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

Civil Appeal
Case No. 18/2621 CoA/CIVA

BETWEEN: **Martin Iapatu, Tau Niamanase, Nalpini Iatimu, Kauei Harry, Iapit Kamliapin, Munia Iatapu, Kapalu Kauiel, Jimm Nital, Rauh Kapalu, William Kapalu, Jimmy Kauiel, Charley Naknaou, Iasu Stephen**
First Appellants

AND: **Peter Iaus, Ken Nauka, Sam Iauei, Ioran Namonike, Itls Iamorile, Sam Kulu (K), William Iasu, Jeak Iasu, Mako Iasu, Stephen Nawa, Pakoa Charley, Marcel Namtengas, Tom Iaute, Kasoi Rosikai, Charley Kuei, Charley Caledonia, Milli Laukuasuas, Kuai Ianpisin and Namei Iaukun**
Second Appellants

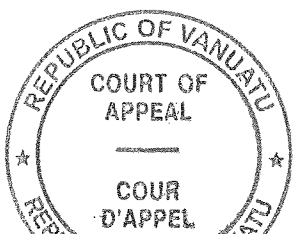
AND: **TOM NOAM**
Respondent

Coram:	***Hon. Chief Justice Vincent Lunabek*** ***Hon. Justice John von Doussa*** ***Hon. Justice Ronald Young*** ***Hon. Justice Daniel Fatlaki***
Counsel:	*Mr. E. Molbaleh for the First Appellants* *Mr. C. Leo for the Second Appellants* *Mr. M. J. Hurley for the Respondent* *Mr. R. T. Kapapa for the Interested Parties Lakin Yahim and Luwi Harry Naksam)* *Mr. E. Molbaleh for other Interested Parties*
Date of Hearing:	*13th November 2018*
Date of Judgment:	*16th November 2018*

JUDGMENT

1. The appellants appeal against the following order made on 19th September 2018 by a judge of the Supreme Court in Civil Case No.3848 of 2016 (CC3848/16):

"*That the Vanuatu Police are authorized to destroy any gardens, farming, fences, houses and trees planted or erected since the Island Court order was issued on 27th November 2014 without the lawful authorization of the claimant;*



The defendants are not permitted to enter into the claimant's declared boundary without the authorization of the claimant;

Any violation of this court order will be dealt with by way of contempt of court order;

That the Vanuatu Police are ordered to serve this court order on the defendants and enforce this order with immediate effect".

Background

2. The order had been obtained by the respondent Mr Noam who is the claimant in CC3848/16. By decision of the Tanna Island Court made on 27th November 2014 Mr Noam and his family (the Iouniwan Family) were declared the custom owners of Lapangnapeuk located on Tanna. The proceedings named 60 individual people as defendants who were alleged to be residing unlawfully on that land, and claimed an order for eviction of them "from the claimant declared customary boundary".

3. On 13th September 2017 Mr Noam obtained a summary judgment ordering the defendants to deliver up possession of Lapangnapeuk and directing their eviction if they failed to do so.

4. That order was set aside by this court on 17th November 2017 on account of several fundamental errors of law in the procedures followed in making the order and in the terms and scope of it: ***see***: Iaus v Noam [2017] VUCA 40: Civil Appeal Case 2629 of 2017. The procedural errors included that only two of the named defendants had been served with the proceedings. The terms of the order also failed to recognize customary rights of people who were residing and gardening on the land in exercise of long standing customary rights. Those rights had been recognized in the decision of the Tanna Island Court which included the following paragraph:

"That family Ioukoupa and Nauanapkai be given the right to use the land areas of Lapangnapeuk declared to family Iouniwan. These family units will have to seek permission from the head of family Iouniwan should they wish to further develop the land for all purposes".

5. The Court of Appeal in its judgment dealt at length with the nature of customary secondary rights to reside on land and to use it, being rights of the kind protected in this paragraph of the Island Court decision. The Court of Appeal recognized the potential difficulties that could arise in determining the extent of those customary rights and the boundaries of existing use. The Court invited counsel for the parties to consider dealing with issues of this kind through customary processes and the Island Court rather than in the Supreme Court.

6. Following the decision of the Court of Appeal Mr Noam requested the Tanna Island Court to review and revise its decision of 24th November 2014 and it did so. The Island Court published judgment on that application on 31st August 2018. The judgment reads:

"*The court is satisfied that:*

- *A declaration of the Tanna Island Court dated 27th November 2014 gives right to persons affected by decision to continue to harvest coconuts, to make garden, graze cattle and other existing developments within the developed land;*
- *The exercise of these rights is limited to existing properties prior to the declaration;*
- *The counter-claimants have abused this declaration and have continued to further develop the land by clearing further land for gardening and are depriving the Original Claimant and his families the right to ownership and use of the land.*

IT IS THEREFORE ORDERED THAT:

1. *Other than the rights declared in the judgment of the Tanna Island Court on 27th November 2014, the Counter-claimants and their families and relatives are restrained from further developing the land known as Lapangnapeuk declared to Family Iouniwan except that they obtain permission of the Applicant Mr Tom Noam;*
2. *Any person held to be in breach of this order will be dealt with for contempt of court order;*
3. *This order will take effect with the declarations in the judgment of the Island Court issued on 27th November 2014*".

7. The decision of 31st August 2018, like the 2014 decision, preserves the customary uses which were "existing developments" on 27th November 2014 but requires the permission of the custom owner to extend those developments.

8. On 3rd September 2018 counsel for Mr Noam applied to the Supreme Court in CC3848/16 "for a conference" and in a supporting sworn statement Mr Noam said "everyday the defendants are planting new gardens and destroying our gardens. If the court does not intervene quickly in granting the enforcement warrant there will be a lot of problems which may escalate into bigger problems". In a further sworn statement filed on 7th September 2018 he said the defendants continued to plant crops and even entered into his declared boundary destroying his crops. On 17th September 2018 Mr Noam filed a further application for a conference hearing, this time making an Urgent Application for an Urgent Conference as the defendants "have now been violating court orders issued by the Island Courts since 2014".

9. The Supreme Court on 17th September 2018 issued a notice of hearing for a conference scheduled for 19th September 2018 and sent copies to Mr Noam's counsel and Mr Leo who had appeared for the second appellants (being 19 of the 60 named defendants) in the Court of Appeal in November 2017. A minute prepared by the conference judge indicates that at the conference counsel for Mr Noam orally sought a restraining order, and the judge invited counsel to draft an order in the terms he was seeking.

10. Then, presumably at a later time that day and without further hearing from Mr Leo, the orders now under appeal were issued.

11. Sworn statements from many people filed in support of this appeal in the few days leading up to the hearing on 13th November 2017 indicate that a party of a police on 28th September 2018 carried out a sudden and unforewarned operation to enforce the orders of the Supreme Court by removing people they understood to be on Lapangnapeuk land, and in doing so cut down trees and burned houses of people who they were evicting. The sworn statements assert that the police party was accompanied by the respondent, members of his family and his then counsel, and were aided in the destruction of properties by some of them. Sworn statements from people who were affected by the police operation say many people were moved, many houses were burned, and much damage was done to establish fruit trees and personal property. Photographs exhibited show damage to trees that plainly are much older than plantings in or after 2014. Sworn statements alleged that fright and fear was experienced by those affected, in one case by a very old woman and in others by many young children. One statement says the established lives of up to 300 people have been up-ended by the eviction operation. Another says that three heads of sandalwood aged 15 years were taken and sold, the proceeds being retained by the respondent and his family.

12. Some of those sworn statements speak of the tragic consequences for them and for their lives, families, houses and gardens. Some deponents allege eviction from areas where they have lived all their lives. The first appellants assert that they have been evicted from areas customarily occupied by them in accordance with the rights of use and occupancy recognized by the Tanna Island Court decisions. The second appellants say that their properties and lands which are outside the customary lands of Mr Noam have been seriously damaged, apparently by those carrying out the eviction in the wrong belief that the second appellants were on Lapangnapeuk land.

13. Other sworn statements were filed by or on behalf of Mr Noam challenge the accuracy of these assertions. It is not possible for this Court to investigate the accuracy of the different versions of the facts. That will be for the parties to

pursue in other proceedings if claims are pressed by those who say that their rights have been wrongly invaded.

The Appellants' Parties

14. There are two groups of appellants, and two other groups of people who appeared on the calling of this appeal.

15. The first appellants, represented by Mr Molbaleh, filed a defence in 2017 in CC3848/16 and were found by the Court of Appeal in its previous decision to have thereby submitted to the jurisdiction of the Supreme Court even though only one of their number had been served with the proceedings. For the purposes of the order now under challenge they are defendants who are subject to the operation of the order.

16. The second appellants represented by Mr Leo were appellants in the previous appeal. Only one of their number had been served with the claim in CC3848/16, namely Peter Iaus. The other people in this group had not been served. During the hearing of the previous appeal Mr Noam through his counsel acknowledged that the lands of this group were not the subject to the Tanna Island Court declaration in favour of Mr Noam and his family and that they should not have been joined as defendants. Perhaps because these defendants in CC3848/16 assumed that after the Court of Appeal decision those proceedings were effectively at an end, but for whatever reason their names were not formally removed from the proceedings. Regrettably the acknowledgement that they should not be named as parties was not brought to the attention of the judge who made the orders now under challenge. They should not have been named as defendants and, save for Mr Peter Iaus, were never parties subject to the jurisdiction of the court as they were never served.

17. Mr Kapapa appeared on the calling of the appeal to inform the court that he was acting for Lakin Yahim and Luwi Harry Naksam whose properties were invaded and damaged by those involved in the execution of the orders of 19th September 2018. They were never named as defendants in CC3848/16 and for this reason the Supreme Court order could have no operation in respect of their rights and interests. They do not seek to be parties to the appeal, but attended to inform the court of their situation. They have commenced other proceedings to protect their positions.

18. Mr Molbaleh also announced appearance for 7 other people who assert that their properties and customary rights have been severally damaged by the purported execution of the Supreme Court orders. Those persons he identified as Jack Royal, Charley Nakohama (also known as Charlie Naknaou), William Yasu,

Kenneth Kawiel and Sam Tapasei, none of whom he said are named as defendants in CC3848/16, and for Kauiel Harry, and Lava Naknau who are named as defendants but who have never been served with the proceedings.

19. Mr Molbaleh needs to check these names against his records and the court file in CC3848/16 as the names Charley Naknaou and Kauei Harry appear in the list of first appellants for whom he filed a defence in 2017, and the names William Yasu and Lava Nakau do appear in the 60 defendants named in the claim in CC3848/16 although there is no proof on file that they have ever been served. Any of the people named as defendants or who have not been served are not presently before the court and they cannot be affected by the order made on 19th September 2018.

20. They have no standing now before this court as potential appellants. As with Mr Kapapa's clients, they appeared only to announce their situation. It is up to them to otherwise take action to protect their rights.

The Appeals

21. The challenge to the order made on 19th September 2018 in so far as it ordered eviction is in effect similar to the earlier order for eviction which this court set aside in 2017. The fundamental defects in the earlier order have been repeated again. The proceedings name all 60 original defendants even though only the first appellants are deemed to have been served. The order fails to recognize the customary rights of use and occupancy that may be held by individual defendants.

22. The order in this case was made as an interim exparte mandatory order without prior service of an application. Indeed there was not even a proper application filed at court seeking the orders that were obtained. The Court of Appeal when overturning the previous eviction order stressed that people could not be evicted by a court order from land unless they were named and served with the application seeking the eviction order. The Court pointed out that the requirement extended to any women who it was intended to evict. In this case sworn statements before the court indicate that it was intended that the order bring about the eviction of some women, but there was no service of applications seeking an eviction order against them, and none of the women in contemplation are named as defendants. It seems that counsel when seeking the order failed to bring these matters to the attention of the judge.

23. Ex-parte orders made without notice to the parties to whom they are directed may be appropriate in urgent situations where the order is to restrain potentially unlawful conduct by the defendant, but, such orders are not appropriate in the

case like the present where an existing situation is to be radically altered by positive action that cannot be later undone-here, the destruction of homes and gardens.

24. Even where circumstances justify the making of an urgent exparte restraining order, the order should not be made unless the applicant has filed in court an undertaking as to damages. This is an essential requirement to give a measure protection to the defendant in the event that it later turns out that the orders should not have been made. No signed undertaking was filed in this case.

25. This Court in a memorandum circulated to the parties immediately after the call-over of the list of cases for the present session expressed concern that the order of 19 September 2018 appeared to have the shortcomings mentioned above, and directed that parties file copies of the papers which had been before the Supreme Court and full notices of appeal as a matter of urgency. This occurred.

26. When the matter was called for hearing new counsel for Mr Noam immediately acknowledged the shortcomings. He conceded that the appeal should be allowed and that the orders made on 19th September 2018 should be set aside.

27. This concession made it unnecessary for the parties or the Court to explore other grounds which could justify setting aside the order. We mention just two other grounds.

28. First, the process for eviction which was ordered was grossly excessive. Even if the urgency of the situation had been such as to warrant the making of an order without prior notice of an application being served on the relevant defendants, the eviction process permitted under the order should have required, at the least, service of the order on the relevant defendants as a first step. The order should have given time to the defendants to make alternative living arrangements and to remove themselves and their possessions in an orderly way and to deliver up possession within a reasonable, though perhaps short time, say three weeks. The orders should then have warned the defendants that if they failed to do so force would be used to remove them. This order contained no provisions to ensure that the lives of those to be evicted were disrupted as little as necessary to achieve eviction. Service of the order should not have been left to the police to carry out at the time of eviction.

29. Secondly, the uncertainty inherent in the first paragraph of the orders gives no meaningful instruction to the police as to how they are to determine what gardens, farming, fences, houses and trees were planted or erected since 27 November 2014 without the lawful authorization of the respondent. The order therefore lacks necessary certainty in its terms.

30. The manner of execution of the order was not an issue that could arise on this appeal. That will be a matter for consideration in later proceedings elsewhere if claims are made by those who were evicted. We note however that the orders of the court did not authorize action against the defendants by anyone other than police officers, yet sworn statements filed in this appeal alleged others took part in the destruction of gardens and properties of those who say their rights were unlawfully invaded.

Consequential Matters

31. Once the order of 19th September 2018 is set aside it will be up to the individuals who alleged they have been unlawfully harmed to take action in other proceedings. This Court cannot undertake a first instance investigation of the allegations and counter allegations which are already evident in the sworn statements.

32. A central issue raised by the decisions of the Island Court is to ascertain the boundaries of the Lapangnapeuk land, the boundaries of the adjoining lands referred to in the Island Court papers as CC3, the location of the homes and gardens that have been damaged in relation to those boundaries, and the geographical limits of the areas of customary use by the defendants. Clearly the parties are in disagreement about these boundaries. Members of this Court in discussion with counsel have urged the parties to take steps as a matter of urgency to have the area properly surveyed by independent experts who can locate and mark the boundaries, and locate the positions of the evicted houses and gardens. Comprehensive photographic records should be made with the location of the photographed objects accurately positioned on the mapping. Proper evidence of this kind obtained now is likely to save considerable expense later in litigating claims, and make the outcome of claims predictable and more readily capable of negotiated outcomes.

33. The court also discussed with the parties what consequential orders and undertakings are necessary to protect the parties as they now pursue their respective rights in other places. Agreement was reached as to the injunction and undertaking which are now recorded in the formal orders of this court.

34. Those orders are:

    (a) The appeals of both appellants against the Supreme Court orders made on 19th September 2018 in Civil Case 3848 of 2016 are allowed;

    (b) The said orders are set aside;

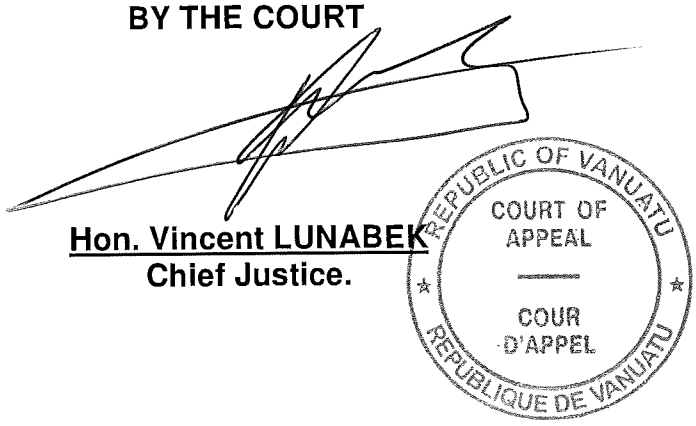
(c) The respondents shall pay the costs of the first and second appellants in this court fixed on the standard basis;

(d) The respondent is hereby restrained from trespassing on the land marked CC3 in the Lapangnapeuk Map attached to the Tanna Island Court decision of 27th November 2014 and from interfering with the use of the CC3 land by the second appellants or any of them;

(e) The court notes the undertaking of the respondent not to further seek to enforce the decisions of the Tanna Island Court dated 27th November 2014 and 31st August 2018 until appeals to the Supreme Court against these decisions are determined. Liberty is reserved to apply to the Supreme Court to vary this undertaking in the event that a party considers the resolution of the appeals is being unreasonably delayed or obstructed by another party;

DATED at Port Vila, this 16th day of November, 2018.

BY THE COURT



Hon. Vincent LUNABEK
Chief Justice.