

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

Civil Appeal
Case No. 19/808 CoA/CIVA

**BETWEEN: FAMILY KALSAKAU, FAMILY SOPE of
IMERE, FAMILY NUNU NAPERICK MALA,
NAFLAK TEUFI**

Appellants

AND: DIRECTOR OF LANDS

First Respondent

**AND: NATIONAL COORDINATOR OF THE
CUSTOM LAND MANAGEMENT OFFICE**

Second Respondent

AND: FAMILY GEORGE KANO

Interested Party

Coram: *Hon. Chief Justice Vincent Lunabek
Hon. Justice John von Doussa
Hon. Justice Ronald Young
Hon. Justice Oliver Saksak
Hon. Justice Daniel Fatiaki
Hon. Justice Dudley Aru
Hon. Justice Gus Andrée Wiltens*

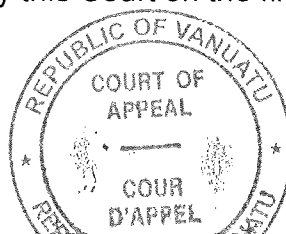
Counsel: *29th April 2019: - J. Tari for the Appellant McGlory Kalsakau claiming to
represent all the appellants
- S. Aron for the First and Second Respondents
- W. Daniel for the Interested Party*

*10th May 2019 - S. Kalsakau for McGlory Kalsakau claiming to
represent the First Appellant
- J. Tari for Vauvautalo Sope claiming to represent the
Second Appellant
- J. Tari for Sauwi Kalpukai claiming to represent the
Third Appellant
- S. Aron for the First and Second Respondents
- W. Daniel for the Interested Party and the Fourth
Appellant*

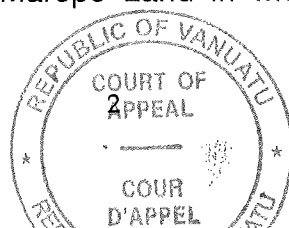
Date of Hearings: *29th April, 2019
10th May 2019*

MEMORANDUM

1. This matter was called for review by this Court on the first morning of the present session of the Court of Appeal.



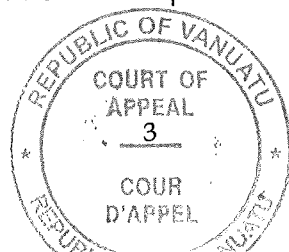
2. By the notice of appeal the above named appellants purported to appeal against orders made in the ruling in the Supreme Court on 20th March 2019 which refused to set aside the discontinuance of judicial review proceedings (JR proceedings) commenced in the name of the first three families named in the present appeal. The JR proceedings sought to challenge a decision of the National Coordinator of Custom Land Management Office (the second respondent) and for consequential orders. The decision under challenge quashed a certificate of registered interest in part of the Marope Land which the pleadings alleged correctly reflected a decision of the Efate Island Court as to custom ownership of the land.
3. The JR proceedings had been commenced by a lawyer instructed by Mr McGlory Kalsakau who in a supporting sworn statement deposed that he was the authorized representative of Family Kalsakau and was also authorized by the three named families to bring the proceedings. The proceedings were commenced on 17th October 2018.
4. On 29th October 2018 the lawyer who had commenced the JR proceedings, this time acting on the instructions of Mr Joshua Kalsakau, another member of Family Kalsakau, filed a notice of discontinuance of the JR proceedings.
5. On 5th December 2018 the same lawyer made application to the Supreme Court seeking an order to reinstate the JR proceedings on the basis that the notice of discontinuance filed on 29th October 2018 was not based on the true instructions of the three named claimants, or Family Kalsakau, and was therefore filed by mistake. That application was dismissed in the ruling now under appeal.
6. The Supreme Court ruled that the JR proceedings had been effectively discontinued by the notice filed on 29th October 2018 and that Rule 9.9(4) of the Civil Procedure Rules expressly prohibited the revival of a discontinued claim. Interim injunctive orders made in connection with the JR proceedings restraining the second defendant from taking any action to alter the register of interests relating to any part of the Marope Land in which the applicants in the JR



application have a vested interest as declared by the Efate Island Court therefore ceased to operate. In his ruling the judge in the Supreme Court said:

“... the claimants or the Kalsakau Family are divided into two groups resulting in two different instructions to two different lawyers. That however is a matter for the claimant or the Kalsakau Family to resolve first before commencing a proceeding against the defendants. ...”.

7. Upon this appeal being called for review, Mr Tari announced his appearance as being for the four families named in the notice of appeal. Sworn statements on the file indicate that there is serious dispute within Family Kalsakau, and amongst the first three named appellants' families as to who is authorized to speak on their behalf. The Court questioned Mr Tari as to the source of his instructions. He said he was instructed by Mr McGlory Kalsakau who claimed to have authority to speak not only for Family Kalsakau but for all the appellants. As the sworn statements show this to be a contentious issue it is clear that Mr Tari could not represent all the appellants named in the notice of appeal.
8. Who is the rightful person to act as the titular head of Family Kalsakau and as the custom owner of interests in the relevant part of the Marope Land is a matter that this Court does not have jurisdiction to determine. That is a custom matter within the jurisdiction of the Island Court.
9. The Court therefore declined to hear the appeal on the representation of the appellants then before the Court, and announced its intention to adjourn the appeal until representation of the three applicants named in the JR proceedings is determined. The Court also indicated that to preserve the position of the parties in the meantime the interim injunction granted in the Supreme Court on 10th August 2018 should continue to operate.
10. Following the call-over, Mr Daniel representing the interested party and the fourth appellant (who had been named as another interested party in the JR proceedings) asked that the matter be re-listed as his clients wished to oppose the imposition of any injunction directed to the first and second respondents restraining further dealing in the Marope land. The matter was relisted on 10th May 2019.



11. On this occasion the appellants were differently represented, and on direction from the Court counsel appearing did so on behalf of specified individual members of the named families. It is clear that much of the disagreement between members of the families evidence in sworn statements on file concerns the entitlement of particular individuals to act as spokesperson for their family members. By having representation before the Court made on behalf of a named individual member, hopefully the argument over representation can be avoided and the real dispute about custom rights of the Marope land can proceed to hearing. If another member of a family disagrees with submissions being made on behalf of their family, that other member can also appear to make a different submission.
12. As counsel argued the respective positions of their clients it became clear that there is a serious outstanding issue as to which of the families named in these proceedings holds custom rights, and as to the nature of those rights. The JR proceedings had identified that central question, and the parties are agreed that the resolution of that question is urgently required.
13. In the meantime there are competing claims of entitlement to the issue of new leases, and to the distribution of moneys arising from the compulsory acquisition of part of the Marope land.
14. The interim injunction granted on 10th August 2018 was intended to hold the positions of the parties until the issue later identified in the JR proceedings was determined, and the appellants have argued that the interim injunction should be continued until this appeal is concluded.
15. Having now received further information and submissions from the parties, the Court considers that the interim injunction should not be reinstated.
16. First, the interim injunction suffers from procedural difficulties. It was issued in proceedings commenced on behalf of the applicants for the injunction whose authority to do so has been questioned. Further the interim injunction did not name any of the families whose interests are likely to be affected by it, and the



- terms of the injunction made no provision for parties affected to apply to have it varied.
17. Secondly, and of more immediate practical importance, the need for injunctive protection no longer seems necessary. The first and second respondents have indicated that they will not process dealings with the Marope land until the custom rights disputes are resolved, and the Supreme Court in other proceedings has ordered that the compulsory acquisition moneys not be distributed until this happens.
 18. Whilst this Court has declined to hear the present appeal until the question of representation of the parties is resolved, the outcome of the appeal may not lead to the JR proceedings being reinstated. The resolution of the custom rights issues is urgent. Rather than await the uncertain and delayed outcome of the appeal this Court urges the parties to engage constructively in fresh proceedings to get the custom rights issues before the Supreme Court. Once fresh proceedings are underway there should be no need for this appeal to proceed. If the fresh proceedings are taken and defended in the names of individual members of the different families, hopefully arguments over representation can be avoided.
 19. We now record that this appeal is adjourned until the representation of the three applicants in the JR proceedings is determined. The question of costs of the appearances of the parties before this Court during this session is reserved.
 20. Liberty is reserved to any party to apply to have this appeal re-listed.

DATED at Port Vila, this 10th day of May, 2019.

BY THE COURT

Hon. Vincent Lunabek
Chief Justice.

