IN THE COURT OF APPEAL
OF THE REPUBLIC OF VANUATU
(Appellate Jurisdiction)

Civil Appeal
Case No. 16/1389 CoA/CIVA

BETWEEN: ANDREW KALPOILEP and JACK KALON
Appellants

AND: KALKOT KALTAK, KALTAPAS KALTATAK, JACK KALMET and NORRIS KALMET as Members of KALTATAK and KALMET Family
First Respondents

AND: THE REPUBLIC OF VANUATU
Second Respondent

Coram: ***Hon. Chief Justice Vincent Lunabek***
Hon. Justice Bruce Robertson
Hon. Justice Daniel Fatiaki
Hon. Justice John Mansfield
Hon. Justice Dudley Aru
Hon. Justice David Chetwynd
Hon. Justice Paul Geoghegan

Counsel: *Mr. J. Ngwele and Mr. G. Takau for the Appellants*
Mr. F. Laumae for the 1st Respondents
Mr. S. Aron for the 2nd Respondent

Date of Hearing: *14 July 2016*

Date of Judgment: *22 July 2016*

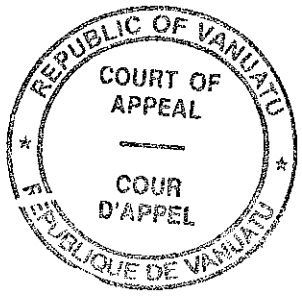
JUDGMENT

Historical Background

1. On 18 May 2004 in Land Case No. 1 of 2004 between Chief Jack Kalon and Maseimermerman Families and Chief Andrew B. Kalpoilep and Eratap/Bufa tribe, the Eratap Customary Land Tribunal ("the Tribunal") declared that the custom owners of *"Naisraper, Eseltuman, Elaktatlof, Etas, Teouma bridge, Port Vila Rubish dump, Eratap and Bufa area (Montmartre Hill)"* (the disputed lands) were:

"Chief Andrew B Kalpoipep mo Chief Jack Kalon blong Erakor tribe mao mbae tufala custom owner blong area ia ***mo tufala representem olgeta tribe mo families we tufala I representem olgeta****"*

(Our highlighting)



2. Significantly, the declaration of customary ownership is based on an amicable settlement reached between the two Claimant parties following the adjournment of the hearing pursuant to Section 28 (3) of the Customary Land Tribunal Act (Cap 271) ("the Act"). And which agreement the Tribunal affirmed "*hemi stret mo I valid.*"

3. On 23 August 2004 in the absence of any appeal or an application to review the Tribunal decision, pursuant to section 34 and 38 of the Act the secretary of the Tribunal recorded the decision in the appropriate statutory Form and forwarded it to the Director of the Land Department. The handwritten Form recorded the custom owners of the disputed land as follows:

"Chief Jack Kalon

representing families of Apiu Joseph and Markal Kalsong Masei Meriman

Chief B Andrew Kalpoilep Eratap

and

Kalkot Kaltatak."

4. Section 34 (1) of the Act provides that on a decision of a Tribunal set out in the statutory Form being signed by the chairperson and secretary "*... it constitutes an accurate record of the decision for all purposes*".

5. On 25 March 2008 the Supreme Court in Land Appeal Case No. 71 of 2006 stayed the enforcement of the Tribunals decision in Land Case No. 1 of 2004. Kalkot Kaltatak and Norris Jack Kalmet families appealed the stay order to the Court of Appeal in Civil Appeal Case No. 33 of 2013. In its judgment delivered on 4 April 2014 the Court of Appeal allowed the appeal because the declaration of the Eratap Customary Land Tribunal in Land Case No. 1 of 2004 is "*final and binding*" and therefore the Supreme Court "*was wrong to make orders with respect to the land covered by the declarations in* (Land Case) *01/2004*".

6. By a Deed of Release dated 18 December 2014 between family Maseimermerman represented by Chief Jack Kalon and somewat surprisingly, Chief Andrew Bakoa Kalpoilep designated representatives and the Government of the Republic of Vanuatu, a sum of VT17, 823, 077 being for premium and accumulated land rents held in the custom owner trust account was released to the Appellants by the Second Respondent.

7. Although the Kaltatak and Kalmet families are not clearly named as claimants in Land Case No.1 of 2004 or in the Tribunal's typewritten declaration of 18 May 2004, Kalkot Kaltatak is clearly included in the secretary of the Tribunal's

handwritten record of the decision. The secretary also deposed in support of the claim:

"That in the dispute chief Andrew Bakoa Kalpoilep and Kalkot Kaltatak represented Kalmet family and Kaltatak family of Eratap and Chief Jack Kalon represented Maseimermerman family of Erakor."

8. This representative capacity is clearly confirmed in a letter dated 27 November 2014 signed by the Appellants to the Minister of Lands; by the intituling of Civil Appeal Case No.33 of 2013 where Chief Andrew Bakoa Kalpoilep is identified as representing Family Kalmet; and finally and most importantly, by a decision of the Efate Island Court in Civil Case No. 1 of 2014 between Andrew Bakoa and Family Kaltatak and Family Kalmetlau which was a dispute concerning "*family claims*" and "*family rights*". In its decision delivered on 29 August 2014 the Efate Island Court declared interalia:

"FAMILY KALTATAK mo FAMILY KALMET LAU oli stret bladline blong FAMILY KALMET."

9. In so declaring that the disputing parties belonged to the same bloodline as family Kalmet the Efate Island Court firmly rejected Andrew Bakoa's assertion that both families did not belong in Eratap. On the contrary, the Court clearly found that the Kaltatak and Kalmetlau Families *"... oli part blong Family tri blong FAMILY KALMET since 1800 kasem nowia*" and "*oli live long Eratap more than one hundred years (100 yrs)."*

10. Since the above decisions a Certificate of a Registered Interest in Land has been issued under the Custom Land Management Act 33 of 2013 in respect of "*Naisraper & Etas land*" on 28 July 2014 in favour of the appellants only.

Chronology of the Claim

11. On 6 August 2015 the First Respondents namely the Kaltatak and Kalmet familes issued a Supreme Court claim against the Appellants namely Andrew Kalpoilep and Jack Kalon and the Republic of Vanautu seeking to enforce the decision of the Tribunal in Land Case No1 of 2004 and the return and an account of the VT17, 823, 077 released to the Appellant under the Deed of Release by the Second Respondent ("*the released monies*"). The First Respondent also sought a restraining order to prevent the release of any more funds and the issuance of a new certificate of registered interest in land reflecting the First Respondent's interest in accordance with the recorded decision in Land Case No. 1 of 2004.

12. In form, the claim is brought pursuant to Rules 16.24 and 16.25 of the Civil Procedure Rules for the enforcement of a decision of a Land Tribunal. Significantly in such a claim Rule 16.25 (5) states:

"A defence filed in the proceeding must not dispute anything in the record of the decision."

13. Be that as it may, between 16 October 2015 and 18 March 2016 the Appellants were ordered to file their defence(s) and sworn statement(s) in support. No defence(s) or sworn statement(s) were filed as ordered nor was any application made for further time to do so. The Republic filed a defence in which it sought an indemnity against the Appellants for the released monies.

14. On 18 March 2016 the First Respondent filed a "*show cause*" application against the Appellants invoking Rule 18.11 of the Civil Procedure Rules. The First Respondents sought judgment against the Appellants for their persistent failure to comply with the Court's orders to file a defence to the claim.

15. On 23 March 2016 the Court heard the application and delivered its decision on 31 March 2016. The application was allowed and judgment was duly entered against the Appellants in terms of the orders sought in the substantive claim as follows:

"(a) That the decision of the Eratap Land Tribunal dated 18th May 2004 as confirmed by the Court of Appeal be hereby enforced as final and binding, and that the defendants be hereby required to comply with the decision in all respects.

(b) That the First and Second Defendants be hereby required to account and pay up VT 17.823.077 held in trust by the Government and released to the First Defendant pursuant to the Deed of Release dated 18th December 2014 to a nominated account by the Claimant for sharing between members of Kalmet family, Kaltatak family and Maseimermerman Family.

(c) That the Government be hereby restrained from releasing any further funds held in trust in respect of Eseltuan, Naisraper, Etas, Teouma Bridge, Montmarte and Eseltumam, South Efate to the First and Second Defendants without the prior written consent and authorisation of the claimants.

(d) The Third Defendant through the Customary Land Management Office to cancel the certificate of registered interest in land registered dated 4th August 2004 and to issue a new certificate in the following names:

Jack Kalmet and Andrew Bakoa Kalpoilep members of and authorised representatives of Kalmet Family of Eratap.

Kalkot Kaltatak member of and authorised representative of Kaltatak Family of Eratap, and

Jack Kalon for and on behalf of Maseimermerman Family of Erakor".

16. It is plain from the Court's decision that the non-compliance complained about was the Appellants persistent failure over a period of several months, to file any defence to the claim and the absence of any attempt by the Appellants to "*show cause*" by way of a response or sworn statements. The Court also observed:

> "*From the documentary evidence already before the Court (sworn statement of Jack Norris dated 26 August 2015) the Deed of Release ("NJK 6") signed by the Family Maseimermerman represented by Chief Jack Kalon and Chief Andrew Bakoa Kalpoilep and the Government, is a clear misrepresentation by Chief Kalpoilep (First Defendant) and is inconsistent with the findings of the Efate Island Court dated 29 August 2014 and previous representations that Chief Andrew Bakoa Kalpoilep is representative of the Family Kalmet. The Judgment of the Efate Island Court is annexure "NJK 4" to the sworn statement of Jack Norris in Civil Appeal Case No. 33 of 2013 shows that Chief Kalpoilep is recognised as representative of the Family Kalmet. The Court of Appeal also confirmed the Land Tribunal decision in Land Case 71 of 2006 as final and binding.*
>
> *As regards a purported appeal, even if there is an appeal in existence, it may be a late appeal. The Court of Appeal has given a strict interpretation to the appeal periods in Section 22(5) of the Island Court Act. Therefore an appeal cannot be sufficient cause or reason for the defendants to oppose the claimants' application.*
>
> *It is therefore highly unlikely that the first and second defendants have any defence which is arguable and on which they have any prospect of success*".

17. On 26 August 2016 the Appellants filed an appeal against the decision advancing three (3) grounds of appeal, later reduced to two at the appeal review. The Appellants also filed two (2) sworn statements in support of the appeal with a view to answering the above quoted observations in the Court's decision.

18. Counsel for the First Respondents vigorously objected to the Appellants sworn statement as irrelevant and highly controversial in so far as it constituted a belated attempt to justify the exclusion of the First Respondents families as parties and/or beneficiaries of the Tribunal's decision in Land Case No. 1 of 2004 and in the Deed of Release.

19. Significantly, neither sworn statement referred to or annexed the decision of the Efate Island Court in Civil Case No. 1 of 2014 which conclusively declared that the First Respondents were always part of Family Kalmet "*... since 1800*". After extensive discussions between counsels and members of the Court, the Appellants' application to introduce the two sworn statements was disallowed.

Discussion and Decision

20. With the foregoing we turn to briefly consider the grounds of appeal and we set out the provisions of Rule 18.11 of the Civil Procedure Rules:

> "***18.11 Failure to comply with an order***
>
> *(1) This rule applies if a party fails to comply with an order made in a proceeding dealing with the progress of the proceeding or steps to be taken in the proceeding.*
>
> *(2) A party who is entitled to the benefit of the order may require the non-complying party to show cause why an order should not be made against him or her.*
>
> *(3) The application:*
>
> *(a) Must set out details of the failure to comply with the order; and*
> *(b) Must have with it a sworn statement in support of the application; and*
> *(c) Must be filed and served, with the sworn statement, on the non-complying party at least 3 business days before the hearing date for the application.*
>
> ***(4) The court may:***
>
> ***(a) Give judgment against the non-complying party; or***
> ***(b) Extend the time for complying with the orders; or***
> ***(c) Give directions; or***
> ***(d) Make another order.***
>
> *(5) This rule does not limit the court's powers to punish for contempt of court*".
>
> (our highlighting)

21. As to ground (1) – Whether the Supreme Court judge had properly exercised his discretion under Rule 18.11(4), the appellants submit that given the existence of the decision of the Eratap Land Tribunal and the Court of Appeal in Civil Appeal Case No. 33 of 2013, the Court should have granted the Appellants further time to file defence as the appellants were the declared custom land owner of land areas in respect of Land Case No. 1 of 2004.

22. This ground constitutes an appeal against the exercise of the Court's discretion under Rule 18.11(4) (highlighted above). In order to succeed on such an appeal, the Appellants must establish that the Court in exercising its discretion either ignored relevant matters or considered irrelevant matters that it should not have taken into account or constituted a miscarriage of justice (see in this regard: para. 30 of this Court's recent judgment in Molvatol v. Molsakel [2015] VUCA 22).

23. The indisputable fact is that the judge made a clear order for the Appellants to file their defence(s) and sworn statement(s) on 16 October 2015 and as at the 18 March 2016 (5 months later and after 2 extensions), no defence or sworn

statement(s) had been filed and no application had been made for an extension of time to do so, nor had the Appellant's attempted to "*show cause*" by filing sworn statements. In the face of that persistent, egregious, and unexplained breach of the Court's order and in the absence of any evidence to support a further extension of time, the Appellant's cannot be heard to now complain that the Supreme Court chose the wrong alternative in Rule 18.11(4).

24. After careful consideration of the Appellants written and oral submissions we are not satisfied that the Supreme Court erred in the exercise of its discretion.

25. The second and remaining ground of appeal seeks to challenge orders (b), (c) and (d) in the Supreme Court's decision which required the Appellants to account and repay the VT17,823,077 they received under the Deed of Release [**order (b)**]; restrained the Second Respondents from releasing any further funds held in trust to the Appellants [**order (c)**]; and finally **order (d)** which directed the cancellation of a certificate of registered interest in land in favour of the Appellants and the issuance of a new certificate of registered interest in land to include the First Respondents and the Appellants in their representative capacities.

26. Appellants submissions are again based on a literal reading of the typewritten decision (not the handwritten record on the statutory Form) of the Tribunal in Land Case No. 1 of 2004, and the judgment of the Court of Appeal in Civil Appeal Case No. 33 of 2013 confirming its finality and reinforced by a submission that the First Respondents were neither named as parties or declared custom owners of the disputed lands.

27. We are satisfied that the submission is based on a misconstruction of the intituling and the declarations of the Eratap Land Tribunal in Land Case No. 1 of 2004 which makes it clear that the Appellants are declared custom owners in their representative capacities consistent with Article 73 of the Constitution which declares that ***"all land in Vanuatu belongs to the indigenous custom owners and their descendants"***, and not as private individuals.

28. We are also fortified by the decision in West Tanna Area Council Land Tribunal v. Natuman [2010] VUCA 35 where the Court of Appeal expressed the view that the expression: *".....the parties to the dispute"* under the Customary Land Tribunal Act [Cap 271] (under which Land Case No. 1 of 2004 was brought and determined) was *"...not intended to be a restrictive one and may include any party whose proper interest may be affected by the resolution of the dispute."*

29. Given the earlier-mentioned determination of the Efate Island Court in Civil Case No. 1 of 2014 in the First Respondent's favour, there can be no doubting that the

First Respondents are a proper "*party to the dispute*" in Land Case No. 1 of 2004. Additionally, the First Respondents have a legitimate and proper interest in the declaration of the Eratap Customary Land Tribunal which resolved the customary ownership of the disputed lands.

30. For completeness, we note that the certificate of registered interest in land which was issued in favour of the Appellants over "*Naisraper & Etas custom land*" was purportedly done pursuant to Section 19 of the Custom Land Management Act No. 33 of 2013. The certificate is clearly based on the typewritten decision of the Eratap Village Land Tribunal dated 18 May 2004.

31. We say "*purports*" advisedly because section 19 refers to decisions where "*... custom owners are determined by a nakamal*" which has no application to the decision of the Tribunal in Land Case No. 01 of 2004. Indeed the relevant provision is Section 58 which provides that an unchallenged decision of a Customary Land Tribunal is "*... deemed to create a recorded interest in land in respect of the person or persons determined to be a custom owner*".

32. As already pointed out the relevant decision "*for all purposes*" is not the typewritten judgment but rather, the decision signed by the chairperson and secretary of the Tribunal in Land Case No. 1 of 2004 which is the handwritten decision incorporated in the requisite statutory Form dated 23 August 2004 and which clearly includes the name of "*Kalkot Kaltatak*" as a custom owner of the disputed lands. In so far as the existing certificate only records the names of the Appellants as the custom owners of the mentioned lands, it is inacurate and incomplete.

33. Subject to the inclusion of Kalkot Kaltatak as representing the Kaltatak family in the certificate of a registered interest and the deletion of the name of "*Jack Kalmet*" who was not named in the handwritten decision of the Tribunal, this second ground of appeal is also dismissed.

34. The appeal is accordingly dismissed with costs of the appeal ordered to be paid by the Appellants alone.

DATED at Port Vila this 22 day of July, 2016

BY THE COURT

Hon. Vincent Lunabek
Chief Justice.

REPUBLIC OF VANUATU COURT OF APPEAL COUR D'APPEL REPUBLIQUE DE VANUATU