereby rendering the decision "*ino save efficace*" and it was awaiting the hearing of its appeal;



- By letter dated **21 July 2008** claimant's counsel disputed the defendant's right to appeal the Tribunal's decision as "*yu no wan party long case. Yu mo neva wan claimen long graon ia ...*". Counsel also indicated that the Tribunal's decision had been registered with the Lands Department and was therefore final and conclusive;

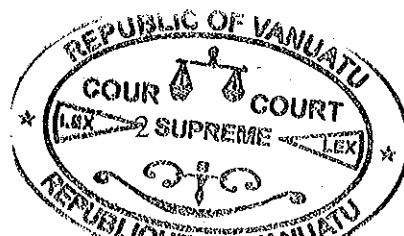
 - **6 February 2010** – **Morris Toaturu Moliva** passed away;
 - **3 June 2010** the claimant issued a Supreme Court claim as "*representative of the estate of Morris Toaturu Moliva*". The claimant also filed an urgent application for restraining orders against the defendants;
 - **1 July 2010** the defendant filed a defence asserting *inter alia*:

"(that) the claimant's representation is bad in law". Furthermore "the defendant have raised objections in accordance to the Customary Land Tribunal Act for the Mal Viti Natavatu Village Land Tribunal not to proceed but they proceeded in their absence" and the defendant "says they have lodged an appeal to the relevant Land Tribunal"
 - **1 July 2010** the defendant also filed an application for an order that:

"The claim initiating this proceeding be struck out in total on the basis the claimant has no standing in customary law or under the Queen's Regulation 7 of 1972 to instigate this action";
 - **9 August 2010** the claimant filed a response opposing the application with a sworn statement in support;
 - **20 August 2010** written submissions were ordered by the Court (per MacDonald J.);
 - **3 September 2010** defence counsel filed his written submissions in support of the strike out application.
1. As at the date of this ruling and despite the Courts orders of 20 August and 7 September 2010, no submissions have been filed by the claimant's counsel.

Discussion

2. The sole issue before the Court is correctly identified in defence counsel's submission as being:



“Whether the claimant has legal standing to initiate this proceedings?”

3. Before answering the question it is convenient to set out several undisputed matters of fact:

- (1) The claimant is the real sister of Morris Toaturu Moliva;
- (2) Morris Toaturu Moliva is the latest declared custom owner of **Atariboe** or **Atanowaka** custom land situated at South East Malo;
- (3) Despite the defendant's assertions, there is **no** official documentary evidence of any appeal having been lodged against the Tribunal's decision in favour of Morris Toaturu Moliva;
- (4) Despite the claimant's assertion of representing the Estate of Morris Moliva, **no** independent sworn statements or letters of administration have been produced evidencing her representative capacity;
- (5) The land the subject matter of the claim is unsurveyed, unregistered “*customary land*” within the ambit of the **Customary Lands Tribunal Act**.

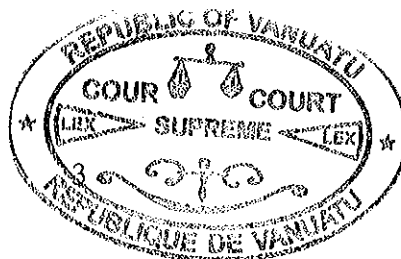
4. I turn next to consider defence counsel's particular submissions in support of the application under the following sub-headings:

- The Constitution; and
- The Civil Procedure Rules.

5. In this latter regard defence counsel's short submission relying on the wording of **Rule 3.12** of the **Civil Procedure Rules** is, that the claimant cannot represent the deceased's estate because:

“(they) do not have the same interest in the Customary land ... (which) ... was declared in favour of Mr. Toaturu alone. Ms. Moliva can only qualify to represent Mr. Toaturu if she is declared with Mr. Toaturu as respective custom owners of the customary land”. And further, the claimant's representative capacity “stands in need to be determined by the appropriate Court pursuant to the qualifying provisions of the Constitution”.

6. **Rule 3.12** relevantly provides:



"(1) A proceeding may be started by ... one or more persons who have the same interest in the subject-matter of the proceeding as representing all of the persons who have the same interest and could have been parties in the proceeding."

(my underlining)

7. The question that arises from the above is: "What is the subject-matter of the proceedings and the interest of the claimant?"

8. I am satisfied upon a consideration of the claim that the "*subject-matter of the proceedings*" is land (if any) that is comprised within the **Estate of the late Morris Toaturu Moliva**. More specifically, the issue may be further refined into the question:

Is the customary land known as "Atariboe or Atanowaka" comprised within the Estate of Morris Toaturu Moliva?

9. "*Customary land*" is defined in the **Customary Land Tribunals Act** as: "*land owned or occupied, or an interest in lands held, by one or more persons in accordance with the rules of custom*". **Article 73** of the **Constitution** declares "*all lands in the Republic of Vanuatu belongs to the indigenous custom owners and their descendants*" and **Article 74** affirms that "*the rules of custom shall form the basis of ownership and use of land in the Republic of Vanuatu*". The above Articles makes it plain that customary land is communally owned by "*indigenous custom owners and their descendants*" determined according to "*rules of custom*" by village or Island Courts which have an exclusive jurisdiction over customary land (see: **Articles 52 and 76**).

10. In the case of **In re Estate of Molivono** [2007] VUCA 22 the Court of Appeal in dismissing the appeal in that case described the competing applications for the right to administer the deceased's estate as based on a "*... misapprehension that the right of a deceased person as a custom owner would be controlled or affected or at least influenced by those who were granted administration of his estate*".

11. The Court then clarified the following "*fundamental point*":

"... either under a will, or under a grant of administration, what will be affected will only be property which belonged to the deceased person in his own right. It does not and never will deal with custom ownership of land. Articles 73 to 75 of the Constitution could not be more clear and unequivocal. Questions of succession to land in custom on the death of a custom owner will be determined in accordance with custom and in the appropriate place which will be an Island court or a Land Tribunal. Neither a will or grant of



administration will determine the question as to who will succeed to custom land'.

(my underlining)

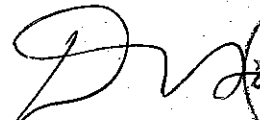
12. Accordingly, in the absence of an appropriate determination by an Island Court or Customary Land Tribunal, the averment that the claimant is the "representative" of the Estate of Morris Toaturu Moliva for the purposes of enforcing his custom ownership rights is misconceived and incompetent.
13. Needless to say even if the claimant had been appointed the administrator of the Estate of Morris Toaturu Moliva (which she has not sought or obtained) such an appointment would still not extend to communally owned customary land or affect rights of succession pertaining to such land.

Conclusion

14. In light of the foregoing the application succeeds and the claim must be and is hereby struck out with costs which are summarily assessed at VT50,000 to be paid to the defendant within 21 days.

DATED at Port Vila, at 25th day of May, 2012.

BY THE COURT


D. V. FATIAKI
Judge.

