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

Civil Appeal
Case No 2748 of 2018 CoA/CIVA

BETWEEN: **Kalsef Tangraro**
Russell Bakokoto
First Appellants

AND: **Steven Kalsakau**
Chief Nmak Kalmet Pomal
Second Appellants

AND: **Erick Gorrytal**
Kalkot Kaltabang
Third Appellants

AND: **Republic of Vanuatu**
Respondent

Date of Hearing:	***Friday 14th February 2020***
Coram:	***Hon. Justice J Hansen J*** ***Hon. Justice R White J*** ***Hon. Justice O Saksak J*** ***Hon. Justice D Aru J*** ***Hon. Justice V M Trief J***
Counsel:	***S Kalsakau and J Ngwele Counsel for First and Second Appellants*** ***S Aron for the Respondent***
Date of Decision:	***Thursday 20th February 2020.***

MINUTE AND REASONS OF THE COURT

---

[1] This case involves land that was previously the customary land of the Erakor, Ifira and Pango people. Soon after Independence, this land was taken pursuant to the provisions of the Land Reform Act [Cap 123]. The land was required for the public purpose of creating the capital of the new Republic of Vanuatu at Port Vila, with ancillary and necessary infrastructure, including the international airport.

[2] The appeal was listed for the November 2019 session of the Court of Appeal. Submissions were filed by the appellants and the respondent. Because the appellants had only recently instructed Mr Boar this Court reluctantly adjourned the matter to this session.

[3] On the 6th February this year Mr Kalsakau filed a Notice of Beginning to Act. On the 7th February he filed an application to amend the Grounds of Appeal and an Application to Adjourn the Appeal to the next session of this Court. At the end of the call over on the 10th of February we had this appeal called and heard submissions from counsel on the two applications. We dismissed both applications and said we would give our reasons in our substantive decision. These reasons appear below.

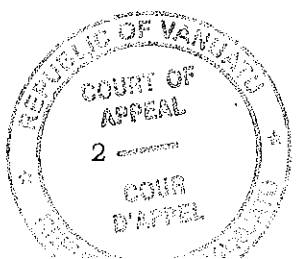
[4] At 4.30pm on the 13th February the Appellants' new submissions were filed. Those submissions withdrew Grounds 1 and 4 of the Notice of Appeal.

[5] At the commencement of the hearing of the appeal we put a number of matters to Mr Kalsakau. The first that Ground 3 in the submissions was in fact a submission that the Order 26 of 1981 was invalid. When it was put to Mr Kalsakau that this ground was exactly what the Court had ruled on 10th February 2020 that he could not include by amendment he withdrew the ground.

[6] Ground 2, in part, was an argument relating to the unconscionability of the 1992 Agreement. We pointed out that this had never been pleaded, was not the subject of evidence and that, therefore, there had been no finding by the primary judge.

[7] We granted Mr Kalsakau time to discuss the matter with his client. When we returned to Court he advised that the whole of the appeal was withdrawn. We granted leave for the whole appeal to be withdrawn. The respondent sought costs on the appeal of VT 25,000. After discussion this was accepted by the appellants. We award costs of VT25,000 to the respondent.

[8] I made comments in Court addressed to the appellants that any fresh proceedings based on the alleged unlawfulness of the 1981 Order, or any other cause of action relating to this land, faced formidable obstacles. I now set those matters out and expand on them. For clarity the views expressed from this paragraph through to para [17] are those of the signatory judge to this minute alone.



[9] Firstly, I record the Grounds of Appeal contained in the Notice of Appeal of 9tth October 2019 filed by the appellants in person (which should have been described as "Amended Grounds of Appeal". These were the grounds which were ultimately withdrawn by the appellants:

(i) *"The process of this constitutional case by the former lawyers of the Appellants and by the Primary Judge was prejudice to the Appellants case from the beginning and during the trial. As result the Appellants were not in a position to advance their case in front of the Court.*

(ii) *The facts and evidence which the Judge fail to consider in his judgment, or fail to give the appropriate wait (sic), amounted by the facts and evidence which the lawyers did not properly submitted, or did not submit at all to the primary judge as part of their misrepresentation of the Appellants, all in which led to errs (sic) in facts in the Judgment of the lower court.*

(iii) *Errs (sic) in law and misrepresentations of the law by the primary judge, as well as misrepresentation of the arguments in law by the former lawyers, all in which led to errors in Law in the Judgment of the lower court.*

(iv) *The primary judge err (sic) in the ways he applied case authorities on the present case, the former lawyers did not properly submit to the primary judge the principle differences between those case authorities and the present case in their submissions, all in which led to errs (sic) in the applications of those case authorities on the present case in the Judgment of the lower court.*

(v) *The proposed amended arguments which the Appellants are inviting the Court of Appeal to consider"*

[10] For completeness I note that the Original Notice of Appeal was filed as long ago as 9th August 2018.

[11] It is clear to me that many of the complaints are against the appellants' previous lawyers who were not parties to the appeal. It also appears as if the appellants have a belief that they are not bound by the pleadings filed by their previous lawyers. They are so bound, but if the pleadings were not in accord with instructions their remedy is against the former lawyers.

[12] As well Mr Kalsakau, as noted above, withdrew reliance on the unlawfulness of the 1981 Order. It also appears to me that inherent in Ground 2 is a collateral attack on the lawfulness of the 1981 order.

[13] The major difficulty is the nearly 40 year delay. As I understood it, as advised by Mr Kalsakau, the proceedings would seek a discretionary remedy. Counting very strongly

against any favourable exercise of such discretion would be the appalling delay, the inevitable problems with evidence after such a delay and the chaos that would be caused to the government and citizens of Vanuatu and Port Vila from any declaration that the Order was unlawful. It is highly unlikely any court would countenance an order with such an effect.

[14] As well the challenge is also said to be based on the alleged ground that the Order did not satisfactorily set out the public interest for which the land was being taken. I do not consider that is correct. The Order clearly refers to the "Urban Boundaries" of Port Vila and attaches a map to the same effect. In my view no one reading the 1981 Order could have remained ignorant of the obvious public interest involved in the taking and use of the land. Self-evidently any such taking would also build in the future needs of the new Republic's capital.

[15] A further ground of unlawfulness is said to be the failure to agree and pay compensation before the taking. The Court deals with this below in the reasons for not granting the amendment sought.

[16] The appellants have had three sets of proceedings in which such a pleading could have been included. I consider there would be grounds to strike out any such new proceedings as an abuse of process on the well-established *Anshun* principles. The withdrawal of all the above grounds of appeal would be relevant to the *Anshun* application and the appellants could very well be estopped from relying on any of the matters withdrawn in the current appeal. The appellants' failure to raise these issues in the three sets of proceedings to date may have cost implications.

[17] While I appreciate the appellants' sense of grievance in this matter it must be finally let go. It has been the subject of 3 sets of proceedings in the Supreme Court all of which reached this Court. They have been unsuccessful every time. They need to move on.

Reasons of the Court for the dismissal of the applications to amend the Amended Notice of Appeal and refusal to adjourn the appeal

[18] We now formally set out our reasons for dismissing the Application to Amend the Notice of Appeal and to Adjourn the Appeal.

[19] This appeal has a chequered history. It is evident from the sworn statements of Kalsef Tangraro and Russell Bakokoto on behalf of the appellants that they have approached a number of lawyers over the years, and it appears they ultimately fell out with each of these lawyers and approached new counsel. This appeal was initially filed as long ago as August 2018.

[20] Having sacked Mr Kapapa the appellants next instructed Mr Boar. By this stage the matter was already set down for hearing in the November session of this Court. Mr Boar applied to the Court for the matter to be stood over to this session. This was on the basis that he was lately instructed and because of difficulty obtaining documentation from the previous lawyer, Mr Kapapa. Given the lengthy history of this matter this Court, with reluctance, adjourned the matter until this session.

[21] Shortly after the November session, Mr Boar's name was struck from the roll of legal practitioners. We have already recounted the steps undertaken by Mr Kalsakau since he commenced to act. We do note Mr Kalsakau appears to have a personal interest in the outcome of the proceedings.

[22] The amendment sought was to include a challenge to the lawfulness of the order made taking the land for public purposes. As noted above that document is Land Reform (Declaration of Public Land) Order № 26 of 1981 (Order № 26 of 1981) dated 26 January 1981. Also as noted above prior to these proceedings there had been two previous proceedings before the Supreme Court dealing with this land, both of which were appealed unsuccessfully to this Court. In neither of those proceedings was there any challenge to the lawfulness of the order just set out. Nor was it challenged in the pleadings in this case. Mr Kalsakau submitted, however, that it was a live issue because the Judge stated it was a lawful order. He also points to the affidavit in support that states all along the instructions of the appellants to their lawyers was to challenge the lawfulness of the 1981 order and the later compensation agreements of 1992.

[23] Mr Kalsakau submitted that Article 77 deals with compensation and Article 80 then goes on to say that notwithstanding Articles 73 and 74, the Government may own land acquired by it in the public interest. He submitted that that means compensation must be fixed prior to the taking of any land. The Articles do not say that. The authorities clearly, and obviously, establish that if a State takes land for public purposes they must pay compensation for the land except in the most exceptional circumstances. But none of the authorities say compensation must be paid before the taking. In Australia and New

Zealand, as examples, takings for public purposes are governed by statute. The relevant statutes require compensation but what occurs is that the necessary notices are given taking the land for public purposes and the parties then agree compensation or the question is litigated. . S 11(2) of the Land Reform Act contemplates the same order of events, so Vanuatu is no different.

[24] It is too late to introduce into this appeal a completely new matter that would require the hearing of evidence and separate considerations. As noted above the appellants are bound by their pleadings below, and if they have any issues in that regard it is with the lawyers responsible for the pleading, and not the respondent or the Court.

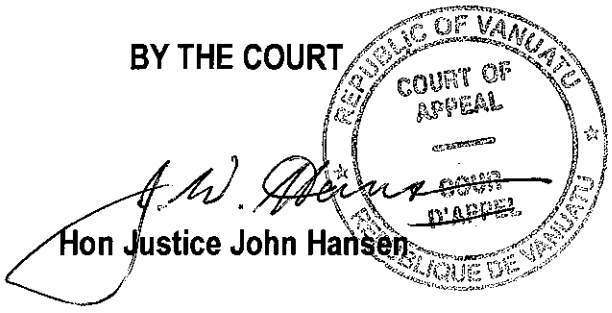
[25] These are our reasons for dismissing the application to amend.

[26] This appeal has been on foot since August 2018. It is necessary in the interests of justice and the interest of all parties that some finality is brought to this matter on what is a third proceeding with the same subject matter. These considerations make it appropriate for the application to adjourn this appeal to the next session of the Court to be refused.

[27] These are our reasons for refusing the adjournment application.

Dated at Port Vila, this 20th Day of February 2020.

BY THE COURT



Hon Justice John Hansen