

IN THE SUPREME COURT OF  
THE REPUBLIC OF VANUATU  
(Civil Jurisdiction)

Civil  
Case No. 21/2548 SC/CIVL

**BETWEEN:** Kalulu Kalsrap Family represented by Kalsong  
Kalulu Kalsrap and Daniel Kalulu Kalsrap  
Claimant

**AND:** Republic of Vanuatu  
First Defendant

**AND:** Leiwi Kalpoi and Nadia Kalpoi  
Second Defendants

**AND:** Claymore Limited  
Third Defendant

**AND:** Bruce Kalotiti  
Fourth Defendant

**AND:** Berry Kalotiti Kalotrip & Michel Kalotiti Kalotrip  
Fifth Defendants

*Date:* 28 September 2022  
*Before:* Justice V.M. Trief  
*Counsel:* Claimant – Mr S.C. Hakwa  
First Defendant – Mrs F.W. Samuel  
Second Defendants – in person  
Third Defendant – Ms L. Raikatalau, holding papers for Mrs M.N. Ferrieux Patterson  
Fourth and Fifth Defendants – Mr D. Yawha

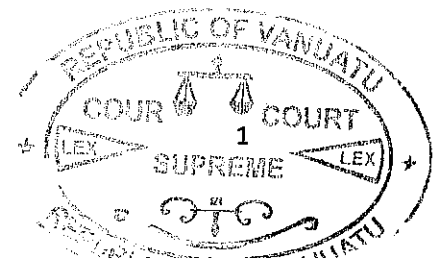
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**DECISION AS TO FIRST, THIRD, FOURTH AND FIFTH DEFENDANTS' APPLICATIONS TO STRIKE OUT THE CLAIM**

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A. Introduction

1. The Claimant Kalulu Kalsrap Family by the named representatives ('Family Kalsrap') are suing the Defendants in relation to the registration of leasehold title no. 12/0844/238 on 11 May 2010 (the 'lease') and of its transfer on 17 June 2010. Orders for the cancellation of the registrations and damages are sought.
2. The First Defendant the State, the Third Defendant Claymore Limited, the Fourth Defendant Bruce Kalotiti Kalotrip and the Fifth Defendants Berry Kalotiti Kalotrip and Michel Kalotiti Kalotrip filed separate Applications to strike out the Claim.
3. I now determine the Applications.



B. Preliminary matter

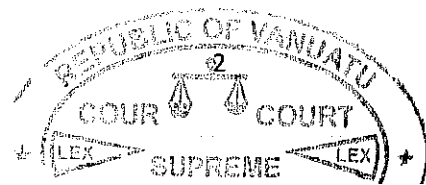
4. Family Kalsrap filed written submissions in response to each of the Applications.
5. Each applicant then filed submissions in reply.
6. On 4 July 2022, Family Kalsrap filed Submissions for the Claimant in response to the Legal Submissions filed by the First Defendant, Third Defendant and Fourth Defendant in support of their respective Applications to strike out the Claim. In effect, these were a second opportunity for Family Kalsrap to respond to the strike out applications without any right of reply from the applicants. Accordingly, I declare this document ineffectual pursuant to rule 18.10(2)(c) of the *Civil Procedure Rules*. I have not had regard to the document in determining the Applications.

C. The First Defendant's Application

7. The grounds for the State's application, and expanded on in the First Defendant's Submissions filed on 7 April 2022, are as follows:
  - a. That the lease is not part of the area of land subject to the Efate Island Court's judgment in Civil Case No. 3 of 1995 ('EIC 1995/03') and Land Appeal Case No. 1 of 2009 ('LAC 2009/01');
  - b. That Family Kalsrap do not have standing as he was not party to EIC 1995/03 and was made a party to LAC 2009/01 but the latter was struck out on 1 April 2014; and
  - c. That this Court in *Kalsong Kalsrap v Vanuatu*; Civil Case No. 290 of 2013 ('CC 13/290') struck out the Claim as the claimant had no standing to bring proceedings and the proceedings were premature as custom ownership rights had not yet been determined in LAC 2009/01. The present case has been brought on the same basis as advanced in CC 13/290 therefore it constituted an abuse of Court process.
8. Strike out and costs of VT100,000 were sought.
9. Family Kalsrap's submissions in response were set out in the Claimant's Response to the First Defendant's Application to Strike Out the Claim filed on 16 March 2022.
10. Mr Hakwa submitted that the lease was not within the land subject to the claim in EIC 1995/03 but was within the appeal in LAC 2009/01. Further, that LAC 2009/01 was not struck out on 1 April 2014 or at any other time after that and is still pending hearing and determination by the Supreme Court. Finally, that the cause of action of the Claim in CC 13/290 was section 100 of the *Land Leases Act*. However, as to the Claim in the present matter [at para. 9(q) of the written submissions]:

3. ...

- (q) *The current case is not based on Section 100 of the Land Leases Act but rather it is a claim to enforce Restraining Order which Mr Justice N R Dawson made on 24 March 2010 against the First Defendant, Second Defendant, Third Defendant, Fourth*



*Defendant and Fifth Defendant for acting and purporting to make and/or register the Lease in contravention, violation and breach of the Restraining Order.*

11. Family Kalsrap sought costs on an indemnity basis against the State.

D. The Third Defendant's Application

12. The grounds for Claymore Limited's application are as follows:

- a. That the lease is located outside of the Eleo-Eurakot land referred to in the judgment in EIC 1995/03 therefore Family Kalsrap has no cause of action and no standing;
- b. The Claim is an abuse of the Court process as it does not disclose any cause of action and is vexatious.

13. Family Kalsrap's submissions in response were set out in the Claimant's Response to the Third Defendant's Application to Strike Out the Claim filed on 16 March 2022.

14. Mr Hakwa submitted that the leased land was not part of the original claimant's claim for custom ownership of Eleo in EIC 2003/95 but that it, commonly known as Honeymoon Beach, is part of the land described as Epang-Tue on pages 104 and 105 of the EIC judgment and coloured **green** on the Sketch Map attached to that judgment, and is therefore part of the land subject of the appeals in LAC 2009/01 and covered by Dawson J's restraining order.

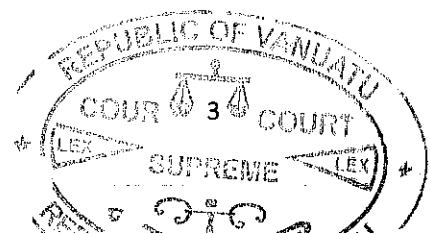
15. Further, that Family Kalsrap has standing as it is party to the proceeding in LAC 2009/01 by virtue of subs. 22(1) of the *Island Courts Act* and the order to be joined as a party which Dawson J made on 24 March 2010.

16. Finally, that what the Claim is about is alleging that the lease was made and/or registered in breach or contravention of the restraining order. That the State knew and were fully aware of the restraining order at all material times from 20 July 2010. And that allegations that the Claim did not disclose a cause of action or that Family Kalsrap did not have standing is not and cannot possibly be a lawful excuse for the Defendants to disobey or not to comply with the restraining order.

17. Family Kalsrap sought costs on an indemnity basis against Claymore Limited.

18. Submissions in reply were filed on 30 May 2022. Mrs Ferrieux Patterson submitted that Claymore Limited was a bona fide purchaser for value of the lease and that the Claim does not plead any fraud or mistake against it. Further, that the land subject to the lease is part of Epang-Tue land which is not part of the disputed land. As the land subject to the lease is not subject to LAC 2009/01, there is no cause of action disclosed against Claymore Limited therefore the Claim is frivolous and vexatious.

19. Finally, that Dawson J's restraining orders do not bind Claymore Limited, even if it were served such orders, and will not affect its holding of the lease.



20. Claymore Limited sought indemnity costs against Family Kalsrap.

E. The Fourth and Fifth Defendants' Applications

21. The Fourth and Fifth Defendants' Applications were made in identical terms, on the following grounds:

- a. That the lease is located outside of the land subject to the judgment in EIC 1995/03 and the appeal in LAC 2009/01;
- b. That Family Kalsrap has no standing as it was not party to EIC 1995/03 but is party only to LAC 2009/01;
- c. That Family Kalsrap was previously held not to have standing in CC 13/290 and its Claim in that matter was struck out;
- d. The Claim is an abuse of the Court process as the lease is situated outside the land subject to EIC 1995/03 and LAC 2009/01, as Family Kalsrap does not have standing and no cause of action; and
- e. The custom ownership of the leased land is subject to determination by a Land Tribunal in Pango Land Case No. 1 of 2016, as confirmed by the Custom Land Management Office's letter dated 10 December 2021.

22. Family Kalsrap's submissions in response were set out in the Claimant's Response to the Fourth Defendant's Application to Strike Out the Claim filed on 16 March 2022.

23. Mr Hakwa submitted that the land comprising the lease is subject to the appeals in LAC 2009/01 and that Dawson J's restraining order applies equally to the land which is the subject of the lease.

24. Further, that Family Kalsrap is party to LAC 2009/01 and therefore has standing.

25. He also submitted that the subject of CC 13/290 was a different leasehold title no. namely 12/0844/237 and that the striking out of the Claim in that matter does not prevent Family Kalsrap from reagitating their claims or concerns about that lease title once LAC 2009/01 has been determined.

26. Finally, Mr Hakwa submitted [at para. 3(s) of the written submissions] that:

3. ...

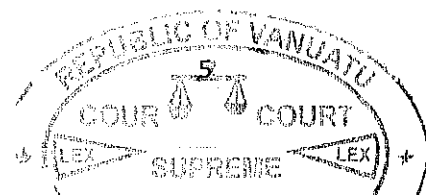
- (s) *The current case is not based on Section 100 of the Land Leases Act but rather it is a claim which the Claimant has instituted to enforce the terms of the Restraining Order which Mr Justice N R Dawson made on 24 March 2010 against the First Defendant, Second Defendant, Third Defendant, Fourth Defendant and Fifth Defendant for acting and/or purporting to make and/or register the Lease in contravention, violation and/or blatant breach of the Restraining Order.*

27. The Fourth Defendant filed submissions in reply on 7 and 9 June 2022, as did the Fifth Defendants. The submissions simply repeated the grounds of the Applications.



F. Discussion

28. Despite the State's assertion that LAC 2009/01 was struck out on 1 April 2014, that LAC remained on foot in 2020 which was referred to by the Supreme Court in striking out the Claim in CC 13/290. There is no merit in the State's allegation that LAC 2009/01 was struck out on 1 April 2014.
29. The lease that was the subject of the Claim in CC 13/290 was leasehold title no. 12/0844/237. The Claim was made pursuant to section 100 of the *Land Leases Act*. On 26 May 2020, Andree Wiltens J struck out the Claim as LAC 2009/01 had not been determined therefore the claimant lacked standing. In addition, the proceeding was premature as ownership rights had not yet been determined, which was conceded by Mr Hakwa.
30. Mr Hakwa submitted that the current case was not based on section 100 of the *Land Leases Act* but rather was a claim to enforce Dawson J's restraining order against the Defendants for making and registering the lease and its transfer in contravention and breach of the restraining order.
31. With respect, if Court Orders need be enforced, surely the appropriate course is to bring the alleged breach to the attention of the presiding judge in the matter in which the Orders were made. I am unclear as to what enforcement will be achieved by raising the matter in separate proceedings before a different Judge.
32. More to the point, I am unaware that enforcement of Court Orders is a cause of action in and of itself.
33. Accordingly, I consider that the cause of action disclosed in the Claim is the statutory cause of action provided by section 100 of the *Land Leases Act*. I reject the submissions to the contrary. Family Kalsrap's claim effectively is that the registrations of the lease and its transfer were obtained by fraud or mistake, including the Defendants' mistaken knowledge and/or belief as to the restraining orders made by Dawson J on 24 March 2010.
34. Mr Hakwa submitted that Family Kalsrap had standing as it is party to LAC 2009/01. With respect, I reject that submission. That Family Kalsrap is an appellant in LAC 2009/01 simply means that it is a disputing claimant for the custom ownership of the disputed land.
35. What I need to consider is whether or not Family Kalsrap has standing to bring a claim under section 100 of the *Land Leases Act*. Like the Court in CC 13/290, I must conclude that unless the decision in LAC 2009/01 has gone the way of Family Kalsrap or it has been declared custom owner of the leased land by another means, it does not have standing to bring the current Claim.
36. It follows that the Claim and this proceeding are premature as custom ownership rights have not yet been determined in LAC 2009/01 or by some other means such as another proceeding or via the procedures set out in the *Custom Land Management Act*.



37. In the circumstances, Family Kalsrap does not have standing and the Claim must be struck out.

38. Given that conclusion, I need not consider whether or not the leased land is subject to the judgment in EIC 1995/03 or the appeals in LAC 2009/01.

G. Costs

39. Costs must follow the event. I decline to order costs on an indemnity basis as the Claimant brought the proceeding for non-compliance with an order of the Court although I have not agreed that that was a cause of action in and of itself but that the Claim was brought pursuant to section 100 of the *Land Leases Act*.

40. The Claimant is to pay the First, Third, Fourth and Fifth Defendants' costs on the standard basis as agreed or as taxed by the Master. Once settled, the costs must be paid within 28 days.

H. Notices of Objections

41. Family Kalsrap filed Notices setting out its objections to the evidence in the Sworn statements of Breeanna Emelee, Gordon Willie and Bruce Kalotiti Kalotrip.

42. Given the outcome of the Strike-Out Applications, I need not rule on the objections made.

I. Result and Decision

43. Declaration that the Submissions for the Claimant in response to the Legal Submissions filed by the First Defendant, Third Defendant and Fourth Defendant in support of their respective Applications to strike out the Claim filed on 4 July 2022 is **ineffectual** pursuant to rule 18.10(2)(c) of the *Civil Procedure Rules*. I have not had regard to the document in determining the Applications.

44. The Claimant does not have standing and the Claim must be **struck out**.

45. The Claimant is to pay the First, Third, Fourth and Fifth Defendants' costs on the standard basis as agreed or as taxed by the Master. Once settled, the costs must be paid within 28 days.

DATED at Port Vila this 28<sup>th</sup> day of September 2022  
BY THE COURT

Justice Viran Molisa Trief

