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

CIVIL APPEAL CASE No. 33 OF 2013

**BETWEEN:** **FAMILY KALMET represented by CHIEF ANDREW BAKOA KALPOILEP and JACK KALMET**
Appellants

**AND:** **FAMILY KALMERMER represented by their duly authorised representative CHIEF MANFEI KALORIB KALMERMER**
First Respondent

**AND:** **FAMILY KALPONG**
Second Respondent

**AND:** **FAMILY KORIMAN**
Third Respondent

**AND:** **FAMILY KALWATONG**
Fourth Respondent

**AND:** **JIF KALTAPAU and DESCENDANTS**
Fifth Respondent

**AND:** **FAMILY KALONIKARA**
Seventh Respondent

**AND** **FAMILY NASE KALMET TALEO**
Eighth Respondent

**AND:** **FAMILY FATAN KALMARI**
Ninth Respondent

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

***Counsel:*** *Mr. F. Laumae for the Appellant*
*Mr. S. Hakwa for the First Respondent*
*Ms. C. Thyna for the Second and Fifth Respondents*
*Mr. W. Daniel for the Third Respondent*
*Mr. J. W. Timakata for the Fourth Respondent*
*Sixth and Seventh Respondents – no appearance*
*Mr. S. Stephens for the Eighth Respondent*

***Date of hearing:*** *31st March 2014*
***Judgment Date:*** *4th April 2014*

# JUDGMENT

## Introduction

1. In March 2008 the Supreme Court made comprehensive interlocutory orders staying the effect of declarations made in the Efate Island Court in Land Case No. 08 of 1993 and the Eratap Customary Land Tribunal in Land Case No. 01 of 2003 and Land Case No. 01 of 2004 pending the hearing and determination of the appeal to the Supreme Court of the Efate Island Court decision in Land Case No. 08 of 1993 (the appeal being Supreme Court Case No. 71 of 2006).

2. The Supreme Court orders prevented dealing in the land covered by these decisions including a prohibition on leasing the land and the sale of any leasehold interest. Any rent or other money received from these lands was to be paid to the Supreme Court. Existing lease rights were protected.

3. The decisions of the Efate Island Court and the Eratap Tribunal declared the Kalmet Family to be the customary owner of the land the subject of the decisions.

4. In April 2008, the appellants filed an application for leave to appeal these interlocutory orders to this Court. The leave application was not pursued when the appellants believed the substantive hearing of the appeal was about to take place. Unfortunately the appeal has not yet been heard.

5. This matter came before this Court in the November 2013 session. At that time this Court made orders requiring each party to provide a map which identified the area they claimed as custom land and any relevant court decisions affecting that land. With some delay these maps have now been provided.

## Leave to Appeal and Extension of time

6. In October 2013 the appellants again sought leave to appeal from the orders of the Supreme Court of March 2008 and for an extension of time within which to appeal.

7. This appeal only challenges part of the Supreme Court orders of March 2008. In particular the appellants wish to challenge the orders that affect the land the subject of Land Cases No. 01/2003 and 01/2004.

8. As to the application for leave and to extend time the appellants say that the orders relating to the land covered by the Land Cases No. 01/2003 and 01/2004 decisions are very restrictive and they consider wrongly restrict their rights as customary owners.

9. As to delay they point to the fact they sought leave to appeal the 2008 orders immediately and only abandoned that application when they (wrongly) believed the substantive hearing would be urgently held.

10. In those circumstances we extend time for filing of the appeal and give leave to appeal.

**The Appellant's case**

11. The basis of the appellant's challenge to the interlocutory orders can be simply stated.

12. These proceedings in the Supreme Court (71/2006) are an appeal from a decision of the Efate Island Court in 08 of 1993 given in 2006. The appellants say the land that was covered by the Island Court's decision 08/1993 was bounded by the Teouma River and the Rentapau River in South East Efate. The various families who made custom ownership claims in 08 of 1993 were within the boundaries of these two rivers, the appellants claim.

13. The land in Land Cases 01 of 2003 and 01 of 2004 was not within this area although it did border some of this area. The land covered by these two cases (01/2003 and 01/2004) was the subject of decision by the Land Tribunal declaring customary ownership. There has been no appeal from these decisions and a judicial review claim challenging the decisions was dismissed. The Supreme Court Civil Case 71 of 2006 is concerned only with an appeal from Land Case 08/1993. The Supreme Court in Appeal Case 71 of 2006 could not make orders affecting the land in claims 01/2003 and 01/2004. This land was not the subject of any orders under 08/1993 and therefore not the subject of the appeal in 71 of 2006 to the Supreme Court. In any event the Customary Land Tribunal had already decided who owned the land in 01/2003 and 01/2004 and the Island Court in 08/1993 could not do so in its decision of March 2006.

14. The appellants therefore submit the Supreme Court had no jurisdiction to make orders affecting the land in Land Cases 01/2003 and 01/2004 when it granted the interlocutory orders.

**The Respondent's case**

15. Only two of the respondents are affected by this appeal, the first respondent, Family Kalmermer and the fourth respondent, Family Kalwatong. The sixth and

seventh respondents did not appear at the appeal hearing. The other respondents do not claim customary ownership of land that was the subject of the 01/2003 and 01/2004 decisions. And so they are not affected by the orders made in the Supreme Court and the subject of challenge in this Court.

16. The case of the first and fourth respondents can be summarised in this way. The 08/1993 case was concerned about land beyond the boundary of the Teouma and Rentapau rivers and their claim was part of the 08/1993 case. They say that prior to its decision of 2006 the Efate Island Court in 08/1993 knew the respondents claimed land beyond the boundaries of the two rivers. These claims involved at least in part the land covered by the decision in Land Cases 01/2003 and 01/2004. Part of the respondents' appeal from 08/1993 to the Supreme Court is based on the claim that the Island Court in 08/1993 failed to recognise and rule on their claim to land beyond the river boundaries (within the 01/2003 and 01/2004 area).

17. And so the respondents say that their claim in 08/1993 included some if not all of the land in the 01/2003 and 01/2004 decisions. They say the decisions in 01/2003 and 01/2004 are of no effect because the Island Court was already considering custom ownership of this land in 08 of 1993 and the Tribunal in those circumstances could not do so.

18. The orders of the Supreme Court therefore properly prevented dealings in the land covered by the 01/2003 and 01/2004 decisions until the 08/1993 appeal is heard and determined.

## Discussion

19. The first question for this Court is therefore whether the Efate Island Court Case in 08/1993 covered part or all of the land in Land Cases 01/2003 and 01/2004. If it did not then there can be no justification for the orders relating to this land. The appellants' case is that its original claim in 08/1993 was within the two rivers and did not extend to the 01/2003 and 01/2004 land case areas. They claimed Family Kalmermer and Kalwatong did not claim beyond the borders of the two rivers until the Tribunal's hearing in March 2006. This "*extension*" of the 08/1993 claim was not accepted by the Island Court.

20. Family Kalmermer said it extended its claim to the area beyond the borders of the Teouma river in 2003 with the authority of the Island Court. Family Kalwatong said its claim to an area beyond the Teouma river had always been part of their counterclaim in 08/1993. However we note that the Kalwatong appeal in 71 of 2006 (of 5 May 2006) does not complain that the Island Court failed to consider any claim they have had outside the area between the two rivers.

21. We have reviewed the decision of the Efate Island Court (some 61 pages) in 08 of 1993 delivered in March 2006. Unfortunately the file from the Efate Island Court was destroyed in the court fire in 2007. We are satisfied that the Island Court was aware of the Kalmermers' and Kalwatongs' claims to land to the west of the Teouma river in the Eratap area. This area is discussed in a number of places in the Court's decision. The Court declared the Kalmet Family to be custom owners of this area. The Kalmermer and other families challenge this decision.

22. Therefore the Kalmermer appeal from 08/1993 to the Supreme Court is justification for the orders of the Supreme Court preventing any dealing in land both within the area bounded by the two rivers and the area to the west of the Teouma River in the Eratap area. However this conclusion is subject to the second ground of appeal.

23. In summary we are satisfied that the decision of the Efate Island Court in 08 of 1993 did cover at least some of the land to the west of the Teouma river (covered by cases 01 of 2003 and 01 of 2004). That conclusion justifies the Supreme Court orders of March 2008 unless the appellants can establish the decisions of the Tribunal in Land Cases 01 of 2003 and 01 of 2004 are binding (the second ground of appeal).

**What is the effect of the Customary Tribunal's decisions in 01/2003 and 01/2004?**

24. The original 08/1993 claim filed by the Kalmet family related to the area within the two rivers. At some stage in these proceedings Family Kalmermer and Family Kalwatong filed amended counterclaims that expanded the disputed area to include land west of the Teouma river. While Family Kalmermer and Family Kalwatong claimed this expansion was many years before the 2006 hearing of the claim there is no documentary evidence which confirms the date of filing of this expansion. However as we have noted by the time of the 2006 hearing the Island Court was aware of the expanded claim.

25. In 2003 Family Kaltatak instituted proceedings before the Eratap Customary Lands Tribunal relating to land to the west of the Teouma river in the Eratap area. A decision was given with respect to this claim in November 2003.

26. In 2004 further proceedings were instituted relating to lands to the north of the land in the 2003 case, also to the west of the Teouma river. The Customary Lands Tribunal gave its decision as to customary ownership in May 2004.

27. The appellants submit that the decisions of 01/2003 and 01/2004 covered the same land to the west of the Teouma river considered by the Island Court in its 2006 decision. Where the Efate Island Court ruled on the customary ownership of this land it was wrong to do so. This land the appellants say was already the subject of final, unchallenged decisions of the Eratap Land Tribunal in 2003 and 2004.

28. Further, the appellants point to Family Kalmermer's unsuccessful judicial review challenge to the 2003 and 2004 Eratap Tribunal decisions in the Supreme Court (25/2005).

29. The respondents' case is that the Tribunal's decisions in 2003 and 2004 are of no effect. The issue of customary ownership of the land to the west of the Teouma river was first raised in the 08/1993 case and the Island Court in that case was the proper Court to decide this customary ownership issue.

30. The respondents said also that this was a case to which Section 5 of the Customary Land Tribunal Act applied. The respondents argued that the dispute about the land in the 2003 and 2004 decisions was before the Island Court in 08/93 (s. 5 (1) (a)) and that there had been no application to transfer the 08/93 case to the Customary Land Tribunal (s. 5 (1) (a) nor was there any consent to such a transfer by the respondents. And so the respondents argued the Customary Tribunal could not hear the 01/2003 and 01/2004 cases.

31. We reject this submission. Section 5 does not prohibit the filing and consideration of the dispute relating to this land by the Customary Land Tribunal.

32. The Kalmet Family case brought in 08/93 initially related to the area between the two rivers. The 01/2003 and 01/2004 cases involved an area west of the Teouma River. And so at this point there was no common dispute to transfer in terms of section 5. The Customary Land Tribunal in 01/2003 and 01/2004 was seized of the dispute about this land by virtue of the process of dispute notification under the Customary Land Tribunals Act and not through any transfer pursuant to section 5.

33. The resolution of a dispute over custom ownership of land (in 2003/2004) under the Customary Land Tribunal Act [CAP. 271] is begun by a party to a dispute about the land giving notice to the affected village chiefs (s. 7 (1) (2)). The notice must specify the land and the disputants (s. 7 (3)).

34. A tribunal is then established (either s. 8 or s. 9). A notice of hearing is given to the parties to the dispute (s. 25) and the dispute heard and resolved (ss. 26 – 30).The decision of the Tribunal may be appealed to a Court convened of a Council of

Chiefs of the relevant area (s. 22-23). This was the procedure followed in 01/2003 and 01/2004.

35. Section 33 provides that subject to the above appeal (and rehearing) rights the decision of such a Tribunal is final subject to subsection (a), the Constitution and; subsection (c) the rights of supervision by the Supreme Court pursuant to s. 39 of the Act.

36. Section 39 provides for parties to a land dispute to apply to the Supreme Court to cancel the decision of a Land Tribunal where: a member of the Tribunal is not qualified (ss. 39 (1)) or the procedures under the Act have not been complied with (ss. 39 (2)).The section provides that, subject to the Constitution the Supreme Court decision is final.

37. In this case neither Family Kalmermer nor Family Kawaltong were parties to the 01/2003 or 01/2004 decisions. In terms of the Customary Land Tribunal Act these families were not disputants relating to the relevant land.

38. In 2005 Family Kalmermer issued proceedings pursuant to s. 39 of the Customary Land Tribunal Act seeking review of the Tribunal's two decisions in 2003 and 2004. The proceedings required leave to institute as they were out of time. (Rule 17.5 Civil Procedure Rules). Leave was refused. The Supreme Court Judge said because the Kalmermer Family were not a party to the decision of the Customary Land Tribunal they could not "*review the process of a Tribunal they are strangers to it.*"

39. There have been no further challenges to the 01/2003 and 01/2004 decisions. Family Kalmermer and Family Kalwatong claimed that they had been unaware of the 01/2003 and 01/2004 cases and had therefore not known of the hearings of these two cases.

40. In Mr. Norris Kalmet's sworn statement of 11 December 2007 in the Supreme Court (relating to 71/2006) he annexes a copy of the public notice given by the Eratap Lands Tribunal of the 01/2003 case.

41. The notice invites notice of opposing claims within a time limit. From the receipt attached it seems the public notice was advertised on radio or television.

42. Further Mr. Kalmet annexes to his sworn statement a notice from the Customary Lands Tribunal office addressed to, amongst others, Mr. Kalmer advising that the hearing of Land Case 01/2003 is 17 November 2003. Mr. Kalmer was the representative of the Kalmermer family.

43. We do not have detailed evidence relating to notification of the 01/2004 case. However there is every reason to believe there would have been a similar public notification process as in 01/2003.

44. We are satisfied that the Kalmermer family had particular knowledge of the 01/2003 case and hearing and that the public notice given of both the 01/2003 and 01/2004 claims would have brought these claims to the attention of the Kalmermer and Kalwatong families.

45. The Tribunal's declaration of the customary ownerships of those lands specified to the West of the Teouma River appeal therefore resolved the customary owners of this land.

46. The Customary Land Tribunal Act has as its object (Section 1) "to provide for a system based on custom to resolve disputes about customary land."

47. In 01 of 2003 and 01 of 2004 the Eratap Customary Land Tribunal did just that. The declarations of the Tribunal in 2003 and 2004 are orders identifying the custom owners of this land. In this case the Island Courts Act [CAP. 167] of 1983 and the Customary Land Tribunal Act gave the respective judicial bodies concurrent jurisdiction to deal with land disputes (given the existence of proceeding 08/93). Once the Tribunal had delivered its decisions the Island Court in 08/1993 should have refused to make declarations affecting the same land.

48. We are satisfied therefore that when the Island Court included in its decision of March 2006 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. Final orders as to the customary ownership in that area had already been declared by the Tribunal in 01 of 2003 and 01 of 2004.

49. In summary we are satisfied the declarations of the Eratap Customary Tribunal in cases 01 of 2003 and 01 of 2004 are final and binding.

50. To return to the orders of the Supreme Court appeal of 25 March 2008. We are satisfied that the Supreme Court was wrong to make orders with respect to the land covered by the declarations in 01/2003 and 0/2004 and wrong to make orders with respect to that part of the 08/93 Island Court decision which related to any land to the west of the Teouma River.Accordingly we allow the appeal to that extent.

51. 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.

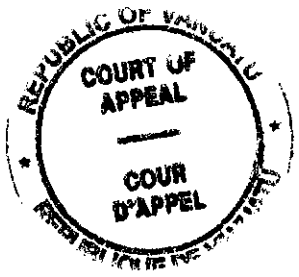
c) Order 1(a) of the order of 18 December 2008 is amended by deleting reference to the judgments in Land case 01/2003 and Land Case 01/2004.

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.

52. The appellant is entitled to one set of costs on a standard appeal basis from the first and fourth respondents. The other respondents should bear their own costs of this appeal.

**DATED at Port Vila this 4th day of April, 2014.**

**FOR THE COURT**




**Hon. Justice John von Doussa**