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

Civil Case No. 51 of 2011

BETWEEN: TOM JOE BOTLENG and JOEL BOELULU JOE
Claimants

AND: VERONDALI LAND TRIBUNAL
First Defendant

AND: TOM TAFFII
Second Defendant

AND: MATHEW DAI and EDWARD SUMBE
Third Defendants

AND: BARNABAS VURO and SILAS MOLISESE
Fourth Defendants

State Law Office
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Coram: *Justice D. V. Fatiaki*

Counsels: *Mr. K. Loughman for the claimants*
Mr. J. Ngwele (State Law Office) for the First Defendant
Mr. F. Laumae for the Third Defendant
Second Defendant – no appearance
Fourth Defendants – no appearance

Date of Ruling: *9 August 2013*

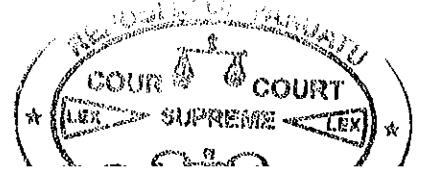
RULING

1. This application was initially issued out of the Luganville registry on **4 January 2011** and later transferred by order dated 16 March 2011 to Port Vila where it was amended on **3 November 2011** to exclude a Fifth Defendant (**Joseph Riri**). In the application, claimants seek to appeal against a decision of the **Verondali Land Tribunal** by way of judicial review.

2. The decision under challenge is dated **18 November 2010** and concerns the applicants claim to custom ownership of **Ratua Island**. In particular, the claimants were unsuccessful before the **Verondali Village Land Tribunal** and partially successful in an appeal against that decision to the **Verondali Land Tribunal** (*"the Tribunal"*).

3. The application is brought under **Rule 17** of the **Civil Procedure Rules** and although it names five (5) respondents/defendants who were before the Verondali Land Tribunal, only the Tribunal and the third defendants, are represented and have appeared before the Court.

4. The second defendants were also successful parties before the Tribunal but have never appeared before this Court or participated in these proceedings. Likewise the Fourth Defendants who were unsuccessful. Although it is unknown



why that should be so, I note that there is no sworn statement of service of these proceedings or of the conference notice, on the second and fourth defendants who are resident in Santo.

5. Be that as it may the claimants challenge the Tribunal's decision on the following nine (9) grounds set out in the amended application as follows:

"*1. The members of the Verondali Land Tribunal (hereinafter the tribunal) are not qualified to sit as members of the tribunal as they are from the islands of Malo, Tutupa and Maeva and do not have sufficient knowledge of the custom of Aore Island (Ratua is situated in Aore) necessary to determine the Ratua Island land case.*

2. Having found that Ratua Island consist of two (2) custom land areas namely "Belhovoco" and "Beldangasingo", the tribunal instead of issuing a single judgment on the case, issue two (2) separate judgments, one judgment covering "Belhovoco" and the other judgment covering "Beldangasingo".

3. Having issued the 2 separate judgments on Ratua Island, the tribunal failed to serve a copy of judgment on "Beldangasingo" on the applicants' to date.

4. The tribunal issued orders outside its powers to do so in that the tribunal ordered that each party to pay an amount of seven thousand five hundred vatu (VT7,500) per day during the hearing as the sitting allowance for members of the tribunal.

5. The tribunal issued orders outside its powers to do so in that the tribunal ordered that each party pay an extra sum of fifteen thousand vatu (VT15,000) prior to receiving a copy of the judgment.

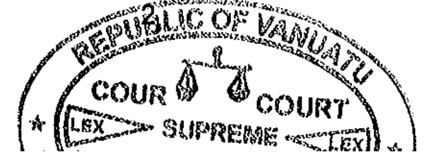
6. The tribunal failed to consider and apply their own customary by-laws which expressly stated that when a woman from Maeva, Tutuba or Aore marries out of their island, the woman's descendants cannot claim land from where the woman was originally from.

7. The tribunal failed to consider the audio recordings and transcripts of the audio recording of late John Molivono the last surviving man from Aore Island who was knowledgeable in the land boundaries of Aore and Ratua.

8. The tribunal failed to consider the audio recordings and transcripts of the audio recording of late John Molivono the last surviving man from Aore Island who had adopted as his sons the applicants father Mr. Frank Joe (deceased) and the third respondents Mathew Dai and Edward Sumbe.

9. The tribunal failed to consider and hold that as the last surviving person (Paramount Chief) of Aore/Ratua, there was no other person from the island of Aore/Ratua let alone Malo, Tutuba, Maeva and Santo who was knowledgeable in the custom and all customary land boundaries of Aore Island and Ratua Island."

6. It is immediately plain from a perusal of the grounds advanced that **grounds (6)** to **(9)** are not appropriate grounds in an application for judicial review as they relate to the merits of the Tribunal's decision. Equally, **grounds (4)** and **(5)** are matters which could in my view, be "*fully and directly*" resolved without affecting



the Tribunal's decision. Counsel for the claimant conceded as much at the hearing of the application when he did not seek to argue **grounds (6)** to **(9)**.

7. Concerning **ground (1)**, it was pointed out to counsel for the claimants that the approval of tribunal members is a matter exclusively for the relevant council of chiefs and the sole qualification for members of a Tribunal required by the **Customary Land Tribunal Act** [CAP. 271] is that the Tribunal member be "*included in a list approved by the relevant council of chiefs*". Whether that occurred in this case however is not entirely clear and will require further evidence and elaboration.

8. The application is opposed by the Tribunal and the third defendants, namely, **Mathew Dai** and **Edward Sumbe** on the basis that the Tribunal members are qualified to sit and determine the claimants' appeal before the Tribunal. Presumably they are satisfied with their partial success before the Tribunal.

9. In this regard the Court of Appeal said in **Taliban v. Worworbu** [2011] VUCA 31:

> "*8. When a Court is faced with such an objection to the constitution of a land tribunal, it is necessary to have regard first and foremost to sections 35, 36 and 37 of the Customary Land Tribunal Act.*
>
> *9. By those sections, the council of chiefs for a particular area (whether a custom area or custom sub-area) is required first to determine the boundaries of the area under its customary regulation (to adopt the terminology employed by s.3 of the Act). That council of chiefs is then required to approve a list of those chiefs and elders who are considered qualified (as defined) and acceptable to adjudicate on disputes as to the boundaries or ownership of custom land within that area. These are mandatory requirements preliminary to but also essential to the establishment of any village land tribunal under ss 7 - 9.*
>
> *10. There are other requirements on the council of chiefs including: (1) to forward the list of approved adjudicators to the Secretary of the Island council of chiefs (for a custom sub-area, a copy is also to be sent to the secretary of the council of chiefs for the custom area to which the sub-area belongs); and, (2) the annual revision of that list. The importance of those two steps to the legitimacy of a particular land tribunal will depend on the circumstances of the individual case.*
>
> *11. In order to determine whether this Land Tribunal was lawfully constituted, and accordingly whether its decision is valid, it will be necessary for the Supreme Court first to ascertain which particular council of chiefs had "customary regulation" over the land in question. Once that is established, it will then need to determine whether the members of the land tribunal in question were, in each case, drawn from the list of approved adjudicators compiled by that particular council of chiefs. Finally, it must be satisfied that the necessary procedural steps (the giving of public notice and suchlike) have been taken pursuant to ss 7 - 9. This is a different issue to whether a land tribunal has conducted itself correctly under Part 6 of the Act.*"

(my underlining)

10. In light of the foregoing a bare assertion that the members of a Tribunal are qualified to sit and determine the claimant's appeal without specific reference to an approved list is plainly insufficient and I accept that there is an arguable case on **ground (1)**.

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11. Defence counsels also generally submit that there is "*no arguable case*". This submission is a reference to the provisions of Rule 17.8 of the **Civil Procedure Rules.** In particular, **Rule 17.8 (3)** states:

"*The judge will not hear the claim unless he or she is satisfied that:*

(a) The claimant has an arguable case; and
(b) The claimant is directly affected by the enactment or decision; and
(c) There has been no undue delay in making the claim; and
(d) There is no other remedy that resolves the matter fully and directly."

12. The Rule clearly places a persuasive burden on the claimants to satisfy the Court that they have "*an arguable case*" sufficient to require the defendants to respond to the case on its merits. It is not unlike an application for leave to issue judicial review proceedings under the "*old*" Civil Procedure Rules and is to be approached on the basis of the materials and any opposition that may be made to the application. At this preliminary stage the Court need not be satisfied, that the claim is fully justified, only, that there is a "*prima facie*" case raised on the materials worthy of further consideration at a hearing.

13. In seeking to persuade the Court that there is "*an arguable case*" on **grounds (2)** and **(3)**, counsel for the claimants submitted that the original claim was for the whole of **Ratua Island** (not part) and therefore the claimants were entitled to receive one judgment dealing with their claim, or, at the very least, be served with a copy of the judgment that dealt with the other customary land ("***Beldagosino***") identified on Ratua Island. In this regard I note that the claimants were named as custom owners of "***Belhovoco***" land albeit jointly with the second and third defendants.

14. In opposing **grounds (2)** and **(3)** counsel for the Tribunal submits that the **Customary Land Tribunal Act** [CAP. 271] does not require a tribunal to issue a single decision over two separate customary lands nor is the tribunal required to serve its decision on the parties beyond announcing its "*... decision in public and, if possible, in the presence of the parties*" (see: Section 29).

15. Counsel for the third defendants lays emphasis on the limited jurisdiction of the Court in an appeal under **Section 39** of the **Customary Land Tribunal Act** being confined to "*procedural matters*" and as to **ground (3)** counsel submits that the failure to serve the decision "*... is a past determination issue*" and therefore, presumably, has no possible impact on the Tribunal's decision.

16. It is unclear from the papers filed in court whether the Tribunal did make a determination about the custom ownership of "***Beldagosino***" land which it found comprises the remainder of Ratua Island and is clearly noted in the Tribunal's decision. Neither is it clear why the Tribunal in its decision confined the claimants custom ownership to "***Belhovoco***" land when the decision of the Verondali Village Land Tribunal against which the appeal is brought determined the custom ownership of the whole of Ratua Island.

17. It may well be that there has been no actual decision made in respect of "***Beldagasino***" land and the reason for this might be inferred that the Tribunal

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was of the view that "***Beldagasino***" land belonged to the fourth defendants **Barnabas Vuro** and **Silas Molisese** and/or the fifth Defendant **Joseph Riri**, and therefore, did not concern or affect the claimants who were only entitled to "***Belhovoco***" land.

18. If I may say so, even accepting that there is no statutory requirement that a Tribunal must issue only one decision in respect of any one claim or appeal brought before it (however many customary lands it identifies or are covered by the decision) nor is there a requirement to serve a copy of its decision on the parties in the proceedings before the Tribunal, the numerous questions and possibilities raised in the above paragraphs is an unsatisfactory state of affairs giving the claimants in my view, a legitimate grievance. In summary, the claimants have been denied custom ownership of part of Ratua Island without being given any reason(s).

19. Accordingly, I rule that the claimants have established an "*arguable case*" on **Grounds 1**, **2** and **3** and, by way of further directions, I make the following orders:

    (1) The claimant is to serve their amended application filed on **3 November 2011** together with a copy of this Ruling on the Second and Fourth Defendants and file in court a sworn statement of service evidencing the same within 14 days;

    (2) The Second and Fourth Defendants are again strongly advised to obtain the services of counsel;

    (3) Liberty is granted to the Second and Fourth Defendants to file and serve on the claimants and the Tribunal a response and sworn statements (as desired) within 21 days;

    (4) Liberty is granted to the claimants and the Tribunal to file and serve further sworn statements as considered necessary in respect of **Grounds 1**, **2** and **3** and in response to any sworn statements filed by the Second and Fourth Defendants within 28 days.

    (5) This matter is adjourned for a final conference/hearing on **20 September 2013 at 9.30 a.m.**

    (6) Costs reserved.

DATED at Port Vila, this 9th day of August, 2013.

BY THE COURT

D. V. FATIAKI
Judge.