CASE NOTE

***VALELE FAMILY v. TOURU* [2002] VUCA 3**

The Legality of Customary Land Disputes in Vanuatu

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INTRODUCTION

This Court of Appeal decision appears to strike a serious blow to any notion of a dual legal system in Vanuatu, as far as the process of land disputes are concerned. The Court seemed to go out of its way to dispel the notion that land disputes might be settled outside of the formal Court system. In a particularly formalistic and technical decision, the Court of Appeal calls into question the legitimacy of traditional land dispute processes holding that the Courts are the only bodies that have "lawful jurisdiction and power to make a determination that binds everyone."

THE CASE

This was an Appeal against the dismissal of an application for an interlocutory injunction. The injunctive relief sought pertained to profits arising from the use of custom land (hereinafter called the Natinae land). The Appellant had instituted proceedings in the Island Court in 1997 to dispute ownership of the Natinae land. Application was made to the Supreme Court for an account of moneys received by the Respondent on behalf of the custom owners, and for continuation of injunctive relief until the resolution of the ownership issue.

The primary Judge substantially upheld the contentions of the defendant (Respondent) that he was the custom owner of the Natinae land. The case was unusual in that the evidence put before the primary Judge by the defendant raised factual and legal arguments as to why the claim for an account of moneys received by him would inevitably fail. In the result, the primary Judge concluded that custom ownership had been determined, and on this basis, dismissed the Appellant's claim for a continuation of injunctive relief.

THE ISSUE ON APPEAL

The primary issue on appeal was whether or not the custom ownership claims of the Appellants had been finally determined against them.

THE APPELLANTS' (PLAINTIFFS') ARGUMENT

In support of the claim for the injunction, the Appellants asserted before the primary Judge that they were the custom owners of the disputed Natinae land; that there was a long running dispute with the Respondent as to the custom ownership of the Natinae land; and since 1982 the Respondent had received the lease payments for the disputed land and had paid none of it to the Appellants. In 1997 the Appellants instituted proceedings in the Island Court to have the dispute over custom ownership of the Natinae land

determined, and that claim remained unresolved. Lastly the Appellants contended that the Island Court was the only body with the jurisdiction and authority to make a binding determination of custom ownership, and until it did so the Natinae land remained land over which custom ownership was in dispute.

THE RESPONDENT'S (DEFENDANT'S) ARGUMENT

The Respondent argued that the ownership of the Natinae land had been decided, and that he was the custom owner of the land. His case before the primary Judge included the following:

In or about 1981 a committee (The Utalamba Committee) was established to look into land matters in Santo. It was a representative group for the area, and was to work in close association with the Department of Lands. The Respondent contended that the committee had jurisdiction to determine customary ownership of land on Santo. The Respondent was nominated to be a representative of custom owners on that committee, and the nomination was formalized by a written declaration by the then Minister of Lands and Natural Resources. A copy of the declaration was produced, and it appears in that declaration that the Minister nominated him pursuant to s.6(2) of the *Land Reform Regulations*. The declaration expressly allowed 30 days to dispute the nominations.

Prior to 1982 the Respondent lodged a claim in an "Area Land Court" or an "Area Land Committee". The Committee declared him to be custom owner of the Natinae land, and this decision was conveyed to an officer of the Department of Lands. There being no appeal, The Minister declared him to be the custom owner of the Natinae land.

In March, 1988, a council of chiefs met and confirmed that the Respondent was a custom owner of the Natinae land. The decision of the council of chiefs did not name the Appellant as a custom owner.

In February, 1988, the Department of Lands and Natural Resources wrote to the Respondent and other custom owners of the Natinae land informing them that there had been settlement of the land dispute concerning titles including the Natinae land, and that the Santo Land Council, which had been receiving rents, would pay out the moneys in hand to be shared equally between the addressees. The Appellant was not named in that correspondence as a party entitled to share in the rents.

THE APPELLATE COURT DECISION

The Appeal Court began by agreeing with the primary Judge that the Minister's Declaration made in 1982 could not have been made pursuant to s.6 of the Land Reform Regulations Act, 1980 (which was in the same terms as s. 6 of the Land Reform Act [CAP 123]), because this section refers to alienated land. However, the Appeal Court did not agree with the conclusion of the primary Judge that the appointment of the Respondent to represent the custom owners was actually made pursuant to s.8 of the *Land Reform Regulations.* The Appeal Court added that in any event, s.8 did not empower the Minister to issue a certificate, or take any other action, which would have the effect of deciding the dispute as to custom ownership.

The Appeal Court then proceeded to review the Lease Titles for the Natinae Land. The two Lease Titles showed that the registered lessor was the Santo Land Council. The Santo Land Council was established by the Minister pursuant to Land Reform (Santo Land Council) Order No. 125 of 1981, and was empowered to manage the land. The power to enter into leases of the land specifically required a recital in each lease that the Council was acting on behalf of the Government or the custom owner, as the case may be. The Natinae leases contained recitals to the effect that the leases were entered into on behalf of the custom owners.

The Appeal Court found it to be significant that the leases remained registered in the name of Santo Land

Council as lessor, even though Order No. 125 of 1981 was revoked in 1988 by Order No. 31 which provided that all property owned by the Santo Land Council was now vested in the Government of the Republic of Vanuatu. The effect of this order, stated the Appeal Court, was that the Minister directly resumed general management and control of the land under s.8 of the Land Reform Act [CAP 123], and thereby held the land as land where ownership is disputed.

As to this point, the Appeal Court concluded that the register of Lease Titles gave no support to the claim by the Respondent that the ownership dispute had been resolved.

The Appeal Court then moved on to consider the Utulamba Committee and its associated "Area Land Court", and the council of chiefs which met in 1988. The Appeal Court rejected the argument that these bodies had lawful authority to make a determination binding on all claimants. Rather, the court concluded that the Constitution "envisages that disputes between citizens, or between a citizen and the Government, including disputes over custom ownership of land, will be finally resolved through the Courts, if they cannot be settled by agreement between each and every party who claims a competing interest."

The Appeal Court based this last conclusion Articles 73-78 of the Constitution interpreting these articles as guiding provisions as to the appropriate customary institution or procedures for resolving disputes about custom ownership. This led to consideration of Article 52 of the Constitution which provides for the establishment of village or island courts with jurisdiction over customary matters; and of the Island Courts Act [CAP 167]. The Court stated that "it is clear from the Constitution and from the Island Courts Act that unless everyone who at any time claims an interest in the land is prepared to accept a settlement, the only bodies that have lawful jurisdiction and power to make a determination that binds everyone are the Courts, in the first instance the local Island Court, and if there is an appeal, the Supreme Court".

The Appeal Court concluded that the processes and decisions that had occurred in the past did not finally determine the customary ownership. Until the claim was determined "according to law" the custom ownership dispute continued.

DISCUSSION

The Appeal Court rejected every argument that the Respondent put forward to support his claim for customary ownership of the Natinae land. The Court looked for technical defects in the Minister's declaration. The Court reviewed the Lease records to dispel the notion that the Respondent was a lessor. Lastly, the Appeal Court held that the chief's council and "Area Land Court" lacked the lawful authority to make a determination binding on all claimants.

The effect of this decision was to reject the customary process as a legitimate dispute process by which to determine the ownership of custom land. It appears that the Appeal Court rejected the notion of customary ownership where there was no official State involvement, in the form registration (such as a lessor), or in a legal decision.

However, even if the Court rejects the custom process, the Court cannot reject customary rules, as the Constitution has provided for their inclusion and consideration. The Appeal Court did consider Article 74 which provides that "the rules of custom shall form the basis of ownership and use of land in the Republic"; but there is also Article 45 which directs the judiciary "to resolve proceedings according to law", and *law* according to Article 93, includes custom. The result of the Appeal Court ruling is that even if land ownership must be decided according to customary rules, these customary rules must be adjudicated within the State legal system.

Although the Constitution requires the Government to arrange for appropriate customary institutions or procedures to resolve disputes concerning the ownership of land (Articles 73-78), there is no implied or express concomitant requirement that disputes *must* be decided by the State institutions in order to be

binding. However, the effect of this Court of Appeal decision could call into question the legitimacy of any custom land dispute decision that has not had the blessing of the formal court system.

The case has been considered. In *Kalomtak Wiwi Family* v. *Minister of Lands,* [2004] VUSC 47 aff'd [2005] VUCA 29, the lower Court considered the fact that the Claimants had been declared custom owners by council members of the village. The Court relied on the *Touru,* and stated that: "It is the Courts who are the only bodies recognized under the Constitution with powers to determine custom ownership." The Court of Appeal applied the principle again in cases with very similar facts to the *Touru* decision in *Livo* v. *Boetara Trust,* [2002] VUCA 10; and in *Cevuard* v. *Samsen,* [2003] VUCA 10.

In the aforementioned cases the matter of *ownership* was before the Courts. However, where ownership has not been at issue, the Court has not applied the *Touru* decision. In *Warput* v. *Santo Veneers*, [2004] VUCA 18, the Appellant sought damages from the Respondent forestry company for harvesting timber on his land. The Appellant based his claim as custom owner of the land on the declaration of the area Council of Chiefs. In ruling in favor of the land owner, the Appeal Court said that *Touru* was not applicable because the case was not about ownership. The Appellant had possession and use of the land and this was sufficient for finding the forestry company liable for damages for their trespass, and unlawful harvesting of trees on the custom owner's property. Thus, the Court distinguished between legal ownership which would have required the application of *Touru*, and a form of custom ownership which was duly recognized by the Court.

Perhaps it is because of the change of land uses that has led to the *Touru* decision. Jowitt[1] contends that most of the time custom deals with land disputes in Vanuatu. However, she goes on to state that "custom is increasingly failing to resolve issues as uses of land are changing", and "[p]eople are no longer as willing to accept the legitimacy of custom settlements when settlements are not in their favor." In light of these comments, the Court of Appeal decision in *Touru* may be seen as the Court's response to changing land uses in an increasingly commercial environment which is demanding a greater degree of legal certainty.

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[1] Jowitt, A. 'Indigenous Land Grievances, Customary Land Disputes and Restorative Justice', [2004] JSPL 8(2) http://www.paclii.org/journals/fJSPL/vol08no2/8.shtml accessed 10/10/2006.