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

Civil Appeal Case No. 03 of 2015

BETWEEN: MICHEL KALNAWI KALOURAI
Appellant

AND: REPUBLIC OF VANUATU
First Respondent

AND: THE MINISTER OF FINANCE AND ECONOMIC MANAGEMENT
Second Respondent

AND: THE MINISTER OF LANDS
Third Respondent

Coram: ***Hon. Justice John von Doussa***
Hon. Justice Oliver Saksak
Hon. Justice Daniel Fatiaki
Hon. Justice Stephen Harrop
Hon. Justice Mary Sey
Hon. Justice Dudley Aru

Counsel: *Mr. J. Kilu for the Appellant*
Ms. F. Williams for the Respondents

Date of Hearing: *28 April 2015*

Date of Judgment: *8 May 2015*

JUDGMENT

1. This is an appeal against the decision of the Chief Justice in the Supreme Court which dismissed the appellant's claim for compensation for custom land taken by the government of Vanuatu. The land in question encompasses the airport at Bauerfield, Port Vila and other land including land known as the Marobe land.

2. In the court below the respondents were collectively described as the government. The same description is adopted in this judgment. References to the appellant also include his predecessors in title who acted as the senior representative of the Naflak Teufi Tribe whom he represents in these proceedings.

3. It is common ground that the government exercised its power lawfully to compulsorily acquire the land for public purposes under the Public Land Declaration Order No. 26 of 1981. The appellant's claim is that the government has failed to recognize the rights of the appellant's tribe as custom owners of

their land and has failed to pay compensation for the compulsory acquisition of that land.

4. The government's defence to this claim is that compensation has already been paid for the land. The government says that by agreement regarding compensation made in July 1992 ("*the 1992 Agreement*") reached with the Erakor, Pango and Ifira communities full compensation was paid to the Ifira community (as well as the other communities) including for the Marobe land claimed by the appellant.

5. In the court below a number of issues were adjudicated and resolved, and are no longer in dispute. It is now accepted that the appellant is the proper party to bring proceedings on behalf of the Naflak Teufi Tribe. A claim by the appellant for rents received in respect of the Marobe Land since 1994 was dismissed and there is no appeal on that issue. At trial the government argued that a deed of settlement reached in 2004 with the then representative of the Naflak Teufi Tribe constituted a bar to the present claim for compensation. This argument was rejected in the Supreme Court and there is no appeal from that ruling.

6. The remaining issue which was decided adversely to the appellant in the Supreme Court, and which is now before this Court, is the appellant's claim for compensation.

Issues at trial

7. At trial the appellant contended that the government was wrong to negotiate a settlement in 1992 for compensation with members of the Ifira community as there was at the time dispute over customary ownership of the land that had been taken. For this reason the 1992 Agreement should not have been entered into while there was uncertainty about the custom ownership. The appellant argued that they tried to stop the settlement of the compensation claim and payment of compensation at this time. They wrote to the government advising of their dispute over custom ownership and protested against any compensation payment before a resolution of ownership. Proceedings were issued by the appellant to try to prevent the compensation payment being made but those proceedings were never pursued or heard.

8. The appellant contended that the compensation payment under the 1992 Agreement relating to the Marobe land was paid to others in the Ifira Community and that this was in breach of the requirements of the Land Reform Act. By the time the present proceedings were issued the appellant had been declared the custom owner of the Marobe land and contended that he is therefore entitled to be paid compensation for its compulsory acquisition. The

appellant said that the 1992 Agreement did not compensate the custom owners of that land.

9. The government defended the claim on the ground that under the 1992 Agreement they compensated the Ifira Community, that is the whole community, for all the land taken in the Port Vila public area including the Marobe Land. They contended that the fact that individual tribes within the Ifira Community have since being declared owners of parts of the land within the Port Vila public area made no difference to the validity of the settlement of the compensation claims. If the appellant considered he was unfairly treated when the compensation allocated to the Ifira Community was distributed once received from the government, he should have brought his claim against that community. In any event the government pleaded that the appellant's claim was out of time and barred by statute.

Findings in the Supreme Court

10. The Supreme Court identified the fundamental question as whether the 1992 Agreement settled all compensation disputes relating to the Ifira land including the Marobe land, thus preventing the appellant from seeking further compensation for the Marobe land.

11. The Supreme Court referred to and followed the decision of the Court of Appeal in **John Kalomtak Wiwi Family v. Minister of Lands [2005] VUCA; Civil Appeal Case 22 of 2004**. That matter concerned the very same 1992 Agreement as it related to the Erakor Community and its members. The Erakor Village had land declared to be public land by the 1981 declaration. The 1992 Agreement was reached with representatives of each of the three communities whose land was taken. The 1992 Agreement provided for the division of a total compensation sum of VT275,400,000 for all the land acquired, and for the division of that sum between the three communities. The Erakor Community and the Ifira Community were to receive VT110,160,000 each. The compensation allocated to the Erakor village was paid to the representatives of the Erakor Community who had been parties to the 1992 Agreement. Subsequently in 2000, Family Wiwi was held to be the custom owner of a portion of the Erakor land. Family Wiwi argued that it thereupon became entitled to claim compensation for that land which had been taken in 1981. The claim was dismissed both by the Supreme Court in the first instance and on appeal by the Court of Appeal.

12. It is convenient to refer to the terms of the 1992 Agreement at this stage. Regrettably the parties were not able to produce a copy of the executed agreement. However the inference from the secondary evidence put to this Court (and not challenged by any party) is that a number of representatives of

each of the three communities, probably in each case in the order of 3 or 4 people, signed the 1992 Agreement as representatives of their respective communities. Clause D of the 1992 Agreement said:

> *"The Government and the former custom owners acting through their duly authorized representatives had desire of effecting an agreement for compensation for loss of use of the said land in accordance with the said Act."*

13. The agreement then set out the compensation payable. It said:

> "*As compensation for the loss of use of the said land by the former custom owners prior to the signing of this agreement, the Government pays and the representatives accept, on behalf of the former custom owners (receipt is hereby acknowledged) the sum of VT275,400,000 in final settlement for the said loss payable as follows ....*

14. The agreement then detailed the payments to be made to each of these three communities. Finally the agreement contained an indemnity provision in the following terms:

> "*The representatives of the custom owners their issue successors in title and their authorized personal and legal representatives also either appointed or authorized shall indemnify the Government from any claim that the money has not been properly paid out or further claims by others to such payment or to the said land*".

15. The Court of Appeal concluded that the 1992 Agreement was in full settlement of all rights to compensation by custom owners of the land taken; that there had been no challenge to the legality or propriety of the 1992 Agreement at the time; and that there was no fraud or lack of knowledge or understanding of what was happening by Family Wiwi in 1992 when the agreement was reached.

16. The appellant sought to distinguish the decision on its facts, but the Supreme Court considered the facts relied on by the appellant did not distinguish the essential reasoning of the Court of Appeal.

17. The Supreme Court held in this case that at the time of settlement in 1992 the Minister (representing the government) acted lawfully and that the 1992 Agreement complied with the obligation to compensate the custom owners for the land taken. The Court was satisfied that the 1992 Agreement was reached with those who represented the custom owners (within the meaning of the Land

Reform Act [CAP. 123]). The compensation agreed upon in 1992 Agreement was subsequently paid. The Ifira Community, including the appellant, had therefore already been compensated for the land taken in 1981 and the 1992 Agreement effectively defeated the appellant's claim.

18. The Supreme Court also upheld the plea that the appellant's claim was statute barred as it was commenced well outside the limitation period of 6 years which applies to claims made to recover any sum recoverable by virtue of any Act: s.3 (1) (d) of the Limitation Act [CAP. 212]. The Court observed that the appellant's proceedings were not issued until 2005 which was 13 years after the 1992 Agreement and 24 years after the land was compulsorily acquired.

Issues on appeal

19. The parties maintained the positions adopted by them in the Supreme Court. The appellant sought again to distinguish the decision of the Court of Appeal in the Family Wiwi litigation. On the limitation point the appellant argued that the case was brought within time as the custom ownership of the Naflak Teufi Tribe of the Marobe land was not determined until 2005 by a decision of the Supreme Court, and until that time they did not have the necessary standing to sue as custom owners.

Discussion

20. Under the Land Reform Act compensation for the compulsory acquisition of custom land must be paid to the custom owners. The Land Reform Act at all times relevant to these proceedings has defined "*custom owner*" to mean "*the person or persons who, in the absence of a dispute, the Minister is satisfied are the custom owners of the land*".

21. The Supreme Court accepted that when the Minister entered into the 1992 Agreement the Minister was satisfied that the representatives of the Ifira Community with whom the Agreement was made were the appropriate custom owners of the land, and that as there was no dispute at the time they were the people who had a lawful authority to agree and accept compensation for the land taken.

22. This was also the situation with the Erakor Community and each representative who entered into the 1992 Agreement on that community's behalf.

23. The ground on which the appellant challenges the conclusion of the Supreme Court is that in the present case, unlike the Family Wiwi case, there was a dispute over custom ownership and the Minister had been made aware of that

dispute. It is on this ground that the appellant says that the Court of Appeal decision is distinguishable and not applicable.

24. Before discussing the facts relied on by the appellant we note that a distinction must be drawn between facts as they existed at the time the 1992 Agreement was made, and the facts as they existed when the agreed compensation was about to be paid pursuant to the 1992 Agreement by the government in July 1994. The rights to compensation were settled in 1992 by the 1992 Agreement, and the facts in 1992 are those which determined whether the Minister dealt with the proper "*custom owner*" as defined when the 1992 Agreement was reached.

25. The facts relied on by the appellant are set out in paragraph 11 of the appellant's written submissions. Leaving out matters of detail those facts are:

    (a) Refusing to withdraw their land claim from the Island Court in Land Case No. 1 of 1993;

    (b) Their letter dated 10th October 1994 addressed to the Solicitor General, State Law Office, protesting against premature compensation payments by the government;

    (c) The Public Solicitor's letter acting on behalf of those represented by the appellant, dated 12th July 1994 to the government protesting against premature payments by the government;

    (d) On 14th October 1994 a court claim in Civil Case No. 132 of 1994 was issued on behalf of those the appellant represents seeking restraining orders to prevent the compensation payments being paid out, but the case never proceeded;

    (e) The then representative of the appellant's tribe signed a "*Joint Memorandum of Response*" sometime in September 1994, directed to the government, also protesting against any premature payments;

    (f) The chief of the Naflak Teufi Tribe refused to receive its proposed share of payments being handed out by the government on 13th October 1994 pursuant to the 1992 Agreement.

26. All these factual matters occurred well after the settlement recorded in the 1992 Agreement had been reached.

27. Land Case No. 1 of 1993 was commenced by the applicant to establish the custom ownership of the Marobe land. The proceedings were commenced

months after the settlement and at a time when discussions had commenced about how the agreed compensation would be distributed.

28. The letters of protest referred to in particulars (b) and (c) requested that no payments of compensation be paid to anyone while their claim for custom ownership of the Marobe land remained outstanding and until other custom owners claims over other parts of the land were resolved.

29. The "*Joint Memorandum of Response*" was made on behalf of the Ifira Community, and is signed by many leaders including the representative of the appellant's tribe. It complains about the lack of consultation with the Ifira Community over the making of the 1981 declaration. The response requests the government not to distribute compensation monies to individuals and contends that the overall compensation sum allocated to the Ifira Community in the 1992 Agreement is not a genuine reflection of the value attached to the land. The response does not otherwise question the 1992 Agreement or the authority of the representatives of the Ifira Community who entered into it.

30. The facts relied upon by the appellant do not establish that there was a dispute over custom ownership in 1992 in respect of the Ifira lands taken, or any part of them, let alone that the Minister was aware of some dispute. On the contrary, the evidence before the Supreme Court justified the finding that the Minister acted in accordance with his statutory authority to enter into the agreement with representatives of the Ifira Community.

31. The appellant now asserts that no representative of his tribe signed the 1992 Agreement. Absent any evidence as to the identity of those people who were acting as the representatives of the Ifira Community that assertion may, for present purposes, be accepted. However there is no evidence to challenge the overwhelming inference from the evidence that was before the Court that the representatives who acted for the Ifira Community had the authority of the community to do so.

32. As all the factual matters relied on by the appellants to distinguish the Family Wiwi decision arose after the 1992 Agreement had settled the compensation claim for all land taken from the Ifira Community the Court of Appeal decision is not distinguishable. It was binding on the Supreme Court. The correctness of the Court of Appeal decision has been accepted in this Court and the application of the decision must result in the dismissal of the appellant's claim and this appeal.

33. We agree also with the Supreme Court that the appellant's claim was statute barred.

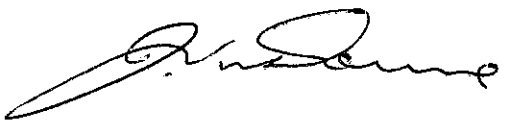
34. Land Case No. 1 of 1993 was decided by the Island Court on 25th February 1994. The decision upheld the custom ownership of the appellant's tribe to the Marobe land. The Island Court decision was appealed by other parties. The appeal was not decided by the Supreme Court until 19th December 2005. The Supreme Court upheld the finding of the Island Court. The appellant contends that he lacked standing to bring proceedings for the compensation for the Marobe land until his custom ownership title was determined by the Supreme Court. That contention is not correct. The title of the appellant's tribe to the Marobe land was determined by the Island Court in 1994. Their title was at risk of being overturned on appeal, but until it was overturned, the appellant's tribe was the declared custom owner. If it were necessary for there to be a determination of custom ownership before proceedings could be commenced, time commenced to run from 1994. However we doubt that a declaration of custom ownership was a necessary pre-requisite. The 1992 Agreement could have been challenged by judicial review proceedings at the time and we think it is most probable that the members of the appellant's tribe would have had a sufficient interest to support such proceedings even without an Island Court determination of ownership. However it is not necessary to decide that point as time plainly ran from not later than the Island Court decision in 1994.

35. In the course of submissions to this Court the appellant argued that the Supreme Court in 2006, when dismissing an application to strike out their claim on the ground that it was statute barred, had ruled that the claim was not out of time. A careful reading of the 2006 decision indicates that the strike out application was dismissed on the ground that the government's pleading had not been completed and issues raised in the strike out application should go to trial. One of the unanswered pleadings in the claim at that time concerned the decision of the Supreme Court in 2005 on the Island Court appeal. The 2006 decision preserved the right of the appellant to argue that the claim was not out of time, but did not decide the point.

36. The appeal must be dismissed. The appellant must pay the respondent's one set of costs fixed on the standard scale.

DATED at Port Vila, this 8th day of May, 2015.

BY THE COURT



John von Doussa
Judge.