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

Civil Appeal
Case No. 24/814 COA/CIVA

BETWEEN: **Jeffrey Tokataake, Nisos Meneal, Peter Tulangi, Samson Abock, Kalmaling Mangawai, Antonio Kaltaki**
Appellants

AND: **Family Kalsakau (represented by Ephraim Kalsakau & others)**
First Respondents

AND: **Ifira Land Corporation Limited**
Second Respondent

AND: **John Nalwang, Acting Coordinator of the Customary Land Management office**
Third Respondent

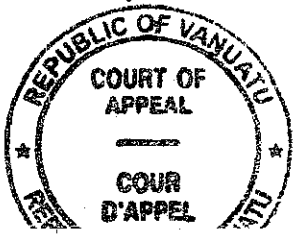
Date of Hearing:	***10 May 2024***
Before:	***Hon. Chief Justice V. Lunabek*** ***Hon. Justice J.W. von Doussa*** ***Hon. Justice R. Asher*** ***Hon. Justice V.M. Trief*** ***Hon. Justice E.P. Goldsbrough*** ***Hon. Justice W.K. Hastings***
In Attendance:	***K.T. Tari for the Appellants*** ***S. Kalsakau for the First & Second Respondents*** ***F. Bong & S. Aron for the Third Respondent***
Date of Decision:	***17 May 2024***

JUDGMENT OF THE COURT

A. Introduction

1. This was an appeal against the Supreme Court judgment in which a Certificate of Recorded Interest in Land dated 17 November 2023 was quashed and a declaration made that Judgments No. 57 and 62 of the Joint Court of the New Hebrides are not judgments declaring custom ownership of land and are not capable of creating any recorded interests in land. The judgment was made following a Rule 17.8 conference.

2. The Certificate of Recorded Interest in Land, colloquially known as a "green certificate", had been issued in favour of the appellants Jeffrey Tokataake and others as a result of judgment No. 62 of



the Joint Court of the New Hebrides. The first respondents Family Kalsakau and the second respondent Ifira Land Corporation Limited filed an Urgent Claim for Judicial Review seeking an order quashing that green certificate.

3. On 15 February 2024, the primary Judge conducted a Rule 17.8 conference at which he considered the matters set out in rule 17.8(3) of the *Civil Procedure Rules*. State counsel handed up at that conference copies of the green certificate and of the Joint Court judgment No. 62.

4. The primary Judge issued judgment the following day in which he set out that he was satisfied that the claimants (now first and second respondents) had an arguable case, were directly affected by the decision for review, that there was no undue delay in making the claim, and that there was no other remedy to resolve the matter fully. He also held in the judgment that Joint Court judgment No. 62 referred to a deed of sale but did not contain a declaration of customary ownership of land, and that Joint Court judgment No. 57 (which was the one referred to in the judicial review Claim) also did not contain any declaration of custom ownership of land. He entered judgment for the claimants, quashed the green certificate and declared that the Joint Court judgments No. 57 and 62 were not judgments declaring customary ownership nor were they capable of creating any recorded interests in land.

5. The appellants appeal to this Court on the ground that the primary Judge erred in deciding the substantive Claim at the rule 17.8 conference without allowing them to file evidence to support their defence.

B. Discussion

6. At the hearing before this Court, appellants' counsel Mr Tari accepted that the Joint Court judgment No. 62 does not contain any declaration of custom ownership of land and that therefore, there was no merit to the appeal.

7. Mr Tari accepted that the relevant evidence had been filed in this Court, including copies of the green certificate dated 17 November 2023 and of the Joint Court judgment No. 62 dated 11 July 1930. He submitted, however, that the appeal was as to procedure only in that the primary Judge decided the substantive Claim at the rule 17.8 conference without allowing the appellants to file evidence.

8. However, when questioned by the Bench, Mr Tari could not point to a matter that if the appellants had been allowed to file evidence to support their defence, would have given them an arguable defence.

9. This Court has previously held that the New Hebrides Native Courts, subject to an appeal to the Joint Court, were empowered to hear and determine disputes over custom ownership of land. Decisions on custom ownership made under this legal regime were binding and enforceable on the parties in dispute and remained so until Independence: *Kalotiti v Kaltapang* [2007] VUCA 25 at p. 4. Decisions of Native Courts that were binding on indigenous custom owners of land immediately before Independence became binding on them after Independence by virtue of Article 95(2) of the Constitution: *Kalotiti v Kaltapang* [2007] VUCA 25 at p. 5.

10. However, judgment No. 62 of the Joint Court was not made in respect of an appeal from a Native Court decision determining custom ownership of land. It was made on the application of Mr Jacques le Peltier, a French citizen seeking the registration of a parcel of land in Vila, in recognition of his being the current holder of a chain of title which commenced with a deed of sale between him and a number of natives of "*the tribe of Vila*". It did not contain any determination of custom land ownership.

11. Following Independence, only a competent Court set up by law could determine custom ownership (see *Valele Family v Touru* [2002] VUCA 3), or following the enactment of the *Customary Land Tribunal Act* No. 7 of 2001, a customary land tribunal. Since the Sixth Amendment of the Constitution which came into force on 21 January 2014, disputes as to land ownership and any disputes over custom land must be resolved by customary institutions and procedures pursuant to the *Custom Land Management Act* No. 33 of 2013: see the judgment of this Court delivered in this session in *Tura v Family Taftumol,* Civil Appeal Case No. 1481 of 2023.

12. We consider that Mr Tari's concessions were properly made because the Joint Court judgment No. 62 does not contain any declaration of custom ownership of land, therefore it did not create – and was not capable of creating – any recorded interest in land. The Joint Court judgment No. 57 also does not contain any declaration of custom ownership of land. It follows that the green certificate issued to the appellants was unlawful.

13. In the circumstances, the appellants did not have any arguable defence in the judicial review proceedings and it would not have made any difference if they had been allowed to file evidence before judgment issued. Accordingly, in the specific circumstances of this case, we consider that the primary Judge did not err in deciding the substantive Claim at the rule 17.8 conference without allowing the appellants to file evidence. There is no merit to the appeal.

C. Result and Decision

14. For the reasons given, the appeal is dismissed.

15. The Appellants are to pay the First and Second Respondents' costs of VT50,000 within 28 days.

16. There is no order as to the Third Defendant's costs.

DATED at Port Vila this 17th day of May 2024

BY THE COURT

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Hon. Chief Justice Vincent Lunabek

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