

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

Civil Case No. 107 of 2011

**BETWEEN:** BILL STEPHEN

Claimant

**AND:** SANTO/MALO JOINT AREA LAND TRIBUNAL

First Defendant

**AND:** SANTO/MALO ISLAND LAND TRIBUNAL

Second Defendant

**AND:** FAMILY ANTAS

Third Defendant

**AND:** FAMILY BEN SUA

Fourth Defendant

**AND:** FAMILY BEBELAU

Fifth Defendant

**AND:** FAMILY BULRAVE

Sixth Defendant

**AND:** FAMILY SAWA

Seventh Defendant

**AND:** FAMILY FOMULE GARAE

Eighth Defendant

**AND:** FAMILY NOEL VARI

Ninth Defendant

**Coram:** Justice D. V. Fatiaki

**Counsels:**

Mr. S. Hakwa for the Claimant  
Mr. J. Ngwele (SLO) for the 1<sup>st</sup> and 2<sup>nd</sup> Defendants  
Mr. T. J. Botleng and later B. Livo for the 3<sup>rd</sup> Defendant  
Mr. B. Bani for the 4<sup>th</sup> Defendant  
5<sup>th</sup> Defendant – no appearance  
6<sup>th</sup> Defendant – no appearance  
Mr. E. Nalyal for the 7<sup>th</sup> and 9<sup>th</sup> Defendants  
Ms. Jane J. Bani for the 8<sup>th</sup> Defendant (since 2013)

**Date of Judgment:** 6 March 2015

**JUDGMENT**

**Chronology**

- 1981 - Claimant's father lodged claims with the South Santo Land Committee to custom ownership of **NASULNUN** and **ARTACHE** lands located in South Santo ("the said lands");



- June/July 1981 - The **South Santo Land Committee** declared the claimant's family customary owners of the said lands;
- 30 May 1983 - **Island Court's Act** [CAP. 167] commenced and created Island Courts for Vanuatu;
- 1983 - Claimant's father lodged a claim in the **Santo Malo Island Court** ("**SMIC**") for a declaration of custom ownership of the said lands;
- 1983 – 2008 - 17 additional claimants filed claims to the said lands in SMIC ("**The SMIC case**");
- 10 Dec. 2001 - **Customary Land Tribunals Act** [CAP. 271] ("**CLT Act**") commenced and created Land Tribunals for Vanuatu;
- 29 April 2003 - The SMIC case was transferred to be dealt with under the CLT Act by order of the SMIC supervising magistrate (confirmed in a letter dated 9 June 2011 from the Customary Lands Tribunal Office);
- 9 Sept. 2008 - **Vaturani Island Council of Chiefs South Santo Area II** determined custom ownership of **Nasulnun land** in favour of Family Sokamele and Family Salatiel the claimant's family;
- 23 Oct. 2009 - The **Santo/Malo Joint Area Land Tribunal** ("**SMJALT**") declared that **Artache land** in South Santo was jointly owned by "**VOMULE wetem boy blong hem PETRO**" (ie the 8<sup>th</sup> Defendant family);
- 23 April 2010 - **Santo/Malo Island Land Tribunal** ("**SMILT**") in the absence of the claimant's family, declared part of **Nasulnun** custom land in favour of Family Jif Jarararo and the remaining part in favour of Loloso, John Kelen, and Noel Vari;
- 23 April 2010 - In the absence of the claimant SMILT declared the 8<sup>th</sup> defendant Family Formule Garae customary owner of **Artacha land**;
- 23 April 2010 - SMILT also declared that a part of **Nasulnun** "**antap log las hill**" belonged to the claimant's family;
- Aug./Sept. 2010 - The claimant filed a claim for judicial review against the defendant Tribunals in Supreme Court, Santo (**Civil Case 37 of 2010**). Leave was subsequently refused on 17 December 2010;
- 26 May 2011 - The claimant filed an ordinary claim in the Supreme Court, Santo registry (**Civil Case 25 of 2011**) seeking the cancellation of the decisions by the defendant tribunals and an order that the SMIC forthwith hear

and determine the claimant family's appeal against the SMJALT decision;

- 6 June 2011 - Saksak J disqualified himself from hearing the Supreme Court claim on the ground that he was a close relative of the 4<sup>th</sup> defendant Family Ben Sua and the case was transferred to Port Vila registry;

1. Upon its transfer to Port Vila the file was assigned a new case file number (from **CC25 of 2011** it became **CC107 of 2011**). Given that the said lands and most of the parties were resident in Santo and had no legal representation except for the defendant Tribunals (SLO), **Family Antas** (B. Livo and T. J. Botleng), **Family Sawa** (E. Nalyal) and **Family Noel Vari** (E. Nalyal), the management of the case proved very difficult and time consuming especially with the service of court orders and conference notices on the Fourth, Fifth, Sixth and Eighth named Families who showed little interest and took no real part in the proceedings.

- 23 Aug. 2011 - The Chief Registrar issued the first Conference Notice of the case to be held in Port Vila on 19 September 2011;
- 16 Feb. 2012 - Claimant files an application to stay the defendant Tribunals' decisions;
- 13 June 2012 - Court lists the case for a Rule 17.8(3) CPR argument on 4 July 2012;
- 13 June 2012 - Family Noel Vari files a sworn statement in support of its defence to the claim;
- 4 July 2012 - Court rules that the claimant's claim should proceed to a final hearing. All parties were granted liberty to file sworn statements and submissions as desired before a final hearing;
- 29 Oct. 2012 - Case adjourned for final hearing on 12 December 2012;
- 12 Dec. 2012 - After hearing counsel for the claimant and the defendant Tribunals the court directed judgment on notice;
- 20 Feb. 2014 - The **Custom Land Management Act No. 33 of 2013** ("**CLM Act**") came into operation;
- 2 June 2014 - A Certificate of Registered Interest in Artacha Land was issued in favour of the 8<sup>th</sup> defendant family under the CLM Act;

- 4 June 2014 - Lease No. 04/2942/002 between the 8<sup>th</sup> defendant family and **Milae (Vanuatu) Limited** over **Artacha land** was registered;
- 16 Sept. 2014 - The Court issued injunctive orders against all defendants including the Minister of Lands, the Director of Lands and **Milai (Vanuatu) Limited** prohibiting any dealings with the lease;
- 22 Oct. 2014 - Family Fomule Garae (Eighth Defendant) filed an urgent application for a variation of the injunction on the basis of the defendant Tribunals decisions in 2009/2010 (above);
- 6 Nov. 2014 - Claimant filed its opposition to the variation application;
- 8 Dec. 2014 - Court issued a Conference Notice listing the case on 19 December 2014 at 11.00 a.m. to hear the variation application;
- 19 Dec. 2014 - In the absence of counsel for the 8<sup>th</sup> Defendant the variation application was summarily dismissed with costs. Despite the dismissal the variation application continues to be pursued by counsel for the 8<sup>th</sup> defendant;

2. The Supreme Court claim is entitled under the **Customary Land Tribunal Act No. 7 of 2001** and in the body of the claim, there is a clear assertion of a breach of the provisions of **Section 5** of the CLT Act as it relates to the claimant's "*pending proceeding*" in the **Santo/Malo Island Court** ("*the first ground of complaint*"). Alternatively, the claimant accepts the decision of the First Defendant Tribunal so far as it relates to its claim for **Nasulnun** and **Artache** but challenges those parts of the Tribunal's decision that was in favour of the Defendant families.
3. In this latter regard the claimant complains that the First named Tribunal breached the procedure required to be followed under **Parts 4, 6 and 7** of the **CLT Act**. In particular:
  - (a) by including in its membership **Chief James Tangis** who, by origin, is not qualified to sit as a member; and
  - (b) including **Chief Sam Vula** who is disqualified on the basis of his close relationship by blood to the 8<sup>th</sup> Defendant Family;
4. Against the Second Defendant Tribunal the complaint is that it failed to follow procedure in breach of **Parts 4 and 6** of the Act. In particular:

- (a) in permitting two entirely new claimants, namely **Family Pospit** and **Family Noel Vari** to join the case at an appellate level; and
  - (b) by treating the appeal of the claimant family as if it were a rehearing of its original claim under the CLT Act instead of an appeal from the First Defendant Tribunal.
5. Alternatively, the claimant accepts the decision of the First Defendant Tribunal as far as it goes in favour the claimant and the claimant asserts that the Second Defendant Tribunal has not yet heard its appeal against the First Defendant Tribunal which was lodged with the Second Defendant Tribunal on 14 December 2009.
6. **Section 5 of the Customary Lands Tribunal Act** which refers to pending court proceedings, provides:

***"5 Pending court proceedings***

*(1) If:*

- (a) a person is a party to a proceeding before the Supreme Court or an Island Court relating to a dispute about customary land; and*
- (b) the person applies to that Court to have the proceeding withdrawn and the dispute dealt with under this Act; and*
- (c) the other party or parties to the proceeding consent to the withdrawal and to the dispute being dealt with under this Act; and*
- (d) that Court consents to the withdrawal and to the dispute being dealt with under this Act;*

*the dispute must be dealt with under this Act and one of the parties must give notice under section 7.*

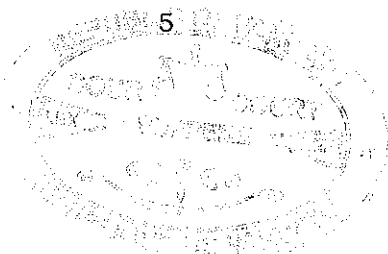
*(2) The Supreme Court or an Island Court may:*

- (a) order that any fees paid to that Court in respect of such proceedings be refunded in full or in part to the applicant or any of the other parties; and*
- (b) make such other orders as it thinks necessary.*

*(3) To avoid doubt, if proceedings before the Supreme Court or an Island Court relating to a dispute about customary land are pending, the dispute cannot be dealt with under this Act."*

(my underlinings)

7. In terms of subsection (3) above, the claim before the **Santo/Malo Island Court** was a "*pending*" dispute about customary lands namely, "*Nasulnun*"



and "Artacha" lands and therefore could not be dealt with under the provisions of the CLT Act unless and until all the cumulative requirements of subsections (1) (a) to (d) are fulfilled.

8. The claimant has consistently denied on oath that it never applied for or agreed to withdraw its claim before the Santo/Malo Island Court and have it dealt with under the Customary Land Tribunal Act.
9. Both Tribunals in their joint defence, deny any knowledge of the transfer of the claimant's claim before the Santo/Malo Island Court and asserts that neither Chief James Tangis or Chief Sam Vula were members of the relevant Land Tribunals that determined the claimant's claim to **Nasulnun land**. Even the sworn statement of **Gordon Arnhambhat** the Acting Senior Land Tribunal Officer makes no mention of a transfer of the claimant's Santo/Malo Island Court claim to the Lands Tribunal under the CLT Act. No mention is made at all in the joint defence or sworn statement about "**Artache land**".
10. In the absence of defences from the other named defendant families (despite service of the claim on each of them) it is impossible to gauge their reactions to the several assertions in the claim. Similarly there is no sworn statement from the Island Court clerk or a copy of the relevant Island court file which could assist in the determination of the first ground of complaint.
11. I am grateful however to the 9<sup>th</sup> defendant family who filed an opposition and sworn statement in support by NOEL VARI which provides some valuable annexures in my consideration of the first ground of complaint.
12. In this regard the relevant handwritten entry of the **Santo/Malo Island Court** (SM J Garae) dated **9 April 2003** is as follows:

"J. Garae  
Nick

*Frank Tavuti – I agree with the others that we withdraw our claim and be heard by the LT (Land Tribunal). I've paid my fees, I bring receipt today."*

**ORDER**

1. Claim withdrawn;
2. Fees be refunded/receipt

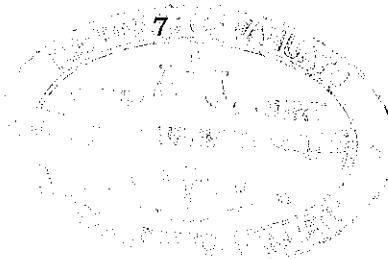
(signed) 09/04/03".

13. It is unfortunate that the handwritten entry does not clearly record the presence of all the parties on 9 April 2003 and despite the Land Tribunal's confirmatory letter (8 years later) that: "... all the seventeen (17) claimants



plus Stephen Salathiel (the claimant's father) agree to withdraw the case and have it transfer to the Lands Tribunal for hearing" (which is nothing more than inadmissible hearsay), the claimant's sworn assertion to the contrary remains undenied by anyone who was actually present on the day.

14. It is doubly unfortunate that "*Frank Tavuti*" who is named in the entry remains unidentified with any of the claimants before the Santo/Malo Island Court nor is the identity of the other parties who agreed to the withdrawal of the Santo/Malo Island Court claim clearly disclosed in the entry.
15. Furthermore, there is not a shred of evidence that a Notice under **Section 7** of the CLT Act has been given by "*one of the parties*" to the dispute as required by **Section 5 (1)**. Similarly none of the present defendants (who presumably were also parties before the Santo/Malo Island Court) have confirmed applying for or agreeing to withdraw the dispute before the Santo/Malo Island Court [see: s. 5 (1) (b)].
16. If I may say so, with hindsight, it is unfortunate that **Section 5 (1)** of the CLT Act requires "*one of the parties*" to give the requisite notice where a dispute is being transferred from the Island Court to a Land Tribunal especially where there were 17 claimants and there has been no appointment or delegation made by the Island Court in agreeing to the transfer.
17. In the present case no Section 5 or 7 notice has been produced to this court and, despite the Island Court's order, it remains unclear what became of the claimant's claim that was before the Santo/Malo Island Court. Indeed, subsequent events appears to suggest that a fresh claim altogether was commenced under the CLT Act (how and by whom is unknown), calling upon any claimants to submit their claims before the **Santo/Malo Joint Area Land Tribunal**.
18. The three (3) public notices that preceded the First Defendant Tribunals hearing, given in June/September 2008 are all headed: **BELMOL CATTLE PROJECT** and refers to "*Belbura*" and "*Belvuol*" customary lands only. All 3 notices are issued on behalf of the chairman of the **Joint Village Land Tribunal of South Santo Area 2, Fanafo Canal and Malo** and are therefore non-compliant with the requirements of Section 5(1) and Section 7 of the CLT Act.
19. The Fourth and last public notice dated 13 May 2009 (6 years after the "*transfer*" order) properly identifies the eight (8) disputed customary lands under consideration by the Tribunal including "*Artacha*" and "*Nasulnun*" land but, even that notice, is signed by Chief James Tangis as chairman of the Tribunal and not by "*one of the parties*" in the Santo/Malo Island Court case

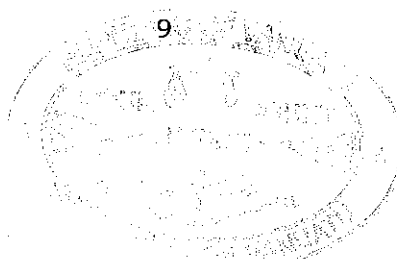


as required in terms of section 5(1) of the CLT Act. This public notice also refers to a differently named Tribunal than the First named Defendant Tribunal.

20. Having noted the above irregularities and omissions, counsel for the 7<sup>th</sup> and 9<sup>th</sup> defendants (E. Nalyal), nevertheless, forcefully submits that the full and unconditional participation by the claimant in the proceedings of the First Defendant Tribunal constitutes a "*waiver*" of the statutory pre-requisites and raises an "*estoppe*" against the claimant preventing it from challenging the First Defendant tribunal's decision which it has accepted in its claim.
21. After carefully considering the defendants written and oral submissions at the Rule 17.8 CPR hearing of the claim, I cannot agree that the mandatory requirements of **Sections 5 and 7** of the **Customary Land Tribunal Act** which goes to jurisdiction, are capable of being waived nor can an estoppel be pleaded so as to avoid strict compliance with the mandatory requirements of statutory provisions.
22. In this regard it may be noted that State Counsel representing both defendant Tribunals (J. Ngwele) whilst adopting a "*neutral stance*" in the matter, nevertheless, highlighted that there had been a fire at the Island Court, Santo premises which destroyed a large number of files including the original Santo/Malo Island Court files and, furthermore, there were logistical problems with the maintenance, storage and handling of Land Tribunal records in the absence of a permanent office premises for the Customary Land Tribunal Unit in Port Vila which was neither separately funded or resourced to properly administer the important work it is required to undertake under the CLT Act.
23. In light of the foregoing I uphold the first ground of complaint that there was non-compliance with the mandatory requirements of Sections 5 and 7 of the Customary Land Tribunal Act. What then is the effect of such a finding and should this Court return everything to 2003 when the claimant's claim before the Santo/Malo Island Court was irregularly withdrawn and improperly transferred to the Land Tribunal system? The answer is not an easy one in the absence of the Island Court file or a copy of the initiating document filed in the Island Court.
24. Needless to say, the court would be ignoring two (2) major pieces of legislation that have been passed since 2003 and the important fact that the claimant by his own admission and pleadings fully and willingly participated in the proceedings of the first defendant Tribunal and, indeed, accepts part of the first defendant Tribunal's decision.



25. I am also mindful that Section 5 does not, in terms, preclude a “*transferred*” claim being otherwise pursued through the ordinary customary land tribunal process (see also: the observations of the Court of Appeal in Family Kalmet v. Family Kalmermer [2014] VUCA 11 especially at paras. 29 to 34).
26. I turn next to consider the complaints specifically directed at breaches of procedure by the First Defendant Tribunal. Before doing so however, it is necessary to briefly consider the tribunals and processes set up under the CLT Act.
27. In this regard I can do no better than to refer to the observations of the Court of Appeal in Solomon v. Turquoise Ltd. [2007] VUCA where the Court said of the CLT Act:
- “Parliament specifically set up a multi-layered system where a party has the right to argue his case about ... land ownership up to 5 separate times (inclusive of an Island Land Tribunal rehearing) in tribunals consisting of local chiefs and elders before the point of final resolution is reached.”*
28. Fundamental to that “*system*” is the role of the Council of Chiefs in determining the boundaries of a “*custom area*” or “*custom sub-area*” **and** in approving a list of qualified chiefs and elders to adjudicate customary land disputes within each custom area or custom sub-area (see: Sections 35, 36 and 37).
29. The CLT Act recognizes a hierarchy of tribunals beginning with at the lowest level – **Village Land Tribunals** which can be either single or joint depending on the location of the boundaries of the disputed land and the number of village boundaries it falls within (see: PART 2); then follows a first tier of appellate tribunals which can be single or joint and which are designated **Custom Sub-Area Land Tribunals** (see: PART 3) **or Custom Area Land Tribunals** (see: PART 4). Notably a dissatisfied appellant before a **Custom Sub-Area Land Tribunal** has a second tier appeal either to a **Custom Area Land Tribunal** **or** to an **Island Land Tribunal** (see: PART 5) and in limited circumstance, an unsuccessful appellant has a further right to a “*rehearing*” before an Island Land Tribunal (see: Section 24).
30. By definition the CLT Act recognizes 4 levels of tribunals as well as “*custom areas*” for the islands of the archipelago which are further divided into “*custom sub-areas*” in the larger islands.
31. On the basis of the above analysis of the CLT Act it can be seen that the custom area; custom sub-area and Island Land Tribunals are appellate

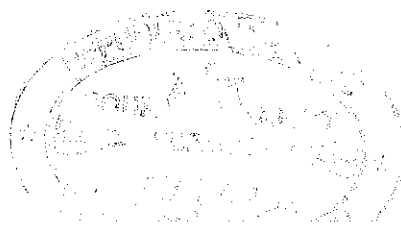


levels or tiers as distinct from the village or joint village land tribunals which are tier one first instance tribunals (see: Sections 12, 17 and 22 in contrast to Section 7).

32. On that basis and consistent with the names of the defendant Tribunals both must be considered appellate tribunals where the initiating document would be an Appeal Notice in accordance with sections 17 and 22.
33. In the present case, however, the initiating document is a Public Notice issued by the chairman of the defendant Tribunal calling on all registered claimants to pay the requisite court fees within 21 days before the assigned hearing date. The Public Notice is clearly non-compliant with the requirements of Section 7, 17 and 22 and appears to be a Notice of Hearing under Section 25 of the Act. I say appears advisedly because in the event that it is an appeal that is being heard **paragraph (e)** requires such a notice to "specify the grounds of the appeal" and there are none specified in the relevant Notice.
34. If I may say so the documents submitted by the parties of relevant Land Tribunal decisions (not by the Land Tribunal officer as might be expected) are incomplete, disorganized, and almost incomprehensible. Certainly most would not withstand close scrutiny.
35. As was recently observed by the Court of Appeal in Tavue v. Joint Village Land Tribunal [2013] VUCA 34 in allowing the appeal and returning the case to the Supreme Court.

"1. *This appeal highlights two things:-*

2. *First, it is vitally important that the processes under parts 6 and 7 of the Customary Land Tribunal Act [CAP 271] are complied with so that the boundaries and lists are clear, including the annual review of lists of approved adjudicators. Furthermore, that the Department of Lands through the Customary Land Tribunals Office keeps proper records of the Land Tribunal decisions and processes and ensures that the Council of Chiefs for each custom area annually review the list of approved adjudicators.*
3. *Secondly, when cases like this arise, the State Law Office should be able to produce to the Supreme Court the proper records so that there will not be disputes between the parties on conflicting and largely anecdotal evidence. The State Law Office tries to assist the Court, as it should, in matters like this, but even it as the representative of the land tribunals is not able to say what the record shows.*




4. *If proper records were created and maintained, the number of cases like this before the Supreme Court and the Court of Appeal would, very likely drop dramatically for the benefit of all.*"

36. In this regard **PART 6** of the CLT Act which details the procedures to be followed by a Land Tribunal from the giving of a Notice of Hearing (**Section 25**); through the hearing of the claim or appeal (**Section 27**); and the giving and recording of the Tribunal's decision (**Sections 29, 30 and 34**), cumulatively, indicates that for every land tribunal decision there will be a "record" kept by a secretary (**section 38**) containing an initiating document, a Hearing Notice, transcripts of witnesses testimony and any cross-examination; documentary evidence such as a sketch plan of the land as well as family tree(s); submissions of the parties on relevant customary law and practices and the deliberations and votes of the members of the Tribunal if the decision is not unanimous.
37. Needless to say in the absence of such a "record" which it is the duty of the defendant Tribunals to maintain and provide to the Court, it is impossible for this Court to do justice to the claimant's application invoking this Court's jurisdiction under **Section 39** of the **Customary Land Tribunal Act**. Accordingly and in exercise of the Court's powers under Section 39 both defendant Tribunals' decisions are quashed with costs to be taxed if not agreed.
38. Mindful of the commencement of the **Custom Land Management Act**, I make no order as to the continuation or resolution of the existing dispute instead leaving it to the parties and their advisors to consider the best way forward for dealing with their dispute unconstrained by the defendant Tribunal's determinations.

**DATED at Port Vila, this 6<sup>th</sup> day of March, 2015.**

**BY THE COURT**

  
**D. V. FATIAKI**  
Judge.

