

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

Civil Case No.83 of 2010

BETWEEN: FAMILY KALMERMER
Claimant

AND: KALTATAK FAMILY represented by
KALTAPAS KALTATAK and KALONTAS
KALTATAK
First Defendant

AND: KALMET FAMILY represented by CHIEF
ANDREW BAKOA KALPOILEP and JACK
KALMETLAU
Second Defendant

AND: NORRIS JACK
Third Defendant

AND: HUGO BRUGGER
Fourth Defendant

AND: THE REPUBLIC OF VANUATU
Fifth Defendant

AND: KALORIB KALMERMER
Sixth Defendant

Coram: Justice D. V. Fatiaki

Counsel: Mr. Hakwa for the Claimant
Mr. W. Thomas (Kilu lawyers) for the First Defendant
Mr. Laumae for the Second and Third Defendants
Mr. R. T. Kapapa for the Fourth Defendant
Ms. C. Thyna for the Fifth Defendant
Mr. L. Napuati for the Sixth Defendant

Date of Delivery: 10th June 2016.

JUDGMENT

1. This is an opposed application by the Third Defendant Norris Jack to stay the present proceedings pending the resolution and determination of **Land Appeal Case No. 71 of 2006** where the claimant is an appellant and the second defendant family is one of several respondents. The subject matter of the land appeal is a large tract of customary land known as: "Teouma Rentapau land".



2. The application cites no authority or legal basis in support but is clearly based on the court's inherent power to control the use of its processes and procedures to prevent oppressive and abusive conduct in the interests of justice, economy, and efficiency and to avoid undue complexity that can arise from parallel proceedings.
3. In this latter regard defence counsel submits that the determination of **Land Appeal Case No. 71 of 2006** will also determine the outcome of the present claim which was filed long after the land appeal. Furthermore the present claim is said to be based on an alleged breach of the Court's injunctive orders in **Land Appeal Case No. 71 of 2006** and should therefore be properly brought as a contempt proceeding.
4. Counsel also forcefully submits that the "*locus standi*" of the claimant in the present claim is at best doubtful as it is neither a party to the lease sought to be rectified nor does it have a declaration of customary ownership in its favour in respect of the customary land over which the lease was granted and registered.
5. The substantive claim is an application for rectification pursuant to Section 100 of the Land Leases Act [CAP. 163] by way of cancellation of a registered lease title No. 12/0932/138 which was initially granted by the First and Second named defendant families to the Third Defendant who subsequently transferred it to the Fourth Defendant for valuable consideration. The grant and transfer are challenged as having knowingly occurred as a result of a mistake(s) both in its creation and registration. The alleged "*mistake*" is said to be the knowing creation, transfer and registration of the said lease in breach of the Court's pre-existing injunctive orders.
6. I accept that the normal process and procedure for dealing with a deliberate disobedience of a Court's injunctive order is by way of an application to the Court for committal for contempt, but, that does not preclude a claim for cancellation of a lease which is created and registered as a directed consequence of such disobedience.
7. For present purposes the following is a brief summary of relevant events and cases extracted from the claimant's chronology:
 - 1993 - Land Case No. 08 of 1993 dealing with "*Teouma Rentapau land*" was first commenced in the Efate Island Court with the following nine (9) claimants:

- (1) **Family Kalmet (original claimant);**
- (2) Family Kalpong;



- (3) Jif Koriman;
- (4) Family Kalmermer;**
- (5) Family Kalwatong;
- (6) Jif Kaltapau & descendant;
- (7) Family Alick Kalonikara;
- (8) Family Nase Kalmet Taleo;
- (9) Family Fatau Kalmari.

The spokesman for Family Kalmermer was identified as “*Thomas Tau*”.

- 25 Nov. 2003 – The Eratap Customary Land Tribunal in Land Case No. 1 of 2003 declared **Family Kaltatak** the customary owner of “*land to the west of the Teouma river in the Eratap area*”;
 - 13 May 2004 – The Eratap Customary Land Tribunal in Land Case No. 1 of 2004 declared **Family Kalmet** (the original claimant in Land Case No. 8 of 1993 before the Efate Island Court) the customary owner of “*lands to the north of the land in Land Case No. 1 of 2003*” already declared in favour of Family Kaltatak and which land was “*also to the west of the Teouma River*”.
8. Neither of the above Land Tribunal decisions were successfully challenged under the relevant provisions of the Customary Land Tribunal Act [CAP. 271] and are therefore “*final and binding*” (see: Sections 39 and 33). Having said that there is a continuing uncertainty over the customary land area(s) determined by the above-mentioned Land Tribunal decisions and that which was later decided by the Efate Island Court in Land Case No. 08 of 1993.
- 24 March 2006 – The Efate Island Court delivered its decision in Land Case No. 08 of 1993 in favour of the original claimant Family Kalmet (see: [2006] VUICB 6 bislama version);
 - 24 April 2006 – Family Kalmermer lodged an appeal in the Supreme Court against the Efate Island Court decision in Land Case No. 08 of 1993 and the appeal was numbered as: **Land Appeal Case No. 71 of 2006**.
 - 25 Oct. 2005 – The Supreme Court refused an application by the Sixth Defendant and “*Thomas Tau*” for an extension of time to appeal again the Tribunal decision in Land Case No. 01 of 2004 [see: Civil Case 25 of 2005];
9. Between November 2006 and December 2008, the Supreme Court in **Land Appeal Case No. 71 of 2006** issued several injunctive orders seeking to maintain the “*status quo*” by staying execution of the Land Tribunal decisions in



Land Case No. 01 of 2003 and Land Case No. 01 of 2004. The final varied injunctive orders of 18 December 2008 are as follows:

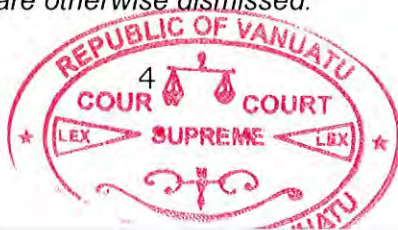
- "1. The Orders which this Court made on 24 November, 2006 and 25 March, 2008 shall be varied as follows:

Pending final determination of all of the appeals which all of the Appellants have lodged in Land Appeal Case 71 of 2006 ("LAC 71/06") against the Judgment of the Efate Island Court in Efate Island Court Land Case No. 8 of 1993 ("EIC 8/93") or until further order of the Court:

- a. *The entire Judgments of the Efate Island Court in EIC 8/93 made on 24 March, 2006 and the Eratap Customary Land Tribunal (the "Tribunal") in Land Case No. 1 of 2003 made on 25 November, 2003 and in Land Case No. 1 of 2004 made on 13 May, 2004 are hereby stayed;*
- b. *There shall be no:*
 - i. *Survey (for the purposes of the creation of any lease);*
 - ii. *Approval (as may be required by the Land Reform Act [Cap 123] as amended or the Land Leases Act [Cap 163] as amended);*
 - iii. *Rectification of any Title; or*
 - iv. *Registration of any dealing whatsoever,*

in respect of the land comprising the entire land the customary ownership of which is disputed and/or claimed by Family Kalmermer and Family Kalwatong in EIC 8/93 and which dispute and/or claims are currently the subject of their respective appeals in this proceeding (the "Land");

- c. *There shall be no sale, transfer, assignment, alienation, licence, or any other dealing whatsoever in custom law in respect of the Land;*
 - d. *The Department of Lands, Survey & Records is restrained from distributing any rents, premiums or other monies received in relation to any lease or sublease over any part of the Land; and*
 - e. *Every member of Family Kalmet, Family Kaltatak and Family Maseimermerman is restrained from acting or purporting to act on the Judgments of the Tribunal in Land Case No. 1 of 2003 made 25 November, 2003 and in Land Case 1 of 2004 made 13 May, 2004.*
2. *Paragraph 1b does not apply to any portion of the Land which is already the subject of a Lease which was obtained and registered prior to 24 November, 2006 in accordance with the Land Leases Act [Cap 163] as amended or any leases created out of the surrender of any existing registered Lease and the Subdivision of the land the subject of that Lease.*
3. *For the avoidance of doubt, a Lease which was obtained and registered prior to 24 November, 2006 in accordance with the Land Leases Act [Cap 163] as amended and is surrendered for the purposes of subdivisions constitutes an existing Lease within the meaning of paragraph 2.*
4. *The Applications made by Bred (Vanuatu) Limited and Teouma Holdings Limited to be joined as parties are otherwise dismissed.*



5. *The Applications by the Attorney General (dated 9 March 2007) and the Republic of Vanuatu (24 November 2008) to be joined as a party are consolidated and adjourned sine die.*
 6. *There is no order as to costs.*
 7. *There shall be liberty to apply in writing."*
- 13 Feb. 2007 – The Supreme Court refused an application by Timatasomat and Somor Usamoli to be joined as a party to **Land Appeal Case No. 71 of 2006**; (see: [2007] VUSC 23);
 - April 2008 – Family Kalmet sought an extension of time and leave to appeal against the above-mentioned injunctive orders of the Supreme Court in **Land Appeal Case No. 71 of 2006** (this application was not pursued);
 - 19 June 2009 – Family Kaltatak and Family Kalmet granted Jack Norris (the Third Defendant) a commercial lease Title No. 12/0932/138 over part of the land dealt with in Land Cases No. 01 of 2003 and No. 01 of 2004;
 - 21 July 2009 – Jack Norris transferred Lease Title No. 12/0932/0138 to Hugo Brugger for VT5,000,000 with the consent of Family Kalmet and Family Kaltatak;
 - 8 Aug. 2009 – The Minister of Lands consented to the transfer of the lease;
 - 24 Sep. 2009 – Lease Title No. 12/0932/138 was registered by the Director of Lands;
 - Oct. 2013 – Family Kalmet again renewed its leave application in Civil Appeal Case No. 33 of 2013 and the Court of Appeal gave several directions with a view to facilitating the hearing of the appeal including the provision of:

"... a map of sufficient geographical size to have marked on it the area of any decision of any Court or Tribunal and any claimed areas ..." (see: [2013] VUCA 30);
 - 4 April 2014 – Court of Appeal delivered its judgment in Civil Appeal Case 33 of 2013 amending the injunctive orders granted in **Land Appeal Case No. 71 of 2006**. In doing so, the Court of Appeal affirmed and upheld the declarations of the Eratap Customary Land Tribunal in Land Case No. 01 of 2003 and Land Case No. 01 of 2004 as: *"final and binding"*.



- The Court of Appeal was also satisfied:

“... that when the (Efate) Island Court included in its (later) decision of March 2006 (in Land Case No. 8 of 1993) a declaration as to the custom ownership of land to the West of the Teouma River in the Eratap area it had no jurisdiction to do so.”;

(my underlining)

10. The amending orders of the Court of Appeal in Civil Appeal Case No. 33 of 2013 are as follows:

“The orders of the Supreme Court of 25 March 2008 and the amending order of 18 December 2008 (which protected leases in existence on the land as at 24 November 2006) will be amended as follows:

- a. Orders (1), (2) and (7) of the order of 25 March 2008 are deleted.*
- b. Orders (3), (4), (5) and (8) in the 25 March 2008 order are amended so that the limitation in those orders applies only to the land between the Teouma and Rentapau Rivers in claim 08/93.*
- c. Order 1(a) of the order of 18 December 2008 is amended by deleting reference to the judgments in Land case 01/2003 and Land Case 01/2004.*
- d. Orders 1(b) to (e) of the orders of 18 December 2008 are amended so that they refer only to that part of the land in 08/93 within the Teouma and Rentapau Rivers.”*

11. For completeness, on 31 March 2016, in Civil Case No. 171 of 2015 between Kaltatak Family v. Andrew Bakoa Kalpoilep, Jack Kalon and the Republic of Vanuatu [2016] VUSC 42 the Supreme Court granted judgment to the claimant (who is the First Defendant family in the present case) and made the following orders:

*“**That** the decision of the Eratap Land Tribunal dated 18th May 2004 (in Land Case Nos. 01 of 2003 and 01 of 2004) as confirmed by the Court of Appeal be hereby enforced as final and binding, and that the defendants be hereby required to comply with the decision in all respects.*

***That** the First and Second Defendants be hereby required to account and pay up VT 17.823.077 held in trust by the Government and released to the First Defendant pursuant to the Deed of Release dated 18th December 2014 to a nominated account by the Claimant for sharing between members of Kalmet family, Kaltatak family and Maseimermerman Family.*

***That** the Government be hereby restrained from releasing any further funds held in trust in respect of Eseltuan, Naisraper, Etas, Teouma Bridge, Montmarte and Eseltumam, South Efate to the First and Second Defendants without the prior written consent and authorisation of the claimants.*



The Third Defendant through the Customary Land Management Office to cancel the certificate of registered interest in land registered dated 4th August 2004 and to issue a new certificate in the following names:

Jack Kalmet and Andrew Bakoa Kalpoilep members of and authorised representatives of Kalmet Family of Eratap.

Kalkot Kaltatak member of and authorised representative of Kaltatak Family of Eratap, and

Jack Kalon for and on behalf of Maseimermerman Family of Erakor.”

(my underlining and emphasis)

12. In light of the above, the claimant’s challenge to the representative capacities of “*Andrew Bakoa Kalpoilep*” to act for Family Kalmet, and, of “*Kalkot Kaltatak*” to act for Family Kaltatak in the creation and execution of Lease Title No. 12/0932/138 is unlikely to succeed.
13. Although the Court of Appeal acknowledged during the course of its judgment in Civil Appeal Case No. 33 of 2013 that **Land Appeal Case No. 71 of 2006** remains to be determined, nevertheless, the Court of Appeal by its variation of the injunctive orders, effectively confined the appeal “... *to the land between the Teouma and Rentapau Rivers*”.
14. In other words the so-called over-lapping lands “... *West of the Teouma River*” that were allegedly dealt with by the Eratap Customary Land Tribunal in Land Case No. 01 of 2003 and Land Case No. 01 of 2004 and later, by the Efate Island Court in Land Case No. 08 of 1993 must now be excluded from the lands to be considered in **Land Appeal Case No. 71 of 2006**.
15. That being the clear effect of the Court of Appeal’s judgment, the Defendant’s application to stay the present proceedings is redundant. Likewise the claimant’s rectification claim which is dependant upon a subsisting valid challenge to the customary ownership of lands declared by the Eratap Customary Land Tribunal in Land Case No. 01 of 2003 and Land Case No. 1 of 2004 in favour of Family Kaltatak and Family Kalmet respectively, has been overtaken by the judgment.
16. Accordingly, the defendant’s application to stay this proceeding is dismissed and the substantive claim is also dismissed because Family Kaltatak and Family Kalmet’s declarations of customary ownership by the Eratap Customary Land Tribunal have been finally confirmed by the judgment of the Court of Appeal and, as such, their respective capacities as “*lessors*” to grant a lease



over their customary land can no longer be entertained or proffered as a “mistake” in the Claimant’s application to cancel Lease Title No. 12/0932/138.

17. Both the Claimant and the Second and Third Defendants having partially succeeded in this judgment I make no order as to costs.

DATED at Port Vila, this 10th day of June, 2016.

BY THE COURT


D. V. FATIAKI
Judge.

