

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

Civil Appeal Case No. 16/3627 CoA/CIVA

**BETWEEN: FAMILY KALMET**  
*Appellant*

**AND: NORRIS JACK KALMET**  
*First Respondent*

**HUGGO BRUGGER**  
*Second Respondent*

**THE REPUBLIC OF VANUATU**  
*Third Respondent*

**FAMILY KALTAKTAK**  
*Fourth Respondent*

**Coram:** *Hon. Chief Justice Vincent Lunabek*  
*Hon. Justice von Doussa*  
*Hon. Justice Ronald Young*  
*Hon. Justice Daniel Fatiaki*  
*Hon. Justice Dudley Aru*  
*Hon. Justice David Chetwynd*  
*Hon. Justice Paul Geoghegan*

**Counsel:** *Silas Hakwa for the Appellant*  
*Felix Laumae for the First, Second and Fourth Respondents*  
*Sammy Aaron (SLO) for the Third Respondent.*

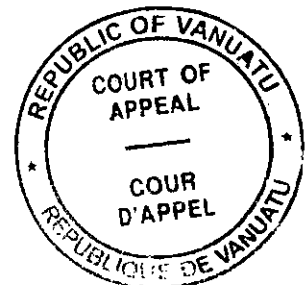
**Date of Hearing:** *Thursday July 13<sup>th</sup> 2017*  
**Date of Judgment:** *Friday July 21<sup>st</sup> 2017*

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**JUDGMENT**

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1. This appeal lies from a decision in the Supreme Court on September 27<sup>th</sup> 2016, which determined that the appellant's claim before the Supreme Court could not proceed

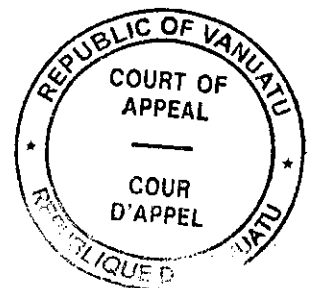


because of the application of res judicata. Accordingly the trial judge struck out Family Kalmet's claim in its entirety.

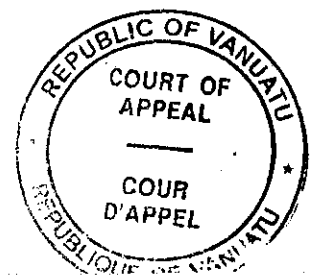
2. While there were a number of expressed grounds of appeal in the notice of appeal filed by Family Kalmet the essence of the appeal is that res judicata was wrongly applied by the trial judge and that accordingly, the decision to dismiss Family Kalmet's proceedings was wrong.

### **Background**

3. There is a significant background to these proceedings which involve various disputes between the parties in these proceedings relating to land located at Eratap on the island of Efate and specifically land the subject of leasehold title No. 12/0932/138 ("*lease 138*").
4. In June 2010, Family Kalmermer filed a statement of claim in the Supreme Court seeking an order that lease 138 be rectified by cancellation of the registration of the lease. All of the parties in the proceedings before this Court were named as defendants in those proceedings ("*CC 83 of 2010*").
5. Other orders were also sought by Family Kalmermer including an order that Huggo Brugger and any member of his immediate family be evicted from the property and orders that Family Kalmet, Norris Jack Kalmet, Huggo Brugger and Family Kaltaktak be dealt with by the Court for contempt.

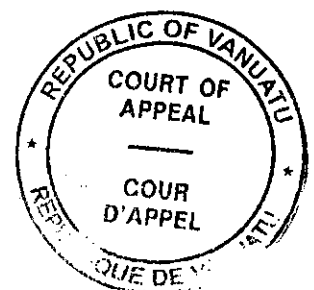


6. In CC 83 of 2010 Family Kalmermer claimed that despite express orders made in the Supreme Court preventing any dealing of any kind with the subject land, Families Kaltaktak and Kalmet had wrongfully purported to issue lease 138 to Norris Jack and that, despite that lease not having been registered, Families Kaltaktak and Kalmet had then also wrongfully executed a consent to enable Norris Jack to transfer lease 138 to Huggo Brugger.
7. The reason for the existence of Supreme Court Orders preventing any dealing with the land was that a judgment of the Efate Island Court determining custom ownership of the land had been appealed to the Supreme Court and that appeal had not yet been determined. The order in the Supreme Court was accordingly a "holding order" pending the outcome of that appeal.
8. Family Kalmermer specifically pleaded that the granting of lease 138 by Families Kalmet and Kaltaktak and the subsequent transfer of that lease by Norris Jack to Huggo Brugger were procured by mistake and/or fraud.
9. In its statement of defence filed on behalf of Family Kalmet and Norris Jack the defendants pleaded, inter alia, the following:-
  - a) Families Kaltaktak and Kalmet were the declared custom owner of Eratap land which included the land within lease 138;

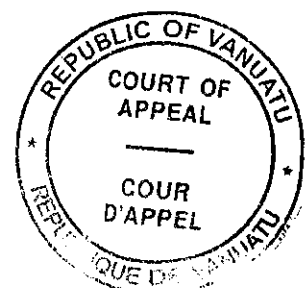


- b) They acknowledged that lease title 12/0932/059 had been surrendered in order to create lease 138 and another lease title, 137, but that the Supreme Court stay order did not include the land within leases 137 and 138;
- c) The authorized representative of Family Kalmermer had consented to creation of the two new lease titles and the subsequent transfer of lease 138 to Huggo Brugger.

10. It will be clear from the above that the issue of fraud and mistake together with circumstances surrounding the issuing of lease title 138 and its subsequent transfer were very much a focus of family Kalmermer's claim. In their statement of defence both Family Kalmet and Norris Jack admitted both fraud and mistake.
11. Mr Jack subsequently applied for an order staying the proceedings pending the resolution of a land appeal case which had the potential to finally determine the issue of custom ownership of the land in respect of lease 138. That application was determined by Fatiaki J. in a judgment issued on June 10<sup>th</sup> 2016.
12. In his judgment, Fatiaki J. dismissed Family Kalmermer's claim in CC 83 of 2010. The reason for doing so was primarily that in April 2014 the Court of Appeal had affirmed and upheld the declarations of customary ownership made by the Eratap Customary Land Tribunal which determined customary ownership in favour of Families Kaltaktak and Kalmet. Family Kalmermer were therefore no longer able to sustain a claim that they had a lawful right to issue lease 138 and that Families Kalmet and Kaltaktak did not.



13. Accordingly CC 83 of 2010 did not proceed to a hearing and no findings of fact were ever made about the allegations of fraud and mistake.
14. The proceedings the subject of this appeal were filed in May 2015 a full year prior to the judgment of Fatiaki J. In its statement of claim Family Kalmet sought a declaration that lease 138 was registered to the benefit of Norris Jack Kalmet by fraud and/or mistake. It alleged that Norris Jack had held the lease in trust for the benefit of Family Kalmet and had breached his duties as trustee by failing to get the consent of Family Kalmet to the transfer and forging the signatures of the representatives of Family Kalmet to effect the transfer of the lease title to Huggo Brugger. An order was sought cancelling the registration of lease 138 and for an award of damages against Norris Jack and Huggo Brugger. The defendants in the proceedings were Norris Jack, Huggo Brugger, the Republic of Vanuatu and Family Kaltaktak.
15. In its statement of claim Family Kalmet alleged:-
- a) That the lease 138 was transferred to Norris Jack on the condition that he held it in trust for the benefit of Families Kalmet and Kaltaktak.
  - b) That in transferring lease 138 to Huggo Brugger, Norris Jack did not obtain the consent, authorisation and approval of Families Kalmet and Kaltaktak to transfer the lease.
  - c) That the transfer of the lease to Huggo Brugger was procured by fraud namely that the signature of the representatives of Families Kalmet and Kaltaktak had been forged on the consent to transfer document;

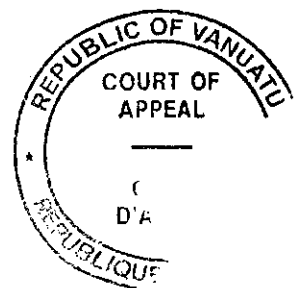


- d) That on December 6<sup>th</sup> 2009, Families Kalmet and Kaltaktak had written to the Director of the Department of Lands, Survey and Records and requested that he revoke the lease.
- e) That notwithstanding that, the lease had been registered.

### Supreme Court Judgment

16. The judgment under appeal arose out of an application filed by Norris Jack and Huggo Brugger that the claimant's claim be struck out in its entirety. The grounds for the application were that the creation and registration of lease 138 had been challenged and determined by Fatiaki J in CC 83 of 2010, that CC 99 of 2015 involved all of the same parties and that given that there had been no appeal of the judgment of Fatiaki J the issue of validity of the creation and transfer of lease 138 was res judicata.
17. After referring to counsel's submissions and the authorities referred to, the trial Judge stated:-

*"11. First the public interest issue that these cases need finality is important. The disputes between these parties, except for the second and third defendants go back to 1993. The chronology of events are usefully set out by Fatiaki J in Civil Case No. 83 of 2010. Whilst other proceedings in the Efate Island Court and Custom Land Tribunals involved determination of customary ownerships, CC 83 of 2010 and this proceeding concerns challenges of registration and transfer of lease title 12/0932/138 on the basis of mistake or fraud.*



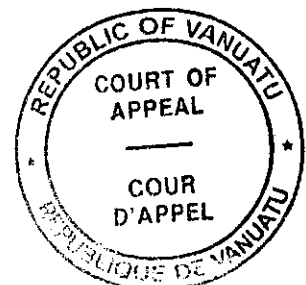
12. Whilst it is correct that Family Kalmermer, the claimant in CC 83 of 2010 is not a party to this proceeding, the current claimant was the second defendant, the first defendant was the third defendant and the fourth defendant is now the Second Defendant. The Republic was fifth defendant, now third defendant and Kalorib Kalmermer was sixth defendant, is not now a party. Does it matter? The answer is No. The subject matter is the same. It is a challenge about the registration and transfer of Lease 12/0932/138.

13. Mr Ngwele argued that CC 83 of 2010 only challenged the registration of lease by mistake and not fraud, and therefore it is not *res judicata*. This argument is untenable and is rejected in light of the ruling by the Chief Justice in Claire Dornic's Case which states:-

"This application of *res judicata* not only applies to facts being produced for reasons that it is already been adjudicated but also in circumstances where a party has had the opportunity to raise his claim in the first proceeding but did not do so therefore being precluded from making such similar claim again". (Underling for emphasis.)

14. In paragraph 16 of the Claimant's claim, he pleads mistake as well as pleading fraud in paragraph 12. He had the opportunity to have done that in CC 83 of 2010 but did not. He cannot therefore be given a second opportunity. Indeed Family Kalmermer pleaded fraud in paragraphs 43, 44, 45, 46 and 48 of their claims".

18. Further at paragraph 16 the trial Judge stated:-

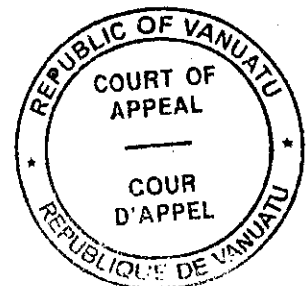


"16 It is therefore clear to me that the parties in this proceeding have been vexed twice in the same matter. The real parties were Family Kalmet, not Andrew Pakoa Kalpoilep as a representative or an individual. If the Family Kalmet consented to grant the lease to their sibling Norris Jack Kalmet, and subsequently consented to its transfer to the second defendant in September 2009, that is sufficient. There is no evidence there were issues of mistake or fraud then. Why did it have to arise only in 2015, some six years or so later?

17. It is ultimately clear to me that this matter is *res judicata*. Accordingly, the application is allowed. The claims of the claimant in Civil Case No. 99 of 2015 are hereby struck out in its entirety. The proceedings is an abuse of process."

#### Discussion

19. In these proceedings Mr Hakwa, appearing for Family Kalmet conceded that Family Kalmet could, in CC 83 of 2010, have applied for the relief that was applied for in CC 99 of 2015.
20. What is clear is that all of the facts giving rise to the claim in CC 99 of 2015 were known to Family Kalmet at the time CC 83 of 2010 was before the Court.
21. Despite the opportunity presented to Family Kalmet to raise the issue of fraud in respect of the transfer of the lease to Norris Jack and then on to Huggo Brugger, Family Kalmet did not do so. In response to paragraph 23 of the statement of claim in CC 83 of 2010 which alleged that the representatives of Family Kaltaktak and Kalmet "wrongfully



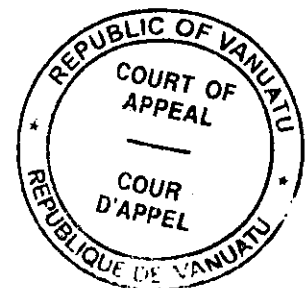


purported to execute a consent to enable [Norris Jack] to transfer the property comprised in the purported lease to [Huggo Brugger]”, Family Kalmet in its statement of defence pleaded that:-

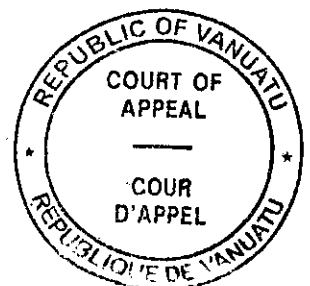
“16. [Family Kalmet] and [Norris Jack] deny paragraphs 23 and 24 of the claim and further say that the authorized representative of claimant Family Chief Kalmermer had consented to creation of the two (2) new titles and subsequent transfer of lease title 12/0932/138 to the fourth defendant. The claimant family is the one who received Vt 5 million from [Huggo Brugger] for the transfer of lease title 12/0932/138 to [Huggo Brugger].”

22. That statement of defence is dated June 25<sup>th</sup> 2010 yet by letter of December 6<sup>th</sup> 2009 Chief Pakoa Andrew as representative for Family Kalmet and Kaltapas Kaltatak as representative for the Kaltatak Family had written to the Director of the Lands Department stating, inter alia, that:-

“We confirm that Chief Pakoa Andrew Kaltapas Kaltatak and Jack Kalmetlau, lessors of this land lease did not sign their signatures to grant consent for transfer of this land lease to Huggo Brugger are enquiring into the matter confirmed that Norris Jack forged Chief Pakoa Andrew’s signature and Jack Kalmetalu’s signature on the consent form, and Kalkot Kaltatak forged Kaltapas Kaltatak’s signature. In a meeting with Chief Pakoa Andrew, Norris Jack admitted they forged the signatures of the lessors. This matter is being reported to the police and an investigation is now underway to lay charges against Norris Jack and Kalkot Kaltatak for prosecution”.

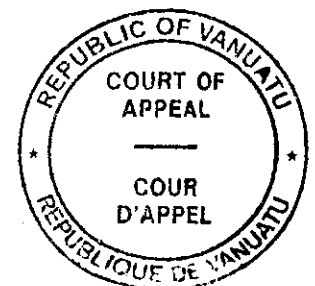


23. Accordingly despite that clear allegation of fraud a statement of defence was filed on behalf of the Family Kalmet and Norris Jack some seven months later in CC 83 of 2010 which does not refer to that specific incident of fraud at all.
24. In addition, in a sworn statement dated December 6<sup>th</sup>, 2010 and filed in CC 83 of 2010, Norris Jack stated :
- "10. The subject lease was issued to me by Kalmet Family and Kaltaktak Family who are the declared custom owners. I have transferred my interest in my lease to the Fourth Defendant with the consent of Kalmermer Family."*
25. No statements were filed on behalf of Family Kalmet and Family Kaltaktak which challenged that assertion despite the fact that representatives of both families had gone to the police earlier regarding their allegations of fraud against Norris Jack.
26. It was submitted on behalf of the appellants that the Supreme Court in CC 83 of 2010 did not give Family Kalmermer any opportunity to call evidence to support their claim and at no time made any decision on whether or not the registration of the lease or transfer of the property was made or procured by fraud and mistake.
27. While that may be so, there was good reason for that. The resolution of the issue of customary ownership had effectively determined Family Kalmermer's claim. As there were no other claims by Family Kalmermer for resolution the proceedings were at an end.



The issue however, in terms of the application of res judicata is whether or not Family Kalmet, being in possession of all of the facts which would presumably substantiate its alleged claim of fraud against Norris Jack and Huggo Brugger, was under an obligation to place all of those issues before the Court in CC 83 of 2010 to avoid an unnecessary duplication of proceedings. Clearly the trial Judge in CC 99 of 2015 took the view that Family Kalmet was under such an obligation.

28. Mr Hakwa submitted that there was no explanation provided in the trial Judge's notes as to why it was considered appropriate to hear the defendant's application for an order to strike out the applicant's claim rather than proceed to trial as previously ordered. The Judge was not required to provide an explanation. The Judge was required to determine the application which had been filed and he chose to do so. There can be no criticism of his decision in that regard.
29. For Family Kalmet, Mr Hakwa submitted that the Supreme Court did not hear or determine the substantive issues in claim CC 83 of 2010 and that at no time did the appellant waive its right to pursue a claim.
30. While the final determination of substantive issues is certainly a factor in whether or not proceedings are considered res judicata, in this case the point is not that Family Kalmet had a claim against Family Kalmermer with reference to the integrity of the registration of the lease. Family Kalmet's claim was against Norris Jack and Huggo Brugger who were also parties in CC 83 of 2010, a claim in which the clear focus of the proceedings was the



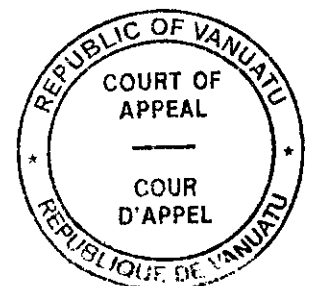
legitimacy of the process of registration of the lease. Whether Family Kalmet waived its right to pursue the claim is immaterial as the enquiry focuses upon whether or not, in accordance with the principals referred to above, it should have raised all matters before the Court.

31. It is equally immaterial, that the issues raised in Civil Claim 99 of 2015 *“are serious and do raise live issues between the parties concerned which the appellant is entitled to pursue in Court”* as submitted by Mr Hakwa. Every legitimate case before the Court raises serious and live issues between the parties. The focus of the enquiry is not upon whether serious and live issues are raised but whether or not those issues should have been raised in earlier proceedings.
32. Equally irrelevant are the submissions on behalf of Family Kalmet that the only claimant in CC 83 of 2010 was Family Kalmermer and that accordingly Family Kalmet *“did not have to plead anything in that case”*. Again, the focus is upon whether Family Kalmet could and should have issued cross claims against Norris Jack and Huggo Brugger during the course of CC 83 of 2010.
33. Closely related, if not intertwined, with the principal of res judicata is the principle of finality in litigation which is one of universal application. Those principles and a number of cases which considered them were reviewed by the House of Lords in Johnson v Gore Wood and Co.<sup>1</sup> In delivering the leading speech Lord Bingham stated :

*“ The bringing of a claim or the raising of a defence in later proceedings may, without more, amount to abuse if the Court is satisfied (the onus being on the party*

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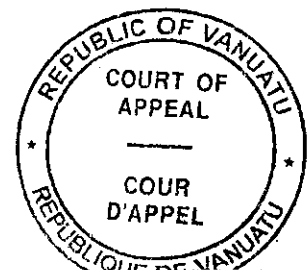
<sup>1</sup> [2000] UKHL 65; [2001] 1 All ER 481.



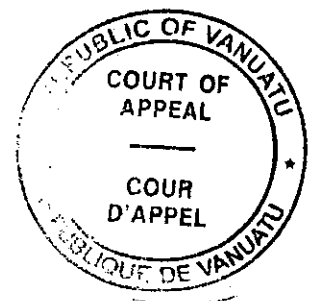
*alleging abuse) that the claim or defence should have been raised in the earlier proceedings if it was to be raised at all. I would not accept that it is necessary, before a abuse may be found, to identify any additional element such a collateral attack on a previous decision or some dishonesty, but where those elements are present the latter proceedings will be much more obviously abusive, and there will rarely be a finding of abuse unless the later proceedings involve what the Court regards as unjust harassment of a party. It is, however wrong to hold that because a matter could have been raised in early proceedings it should have been, so as to render the raising of it in later proceedings necessarily abusive. That is to adopt too dogmatic an approach to what should in my opinion be a broad, merit based judgment which takes account of the public and private interests involved and also takes account of all the facts of the case, focusing attention on the crucial question whether, in all the circumstances, a party is misusing or abusing the process of the Court by seeking to raise before it the issue which could have been raised before".*

( Emphasis added )

34. As against all of the factors we have mentioned, we recognize that this is an unusual case with a number of significant facts which, in our assessment, render res judicata inapplicable in this case.
35. Firstly, res judicata is normally applicable in circumstances where there has been a final determination of the substantive issues before the court. Given the determination of those issues the application of res judicata operates to prevent those issues from being litigated again and also extends to arguments or issues which should properly have been determined at that time.



36. In this case there was clearly no final determination of the issues of fraud and mistake. The proceedings came to an end simply because Family Kalmermer could no longer sustain a claim to the land as custom owners. The issue of custom ownership determined the outcome – not the issue of fraud and mistake. The allegations of fraud and mistake had been specifically admitted by the appellants in CC 83 of 2010.
37. Secondly, while Mr Hakwa responsibly conceded that the discrete issue of the alleged fraud of Norris Jack and Huggo Brugger could have been introduced to CC 83 of 2010, it could not be said that Family Kalmet had sat on their hands. Twelve months prior to the dismissal of the proceedings in CC 83 of 2010 Family Kalmet had filed a claim which alleged the fraud they had complained of in 2009. In such circumstances they could be forgiven for believing that they had placed their allegations squarely before the court albeit by way of separate proceedings. It is worthy of note also that they had instructed different counsel in CC 99 of 2015 from the proceedings in CC 83 of 2010. Counsel in CC 99 of 2015 could not have been expected to have been aware of the hearing before Fatiaki J.
38. Thirdly, the application being considered by Fatiaki J. was an application by Norris Jack to stay the proceedings in CC 83 of 2010. The application was not intended to provide a vehicle for resolution of claims of fraud and mistake and accordingly the parties attention would not have been focused on that issue. This was not an application to strike out a claim, something which would have then required the parties to focus on the allegation of fraud and mistake. While the decision of Fatiaki J. in dismissing the claim was entirely

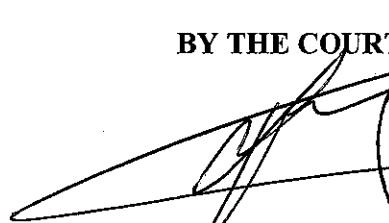


appropriate in the circumstances, that order was incidental to the determination of the primary issue, namely whether the proceedings should be stayed,

39. Given these factors we consider that the principle of res judicata does not apply to this case. We are of the view that these factors were not taken into consideration or given sufficient weight by the trial Judge. We would add however that we consider the circumstances of this case to have been highly unusual.
40. For these reasons we allow the appeal. The order dismissing the claimants claim is quashed. The claimants claim in CC 99 of 15 is reinstated and the matter remitted back to the Supreme Court for determination.
41. Costs are granted to the appellants on the standard basis to be agreed or taxed.

**DATED at Port Vila this Friday 21<sup>st</sup> day of July 2017**

**BY THE COURT**

  
**Vincent LUNABEK**  
**Chief Justice**

