

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

Judicial Review
Case No. 20/1385 SC/JUDR

BETWEEN: John Win Bovu representing his
mother Margaret Qwora (Manbona)
through the Power of Attorney
Claimant

AND: Republic of Vanuatu
Defendant

Date of r. 17.8 Conference: 25 September 2020
Before: Justice V.M. Trief
In Attendance: Claimant – Mr W. Kapalu
Defendant – Ms C. Lahua
Date of Decision: 9 October 2020

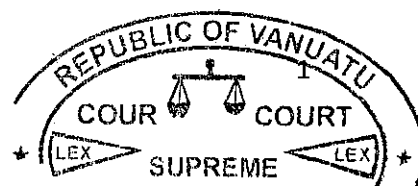
JUDGMENT

A. Introduction

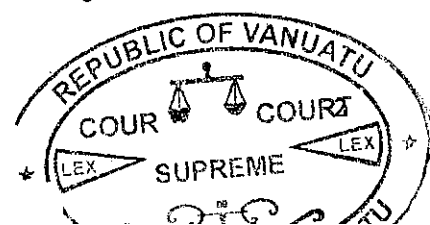
1. This case involves an application for judicial review.
2. What is challenged are alleged inactions of a Custom Land Officer.
3. As required by the *Civil Procedure Rules* ('CPR'), this matter was set down for a Rule 17.8 conference.
4. This judgment sets out my decision as to the r. 17.8 matters.

B. Discussion

5. Rule 17.8 requires that a Court must be satisfied as to 4 matters in order for the case to proceed to trial:



- (i) the Claimant has an arguable case;
 - (ii) the Claimant is directly affected by the decision under challenge;
 - (iii) there has been no undue delay in making the Claim; and
 - (iv) there is no other available remedy which resolves the matter fully and directly.
6. If any one of the 4 aspects is not established, the Court must strike out the proceeding.
7. It is alleged in the Claim that the Claimant John Win Bovu and the Penama Province Custom Land Officer published notice of Mr Bovu's claim to Amagilua land on Pentecost island (now titled as leasehold title no. 07/0134/005) and that no person contested that claim. Further, that as there was no dispute as to the ownership of land, that the Custom Land Officer should have arranged a meeting under Part 3 of the *Custom Land Management Act* (the 'Act') to determine the custom ownership of the land and create a recorded interest in land. It is alleged that this breached s. 6B(5) of the *Land Reform Act*.
8. The Claim seeks a mandatory order that the State recognize that Mr Bovu is the custom land owner of Amagilua land, comprised in leasehold title no. 07/0134/005, and to issue a Certificate of Registered Interest in Land pursuant to s. 19 of the Act.
9. Mr Kapalu immediately conceded that no Court could grant the relief sought in the Claim. First, the Defendant State is not empowered by any legislation to declare a person as a custom land owner. Secondly, s. 19 of the Act applies where the custom owners have been determined by a nakamal; that would not be the case even if the Court granted the mandatory order sought.
10. Mr Kapalu submitted that what is actually sought is a mandatory order that the Custom Land Officer facilitate the process under Part 3 of the Act for Mr Bovu's claim to be heard at a nakamal meeting. Mr Kapalu relied on the Sworn statement of Mr Bovu, submitting that he had given notice of his claim, and as he was the only claimant for the land, he has an arguable case.
11. The Defendant filed the Sworn statements of Malcolm Sarial, Thompson Vanua and Jay Hinge. Jay Hinge, the Acting Director of Lands' evidence is that survey plan title no. 07/0134/005 was approved for Latano Wharf.
12. The evidence of Mr Sarial, the Custom Land Officer for Penama Province and Mr Vanua, a chief who assisted Mr Sarial, is that a notice of claim for Amagilua land at Lolong, North West Pentecost was published on 4 May 2019. However, about 10 days after the notice was put up it was removed by persons unknown. Consequently, 5 other claims for ownership of the land have been received. Tropical Cyclone Harold then destroyed the documents containing those claims. Both confirmed that there has not been a nakamal meeting to determine the customary ownership of Amagilua land.



13. Mr Bovu is alleging inaction by the Custom Land Officer to facilitate the process under Part 3 of the Act. Part 3 of the Act consists of sections 12-22. Section 12 provides:

12. *If an application to approve a negotiator's certificate over custom land has been referred to the National Coordinator and the National Coordinator confirms that ownership of land of the land has not yet been determined by a Court or in accordance with this Act, the National Coordinator must arrange for a notice to be given to identify the custom owners in accordance with the provisions of section 6B of the Land Reform Act.*

14. It is remarkable that the State has not put on any evidence from the National Coordinator of the Customary Land Management Office when he is the person charged with responsibilities in the first instance under Part 3 of the Act and s. 6B of the *Land Reform Act*.

15. On the material before me, I have no information as to whether or not a negotiator's certificate over custom land has been referred to the National Coordinator nor whether or not the National Coordinator has confirmed that ownership of the land has not yet been determined such that s. 12 and the rest of Part 3 of the Act is enlivened.

16. Both counsel assume these have occurred. I cannot make such an assumption on the material before me.

17. The other provision alleged to have been breached is subs. 6B(5) of the *Land Reform Act*. Section 6B provides:

6B. (1) *Upon receiving an application to approve a negotiator's certificate being referred under section 6A, the National Coordinator must determine if the custom owners are already identified by a recorded interest in land in accordance with the Custom Land Management Act.*

(2) *If the custom owners are not identified by a recorded interest in land under the Custom Land Management Act, the National Coordinator is to:*

(a) *arrange for a notice to be given of the intention to identify the custom owners of the land which is the subject of the application, in the following manner:*

(i) *on at least 3 occasions in 1 month, a notice in English, French and Bislama:*

(A) *is to be broadcasted on the radio at the time of the announcement of service messages; and*

(B) *is to be published as part of a table produced by the Director of Lands in the newspaper which includes with it a short description of the area of location, size of land and nearby localities, for all applications for a negotiator's certificate for the month; and*

(ii) *direct the responsible custom land officer to make arrangements to place the notice at the Local Government Council headquarters, the nearest Area Council headquarters, the nearest Sub-Area Council headquarters (if applicable) and at any village or villages located near the land for at least 1 month; and*

(iii) *direct the responsible custom land officer to make arrangements to place the notice on the land to which the approval to negotiate*

relates for at least 1 month requiring all persons having an interest in the land to notify the custom land officer; and

- (iv) *if there is a determination of custom owners, the National Coordinator must also ensure that the custom owners listed in the determination are also notified; and*
- (b) *when the notification period has lapsed, allocate a custom land officer to facilitate the identification of the custom owners in accordance with the provisions of the Custom Land Management Act.*
- (3) *The notice referred to in subparagraph (2)(a) (i) must identify the land in a manner that will be understood by the people of that island and require all persons having an interest in the land to notify the custom land officer who is responsible for that area or the office of the National Coordinator.*
- (4) *The signage associated with the notice in subparagraph (2)(a)(iii) must:*
 - (a) *be in large black font on a white background; and*
 - (b) *be placed facing the nearest public road or pathway; and*
 - (c) *measure at least 2 meters long and 1 meter wide; and*
 - (d) *include all details associated with the application for a negotiator's certificate.*
- (5) *If:*
 - (a) *there is no dispute as to ownership of the land - the custom land officer must proceed in accordance with Part 3 of the Custom Land Management Act; or*
 - (b) *there is a dispute as to ownership of the land - the custom land officer must apply Part 4, 5 or 6 of the Custom Land Management Act.*
- (6) *The custom land officer is required to attend meetings in accordance with the process outlined in section 6C and furnish a full report to the National Coordinator.*

18. The opening words of subs. 6B(1) provide that, "Upon receiving an application to approve a negotiator's certificate being referred under section 6A, the National Coordinator must...".

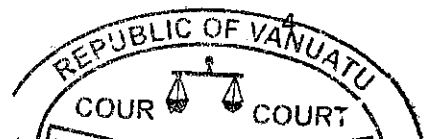
19. Section 6A(1) of the *Land Reform Act* provides:

- 6A. (1) *A person who intends to commence negotiations with custom owners must apply in the prescribed form for a negotiator's certificate to the Chairperson of the Committee. The application must be accompanied with the prescribed application fee.*

20. As noted above, there is no material before me as to whether or not there is a negotiator's certificate over the subject land nor indeed whether or not an application for a negotiator's certificate has even been made.

21. In the circumstances, there is insufficient material before me and I am not satisfied that Mr Bovu has an arguable case.

22. In case I am wrong on this, I am satisfied from the State's evidence that Mr Bovu's claim is not the only one for custom ownership of Amagilua land. There are at least 5 other



competing claims for custom ownership of that land. There cannot therefore be any breach of s. 6B(5) of the *Land Reform Act*.

23. As to the alleged inaction of a Custom Land Officer under Part 3 of the Act, that Part only applies if an application to approve a negotiator's certificate over custom land has been referred to the National Coordinator and the National Coordinator confirms that ownership of the land has not yet been determined. There is no material before me that either has occurred.
24. In the circumstances, I am not satisfied that the Claimant has an arguable case.
25. It is clear that Mr Bovu would be directly affected by the alleged inaction of the Custom Land Officer however there is insufficient material before me to assess whether or not there has even been any inaction as alleged.
26. There is also insufficient material before me to determine whether or not there has been undue delay in making the claim, and whether or not there is any other available remedy that resolves the matter fully and directly.

C. Result and Decision

27. Not being satisfied about the matters in r. 17.8(3), I decline to hear the Claim and it is struck out pursuant to r. 17.8(5) of the CPR.
28. Costs follow the event. The Claimant is to pay costs to the Defendant as agreed or taxed by the Master. Once set, the costs are to be paid within 21 days.

**DATED at Port Vila this 9th day of October 2020
BY THE COURT**


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Viran Molisa Trief
Judge

