

**BETWEEN: KALKOT MATASKELEKELE FOR FAMILY MATAS**  
*Appellant*

**AND: KALSALE FAMILY OF IFIRA**  
*First Respondent*

**CHRISTIANE BRUNET**  
*Second Respondent*

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

**Coram:** *Hon. Chief Justice Vincent Lunabek*  
*Hon. Justice Raynor Asher*  
*Hon. Justice Dudley Aru*  
*Hon. Justice Richard White*  
*Hon Justice Viran Trief*

**Counsel:** *Mr K Mataskelekele in person*  
*Mr K Kalsakau for the First Respondent*  
*No appearance for the Second Respondent*  
*Ms Samuel for the Third Respondent*

**Date of Hearing:** 5 May 2021

**Date of Decision:** 14 May 2021

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## JUDGMENT

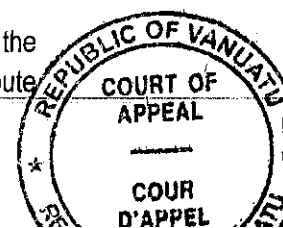
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### Introduction

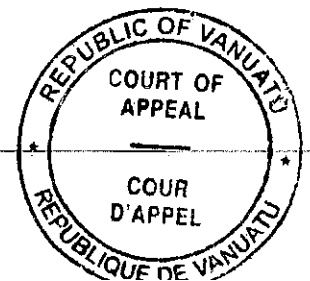
1. This appeal concerns two decisions of Saksak J of 16 October 2020 and 2 December 2020. The first decision struck out the Appellant Kalkot Mataskelekele's claim, and the second decision refused to suspend that strike out. The appeal is opposed by the First Respondent, the Kalsale Family of Ifira. There has been no appearance for the Second Appellant (consistent with non-appearances in the Supreme Court) and the Republic of Vanuatu has been represented by Counsel in this appeal, but has taken no steps and made no submissions. The Republic abides the decision of the Court.

### A brief background

2. Underlying the issues before us is a family dispute between Mr Mataskelekele's family and the Kalsale Family of Ifira, concerning customary land located near Port Vila. The history of the dispute goes back to 1964, and perhaps earlier, and is complex.



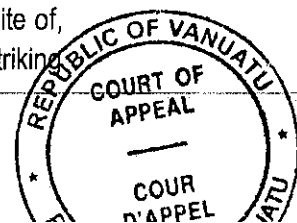
3. There are proceedings in the Efate Island Court (Land) designed to determine the issues relating to this land.
4. The Supreme Court decision from which this appeal arises is essentially a claim that the First and Second Respondents be restrained from dealing with the disputed land pending the outcome of the hearing in the Island Court (Land). There is a proposed sale and purchase of the disputed land. There is also a claim to restrain the disposition of any proceeds of sale.
5. The Republic of Vanuatu is joined and orders are sought restraining the Minister and Director responsible for Land, Land Survey and the Land Records Office from dealing with the land until further orders of the Court. Interlocutory orders were made on 30 April 2020.
6. In a decision of 15 June 2020, Saksak J declined an application to strike out those orders and the statement of claim. The Judge refused to find that the Appellants were estopped from appealing or seeking a review and found the First Respondent's other submissions untenable. The Appellant and his family were found to have standing. The application to strike out was held to be misconceived, and costs were awarded in favour of the Appellants.
7. By September 2020, the Appellant had failed to meet various timetable orders that had been made for the filing of documents. There was a hearing on 2 September 2020 to which Mr Mataskelekele arrived late and sought time to make written submissions. The Judge gave Mr Mataskelekele seven days to file and serve his response and submissions.
8. On 16 October 2020, the Judge issued a decision setting aside his earlier decision of 15 June 2020, and ordering that the claim be struck out. He noted:
  4. *As at 16 October 2020 no response and/or submissions has been filed by Mr Mataskelekele.*
  5. *The application by the first defendant is therefore unchallenged. And I am persuaded by the submissions of Mr Kalsakau and accept them in their entirety.*
9. The appellants then applied to have the decision of 16 October 2020 suspended pending appeal. The Judge heard that application and gave his decision on 2 December 2020.
10. The Judge dismissed that application. The substance of his Judgment is at paragraphs [17] and [18]:
  17. *As of 16<sup>th</sup> October 2020 I had not seen the Reply despite Mr Mataskelekele showed in evidence it was filed on 11<sup>th</sup> September 2020. Even then it was 2 days late. By directions issued 2 September 2020 Mr Mataskelekele sought time to file responses and the Court gave him 7 days to do so. By 9<sup>th</sup> September 2020 Counsel had not complied with clear directions. There is therefore little or no scope for complaint.*



18. *The second ground. The issue of estoppel and resjudicata. The reality is that there as been 2 decisions of different land tribunals. As a result, a certificate of registered interest has been issued to the First Defendants. That document is dated 29<sup>th</sup> June 2016.*
11. This appeal is against the two decisions. The first is of 16 October 2020 striking out the claim, and the second is of 2 December 2020 declining to stay the decision of 2 December 2020.

### Assessment

12. It is plain that through no fault of his own, the Judge was in error when he issued his second decision of 16 October 2020. He understood that the documents he had ordered to be filed by Mr Mataskelekele within seven days had not been filed. However, in fact they had been filed, although the filing was late by a few days. The documents had been on the file for over a month when he issued his decision. The reply of the Appellants that had been directed to be filed within seven days had been filed two days late on 11 September 2020.
13. The document has been produced and there is a Court stamp on it showing the receipt of the document at 4:30pm on 11 September 2020. A Sworn Statement of Mr Mataskelekele was also filed on that date, and this is also evidenced by the same stamped receipt. A further Sworn Statement filed by the Appellants was filed three days later on 14 September 2020. Again, there is a stamped receipt. Ultimately, the First Respondent did not dispute that these documents had in fact been filed, and for some reason not drawn to the attention of the Learned Judge.
14. This concession, rightly made, means that the decision of 16 October 2020 striking out the claim because of a failure to file a response was based on an incorrect understanding of the crucial facts. Contrary to the basis of the order, the documents required had been filed over a month prior to the decision of 16 October 2020 being made.
15. There must be very good reason to strike out a claim, and the central facts on which the strike out is based must be accurate. When the factual matter relied on in striking out is shown to be entirely wrong, the striking out order cannot stand. For this reason only, this appeal must succeed.
16. The fact that the 16 October 2020 order should never have been made, means that the second order appealed of 2 December 2020, must also be set aside by this Court. The Judge appeared to think that because Mr Mataskelekele's reply was in any event two days late, he had little or no scope for complaint. We cannot agree with that assessment. While Mr Mataskelekele's response was late by two days, given that the proceedings had only issued earlier in the year, striking out without further notice that this was in contemplation was a far too drastic response to such a two-day delay.
17. We also must comment on the second ground referred to in the decision declining to stay the strike out of 2 December 2020, namely that the issue had already been determined and estoppel and *res judicata* applied. First, this appears to be a decision that is contrary to, and the opposite of, the Judge's first assessment of 15 June 2020, where he held that there was no basis for striking



out because of an estoppel. In that earlier decision, Mr Mataskelekele's submissions on estoppel had been plainly regarded as at least arguable.

18. Mr Kalsakau endeavoured to persuade us that there had been an earlier decision of the Ifira Land Tribunal which established an estoppel. We can only say that the document that he sought to rely on as the relevant Land Tribunal decision appears on its face not to be a decision of that Tribunal, but rather as Mr Mataskelekele submitted, to be a decision of the Ifira Council of Chiefs. However, we do not determine that issue which will require a full hearing.
19. Suffice to say, the First Respondent's submission that on its merits this proceeding was rightly struck out is not persuasive, and is certainly not a basis for dismissing this appeal.

### **Conclusion**

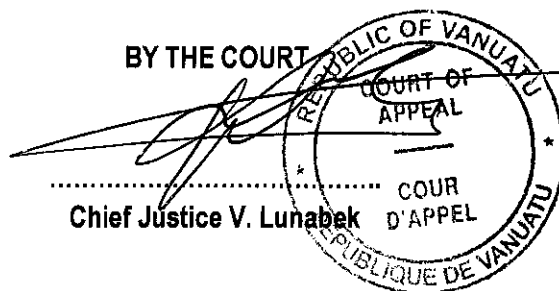
20. We conclude that the circumstances before the Learned Judge when he issued his first decision on 16 October 2020 did not warrant the application being struck out. The Judge was not aware that the ground he relied on, namely a failure to file documents in gross breach of a timetable order, was wrong, as the documents had been filed. We also reject the argument that in any event the case warranted striking out because it plainly could not succeed. That has not been established.

### **Result**

21. For the avoidance of doubt, we record that any interlocutory orders holding the position that were in place on 16 October 2020, remain in force.
22. The appeal is allowed.
23. Mr Mataskelekele represented himself and is not entitled to legal costs. He is however entitled to recover his out-of-pocket disbursements in successfully pursuing this appeal, which we fix at VT 20,000.
24. The costs order against Mr Mataskelekele made in the Supreme Court in the two decisions of 16 October 2020 and 2 December 2020 are set aside.

**DATED at Port Vila, Vanuatu this 14<sup>th</sup> day of May, 2021**

**BY THE COURT**



**Chief Justice V. Lunabek**