

BETWEEN: Family Kalmermer
Claimant

AND: The Eratap Customary Land Tribunal
First Respondent

AND: Family Kalmet
Second Respondent

AND: Family Kaltatak
Third Respondent

AND: Family Maseirmerman
Fourth Respondent

AND: Republic of Vanuatu
Fifth Respondent

Date of Hearing: 25 June 2025

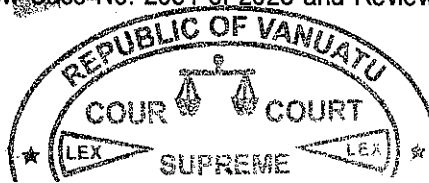
Before: Hon. Chief Justice V. Lunabek

Counsel: Mr Jona Mesao for the Claimant
Mr Sammy Aron and Ms Marie Meltebury for the First and Fifth Respondents
Mr Garry Blake for the Second Respondent (Family Kalmet)
Third & Fourth Respondents – no appearance

REASONS FOR REFUSING THE INTERLOCUTORY ORDERS SOUGHT

Introduction

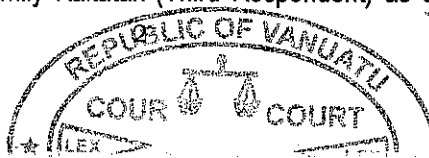
1. This is an Urgent Ex-Parte Application to stay the effect of the two Eratap Customary Land Tribunal decisions of 2003 and 2004 pursuant to Rule 7.6 of the Civil Procedure Rules (CPR) (2002) and restrain the use or reliance of certificates of Recorded Interests obtained as a consequence of these decisions.
2. The Applicant applies for the following orders:
 - (a) The effect and enforcement of the decisions of the First Respondent (Eratap Customary Lands Tribunal), dated 25 November 2003 and 18 May 2004 respectively, be stayed pending final determination of the Applicant review applications filed in the Efate Island Court (Land), namely Review Case No. 2634 of 2023 and Review Case No. 2635 of 2023;



- (b) That the Second, Third and Fourth Respondents, whether by themselves, their servants, agents, or any other persons acting on their own behalf, be restrained from acting upon, relying upon, or otherwise enforcing the said Tribunal decisions, including the use or reliance upon any Certificate of Recorded Interest in land issued in consequence thereof;
- (c) The Applicant is at liberty to file a Judicial Review claim against the decisions of the Eratap Customary Land Tribunal dated 25 November 2003 and 18 May 2004; and
- (d) That the costs of this application be in the cause.

Background: Procedural

3. On 3 June 2025, the Applicant filed an Urgent Ex-Parte Application, amongst other matters, to stay the effect of the Eratap Customary Land Tribunal Decisions of 25 November 2003 and 18 May 2004.
4. The Application is supported by the following:
- A sworn statement of Johnston Kalman Tau filed on the same date;
 - A sworn statement as to urgency of Johnston Kalman Tau filed on the same date;
 - An undertaking as to damages.
5. The Court sat on 10 June 2025 to hear the application. The hearing was adjourned as the decisions of the Eratap Customary Land were not annexed to the sworn statements. The hearing date was scheduled on 25 June 2025.
6. Mr Blake filed a Notice to begin to act on behalf of the Second Respondent (Family Kalmet) on 10 June 2025.
7. The First and Fifth Respondents (the Eratap Customary Land Tribunal and the Republic of Vanuatu) filed a response to the Application on 10 June 2025 with a sworn statement of Linda Mala Olul, Senior Executive Officer, Custom Land Management Office on the same date. The response say that two applications for review were pending before the Efate Island Court (Land) in Review Case No. 2634 and Review Case 2635 pursuant to Section 58(3) and (4) of the Custom Land Management Act No. 33 of 2013 ("*the Act*").
8. The sworn statement of Linda Mala Olul attached with it a copy of Notice of intention to cancel the Certificates of Recorded Interest in lands issued in respect to Eratap Land Tribunal Decision of 18 May 2004 in Land Case No. 01 of 2004 and decision of 25 November 2003 in Land Case No. 01 of 2003.
9. On 23 June 2025, Johnston Kalman Tau filed a Further sworn statement attaching the decisions of the Eratap Customary Land Tribunal dated 25 November 2003 which declared Family Kalmet (Second Respondent) and Family Kaltatak (Third Respondent) as custom owners of Eratap



Custom Land; and the decisions of 18 May 2004 declared Family Maseimermer, Family Kalmet, Family Kaltatak as custom owners of Naisraper Custom Land (Stella Marie – Etas ...).

10. The review applications against these two decisions were filed on 2 October 2023.

Background: Legislations and sequences

11. The Eratap Customary Land Tribunal issued its two decisions of 25 November 2003 and 18 May 2004 under the Customary Land Tribunal Act.
12. The Applicant took no step to challenge these decisions under the Customary Land Tribunal Act since 2003 until October 2023.
13. The Customary Land Tribunal Act was repealed in 2013.
14. The Customary Land Management Act came into force on 20 February 2014. The Act was not operational until October 2016 when the Registrars of the Island Courts (Land) were sworn in and took their oaths of office.
15. Since 2016 to 2023 (7 years) no steps were taken by the Applicant to challenge the two decisions of the Tribunal dated 25 November 2003 and 18 May 2004 pursuant to Section 58 of the Act.
16. Section 58 provides:

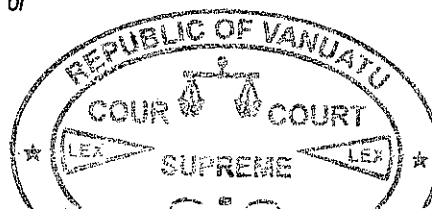
"Existing decisions of Customary Land Tribunal

- (1) *Decisions of:*

- (a) *a single or joint village Customary Land Tribunal; or*
- (b) *a single or joint sub-area Customary Land Tribunal; or*
- (c) *a single or joint area Customary Land Tribunal; or*
- (d) *an island Customary Land Tribunal,*

which determined the ownership of custom land and which were made before the commencement of this Act and have not been challenged within 12 months after the commencement of this Act, are deemed to create a recorded interest in land in respect of the person or persons determined by such tribunal to be a custom owner.

- (2) *The creation of a recorded interest in land under subsection (1) will enable the custom owners so recorded to be identified for the purpose of consenting to an application for a negotiator's certificate or a lease, or is to provide the basis for rectification of an existing lease instrument.*
- (3) *A person may challenge a decision of a Customary Land Tribunal under this section by filing an application with the appropriate Island Court (Land) that the decision of the Customary Land Tribunal be reviewed on the ground that:*
 - (a) *it has been made at a meeting that was not properly constituted; or*
 - (b) *it has been made in breach of the authorised process; or*
 - (c) *it has been procured by fraud; or*



(d) it was wrong in custom or law.

(4) The Island Court (Land) after hearing all relevant evidence may dismiss the application for review, or may order that the decision of the Customary Land Tribunal be set aside and direct that the ownership of custom land be determined in accordance with this Act.

17. Section 58(1) and (2) must be noted:

- Under Section 58(1) decision of Customary Land Tribunal which determined the ownership of custom land and which were made before the commencement of this Act and have not been challenged within 12 months after the commencement of this Act, are deemed to create a recorded interest in land in respect of the person or persons determined by such tribunal to be a custom owner; and
- Under Section 58(2), the creation of a recorded interest in land under subsection (1) will enable the custom owner so recorded to be identified for the purpose of consenting to an application for a negotiator's certificate or a lease, or to provide the basis for rectification of an existing lease instruments.

18. The Second Respondent (Family Kalmet) and other Respondents have acted on the two decisions of the tribunal (25 November 2003 and 18 May 2004) and have been granted Certificates of Recorded Interest relation to these customary lands (s.58(1)) and leases and developments on these lands.

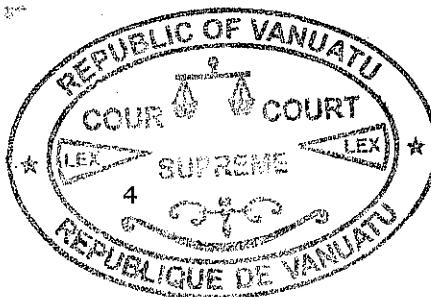
19. The Applicant now comes before the Court to stop a process created under the law (s. 58(1)(2)) for 20 years.

Applicable Rules 7.2 – 7.6?

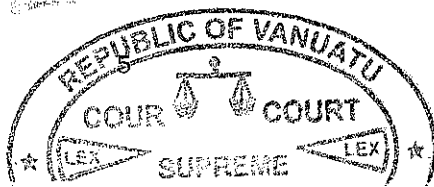
20. This application was brought under rule 7.6 of the Civil Procedure Rules 2002. That rule concerns applications for urgent interlocutory applications for Urgent interlocutory orders and the Court considers it appropriate because of the need to protect persons or party; or to prevent the removal of persons or property from Vanuatu; or because of other circumstances that justify making the order asked for. There is no urgency here. It is noted that two applications for review of two decisions of the Eratap Tribunal filed on 2 October 2023 were pending before the Efate Island Court (Land). No hearing date is yet set. The relevant rule is rule 7.2 because it concerns applications for interlocutory orders during a proceeding.

21. Considerations of matters under rule 7.2 bring me to rule 7.5. I apply rule 7.5 also in this application.

Submissions



22. Mr Mesao urges the Court to make the interlocutory orders sought. The Applicant says that the Eratap Customary Land Tribunal failed to put a notice to all other people of Eratap to attend the meetings of the Nakamal. No Nakamal meetings ever called for the disputes over the Tribunal decisions of 25 November 2003 and 18 May 2004. The declarations of custom ownership were made in respect to particular families only. The Applicant requests that the Court makes the orders staying the effect of the decisions of the Eratap Tribunal made on 25 November 2003 and 18 May 2004. The two applications for review of these decisions made on 2 October 2023 were pending before the Efate Island Court (Land).
23. As to delay from October 2016, after the Efate Island Court (Land) became operational, to 2023 when the review applications were filed, Mr Mesao says he did not obtain material to explain the delay.
24. Mr Arom on behalf of the State referred the Court to the Responses filed on behalf of the First and Fifth Respondents and the sworn statement of Olul in support, he said they will be bound by any orders of the Court.
25. Mr Blake submits to this effect. This application is made under rule 7.2. Rule 7.5 will also be applied as the relevant question will be whether or not there is a serious question to be tried. The time frame referred to of 12 months period is relevant. No actions were taken since 2003 – 2004 to challenge these decisions of the Tribunal under the Customary Land Tribunal Act.
26. The Customary Land Management Act was passed in 2014. It set out 12 months period to challenge these type of decisions. It is said that since the coming into force of the Customary Management Act in February 2014, the Island Court (Land) was not operational until 2 October 2016 when the Registrars of the Island Courts (Land) were sworn in. The Application to review these two decisions were filed in 2023, there was no material evidence of what the Applicant did or steps taken since 2016. The delay of 7 years gap was unexplained.
27. The Second Respondent (Family Kalmet) and other Respondents have acted and have obtained certificates of Recorded Interest since February 2014.
28. The applicant came before the Court to stop a process initiated since 20 years ago. There are no steps taken. The review is yet to be heard. Mr Blake submits it is premature to stop the process in such a circumstance. If there is a degree of prejudice by the Applicant and urgency in 2025 – which is 9 years after – while the Respondents obtained Certificates of Recorded Interest, the Applicant needs to establish that prejudice or degree of that prejudice.
29. Paragraph 7 of the sworn statement of Johnston Kalman Tau filed 3 June 2025 showed that the Applicant is concerned that unless a stay is granted, the Second, Third and Fourth Respondents may lease, transfer, undermining their rights and rendering the review proceedings future. Mr Blake argued that the notice of intention to cancel the certificates of Recorded Interest has no basis. The Act says if no challenge within 12 months, Section 58(1)(2) applied in favour of the Respondents. The discretion must be exercised taking into consideration the fact that 20 years



after the original decisions were made the Respondents have benefited of declared rights under the law.

Is there a serious question to be tried?

30. Two applications for review of the two decisions of the Eratap Customary Land Tribunal of 25 November 2003 and 18 May 2004 are pending before the Efate Island Court (Land). They may constitute a serious question to be tried.

Is the Applicant likely to succeed if the evidence brought by the Applicant remains as it is?

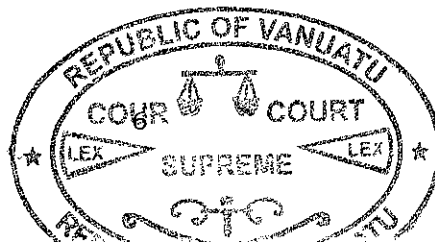
31. If the evidence remains as it is, the claimant may likely to succeed. The evidence supports the proposition that at all material times amongst other matters neither the First Respondent nor Andrew Bakoa Kalpoilep (deceased) had given any or sufficient notice in accordance with the relevant provisions of the Customary Land Tribunal Act (the Repealed Act):

- Advising the people of Eratap of the claims which the Second Respondent and Third Respondent had filed in relation to Eratap Custom Land;
- Advising the people of Eratap of the custom boundaries which comprises the areas of custom land which are the subject of the claims made by the Second Respondents;
- Inviting other families or persons who may be affected by the claims filed by the Second Respondent and Third Respondent to file their own.

32. The evidence also supports the proposition that at all material times, among other matters, neither the First Respondent nor Andrew Bakoa Kalpoilep had given any or sufficient notice in accordance with the relevant provisions of the Repealed Act in relation to the custom ownership, boundaries and invite other families or persons who may be affected by the claims in respect to Naisraper Custom Land.

Would the Applicant be seriously disadvantaged if the order is not granted?

33. It is noted that there were no actions taken since 2003 – 2004. Apart from the attempt to apply in 2014, the applications for review were filed in 2023. There was no evidence of what step the Applicant took. There was no challenge made to the two decisions within 12 months period under Section 58(1) of the Customary Land Management Act. Section 58(1) and (2) gave the Respondents the rights to obtain certificate of Recorded Interest and to consent to applications for a negotiator's certificate or a lease, or is to provide the basis for rectification of an existing lease instrument.



34. It is difficult for a court to stay or restrain what the law gave the Respondents in the circumstances of this case. The application to stay is premature.
35. Section 58(3) and (4) of the Customary Land Tribunal Act (The Repealed Act) give the Applicant the right to challenge the decisions of the Tribunal made on 25 November 2003 and 18 May 2004.
36. The Applicant would not be seriously disadvantaged in the circumstances of this case if the orders sought in the Application is not granted as the effect of the refusal orders is not to render the review nugatory.

Where the balance of convenience lies?

37. On the considerations above, in terms of the urgent interlocutory relief, the balance of convenience is not in the Applicant's favour.
38. On 25 June 2025, after I heard submissions from counsel, I refused to grant the interlocutory orders sought.
39. These are the reasons refusing to grant the interlocutory orders sought on 25 June 2025.
40. The costs lie where they fall.

Dated at Port Vila, this 26th day of June, 2025.

BY THE COURT

Hon. Chief Justice Vincent Lunabek

