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

Civil Appeal Case No. 14 of 2014

BETWEEN: **KENWAY WILLIAM and DON WILLIAM**
Appellants

AND: **AHC (VANUATU) LIMITED**
First Respondent

AND: **DIRECTOR OF LANDS**
Second Respondent

Civil Appeal Case no. 15 of 2014

BETWEEN: **KENWAY WILLIAM, KELSIN WILLIAMS, TONY WILLIAM and DON WILLIAM**
Appellants

AND: **DOLPHIN RESORT LTD.**
Respondent

Coram: ***Hon. Chief Justice Vincent Lunabek***
Hon. Justice John von Doussa
Hon. Justice Raynor Asher
Hon. Justice Daniel Fatiaki
Hon. Justice Dudley Aru
Hon. Justice Mary Sey
Hon. Justice Stephen Harrop

Counsel: *Saling Stephens for the Appellant*
John Malcolm for AHC (Vanuatu) Ltd. and Dolphin Resort Ltd.
Kent Ture Tari for the Director of Lands

Dates of Hearing: *16 and 23July, 2014*

Date of Judgment: *25 July 2014*

JUDGMENT

Introduction

1. The Court has before it appeals in two connected proceedings. The core issue in each appeal is the same. It is whether orders made in the Supreme Court which had the effect of requiring the appellants to remove themselves from the respondents' leasehold land were wrongly made. We will refer to the two proceedings using their file numbers as the No. 14 and the No. 15 proceedings. The appeals were adjourned for seven days after the first hearing to allow the parties to further consider

their positions, but although progress had been made between them by the second hearing, the issues had not been resolved.

2. The appellants in both proceedings are variously Kenway William, Kelsin William, Tony William and Don William. These appellants are related. The spellings of the last names vary and we mean no disrespect in referring to "Williams" throughout. They are represented by Mr. Saling Stephens.

3. The respondents to the No. 14 proceeding are AHC (Vanuatu) Limited as first respondent and the Director of Lands as second respondent. The respondent to the No. 15 proceedings is Dolphin Resort Limited. The two respondent companies are associated and represented by Mr. John Malcolm. The Minister of Lands while represented took no part in the argument.

4. In the No. 14 proceeding Justice Saksak made orders on 30 September 2013 and 15 October 2013 ("*the No. 14 orders*"). The first No. 14 order provided in part:

> "*Within 7 days from the date this order the claimant and their families be required to remove themselves from Leasehold Titles 04/2621/002 and 04/2621/030.*
>
> *Within the same 7 days the claimants will provide confirmation by a registered surveyor that they have removed themselves and no longer reside on Leasehold Titles 04/2621/002 and 04/2621/030.*
>
> *The Police in Luganville be hereby authorized to arrest the claimants and any members of their families and relatives who cause any assault to the Company AHC Limited or its Directors, officers, employees, agents or representatives or cause damage to any of their properties within the two leasehold titles.*"

5. The second No. 14 order related to costs and provided in part that

> "*Removing the total sum of VT67,000 under paragraph 2 and substituting therefore the sum of VT52,000;*
>
> *Deleting the whole of the order under paragraph 3 and substituting therefore the following new order –*
>
> > *The sum of VT52,000 shall be paid by the claimants, Kenway William and Don William.*"

6. In the No. 15 proceeding Justice Saksak fixed a trial date and made the following orders on 13 May 2014 ("*the No. 15 orders*"):

> *"The defendant be required to file and serve sworn statement by their survey or within 14 days from the date hereof.*

All the defendants be required to remove themselves from the claimant's lease titles 04/2621/030 and 04/2621/008 within 14 days from the date hereof. In the event the defendants fail to comply with this order the police be authorized to enforce the order without any further notice."

7. He gave reasons for the No. 15 orders on 3 June 2014.

8. These appeals are the latest manifestation of a dispute between the parties which began in 2003. It has involved numerous decisions of the Supreme Court and no less than four substantive decisions of this Court. It is not necessary to trace the history of these proceedings in detail, but it is necessary to summarize the key issue in dispute.

9. It is that while the appellants accept that the respondent companies' lease titles No 04/2621/008 and 04/2621/009 ('the 008 and 009 leases") are valid, they claim that as sons of the original occupant of that land, Ezra William, they were given by their father five 2.5 hectare blocks of land on the western end of the land contained in the 008 and 009 leases. Ezra William had sold the leases to AHC. They claim that their rights to the 2.5 hectare blocks have been recognized by the Courts over the years under s 17(g) of the Land Leases Act [CAP, 163], and that they are occupying those areas legally.

10. The respondent companies do not accept this. They claim that the appellants are not entitled to occupy any portion of the 008 and 009 leasehold lands, and have been wrongfully resisting removal by the respondents, and interfering with the respondents' rights to their land.

11. We consider that the answer to the question of the validity of the removal orders lies in an interpretation of the orders made to date by this Court and the Supreme Court, and in particular the consent order made on 4 October 2006.

The consent order

12. On 4 October 2006 the Court of Appeal made the following orders which it is necessary for us to set out in full:

> *"3. (a) Don William and Kenway William shall each vacate the house and curtilage properties which are the subject of this litigation and which are situated on Lease 04/2621/008, within 14 days of the date of this order;*
>
> *(b) The appellant AHC Vanuatu Limited shall pay the sum of two million vatu (VT2,000,000) to each of the respondents Don William and Kenway William no later than 7 days after they have complied with Order 3 (a). The said sum shall be paid to the Trust Account of the lawyers for Don William and Kenway William.*

(c) *Don William and Kenway William are entitled to remove their house and chattels and structures from the house and curtilage properties within 14 days of the date of this order.*

(d) *Don William and Kenway William shall not damage or remove any property (other than the property referred to in Order 3 (c)) from Leases 04/2621/008 or 04/2621/009, nor enter upon, interfere with, or damage in any way any part of the land contained in the said leases other than the land comprising the house properties and curtilages (and the existing access roads thereto) during the said 14 day period, or for the purposes referred to in Order 3 (e), without the express consent of the lessee.*

(e) *After 14 days from the date of this Order Don William and Kenway William shall not, without the express prior consent of the lessee, enter upon, or in any way interfere with, the land contained in leases 04/2621/008 and 04/2621/009 for any purpose whatsoever other than for the purpose of gaining direct access to the 2.5 hectares plots contiguous with the western boundary of the said leases. Such access to the 2.5 hectare blocks must only occur via the access road constructed on the southern boundary of the said leases, as depicted in the plan attached hereto and marked "A".*

(f) *Neither party is to assault, threaten interfere or otherwise act unlawfully towards the other.*

(g) *The earlier orders of this court in relation to Gladys William are varied as appears in the following paragraphs (h) and (i).*

(h) *Gladys William is entitled to access to, and use of, her existing house property on Kervimele Island, including the existing curtilage to that house, as depicted in the plan marked "A" attached hereto, and appearing as the cleared area depicted in the photograph attached hereto and marked "B". Access shall only be via the existing access road as depicted in the Plan "A".*

(i) *It is declared that Gladys William is not entitled to access to, or possession of, any part of Kervimele Island other than as provided in Order 3 (h).*

(j) *It is declared that forthwith upon the making of these orders, any rights held by Don William and Kenway William in relation to access to and/or use and/or occupation of any land included within the said leases are extinguished, except as provided in these orders.*

(k) *All previous costs orders and damages orders are set aside."*

[emphasis added]

13. There was also a plan attached to the orders, which we attach as appendix A.

Analysis of the order

14. In order to place the references to the 2.5 hectare blocks in context we go back to the judgments that preceded these orders, and consider the judgments that have followed. This history was referred to in a judgment of this Court of 25 July 2008, *see:* William v AHC (Vanuatu) Limited [2008] VUCA 16.

15. There was a first trial concerning the Williams claims in 2004. The decision was appealed to the Court of Appeal and that Court ordered remittance back with the issue (among others) of Don and Kenway Williams' Section17(g) rights to be considered.

16. There was then in 2005 a three day hearing in the Supreme Court, and a judgment delivered, William v. William on 22 July 2005 in Civil Case 26 of 2003. Justice Saksak made orders recognizing interests of the appellants over the 2.5 hectare blocks in the leasehold properties. However, other interests that Don and Kenway Williams had claimed under Section 17(g) to additional areas of land on the leasehold properties in which they had established houses, were held to be not established.

17. This decision and a later stay decision were considered by this Court in William v. William [2005] VUCA 25 (18 November 2005). That decision recognized the right of Don and Kenway Williams over 2.5 hectare blocks at the end of the two leasehold properties. It was stated, recording the parties positions:

> *"In particular they now agree that the Appellants have section 17(g) rights over the 6 x 2.5 hectare blocks at the end of the leasehold properties adjacent to title no. 04/262/002 ..."*

The reference to six (6) blocks was a typing error. There are five 2.5 hectares blocks, to reflect the number of the sons of Ezra Williams.

18. There was also an issue flagged as to the rights of the Williams to the additional sites they occupied at the coastal end of the leasehold properties. It was held that the Supreme Court orders did not cover all matters and, in parts, were unclear and a further hearing was ordered. It was stressed that the rest of the leasehold land not covered by the s. 17(g) rights could not be trespassed on by the Williams.

19. There was a further trial on 10 April 2006 resulting in a judgment dated 20 June 2006 in which it was confirmed that Don and Kenway Williams had certain s. 17(g) rights.

20. It was the appeal from that decision which led to the consent orders of 4 October 2006. In relation to those orders it was observed by the Court

of Appeal in its 25 July 2008 judgment that Don and Kenway Williams continued to encroach on areas of the leasehold land "*...in which it had been held that they had no right or interest.*"

21. This history shows that when the Court of Appeal made the consent orders of 4 October 2006 they had findings before them of the Supreme Court and its own decision of 18 November 2005 confirming the rights of the Williams to the 2.5 hectare blocks. Therefore, when there are references in clause 3 (g) of those consent orders to access to "*...the 2.5 hectare plots contiguous with the western boundary of the said leases*" these were the "*plots*" that were on the leasehold land. The reference in clause 3(a) of the consent orders to vacating the properties on lease 04/2621/008 was to vacating the buildings that were not in the 2.5 hectare blocks, and the compensation referred to in clause 3(b) related to the vacated buildings.

22. This position was confirmed in a later Court of Appeal decision of 25 July 2008 8/2008 VUCA where it was stated, referring back to the previous Court of Appeal judgment:

> *"In particular the parties had agreed that Don and Kenway each had Section 17(g) rights over a number of 2.5 hectare blocks in the leasehold properties..."*

23. Mr. Malcolm submitted that the reference to 2.5 hectare lots in the consent orders was to land on the other side of the boundary of the leasehold land, and that the only rights to the leasehold land given to the Williams was to the access road. We do not accept that submission. That flies in the face of the express recognition given to the Williams' rights to the 2.5 hectare lots in the earlier Supreme Court and Court of Appeal decision to which we have referred.

24. It is also contradicted by the plan attached to the consent orders which shows a shaded area for the five 2.5 hectare lots on the leasehold land. That shaded area can only be explained as land retained by the Williams on and within the Western boundary of the leasehold land. Mr. Malcolm was unable to suggest an alternative.

Conclusion

25. This being so, we conclude that the Williams' rights under s. 17(g) to the five 2.5 hectare blocks have been recognized in this Court and the Supreme Court on a number of occasions. We therefore accept the premise on which this appeal is based, that the Supreme Court orders under appeal overlooked the Williams' rights to those five blocks. They cannot be required to remove themselves from that part of the leasehold blocks that constitute the five 2.5 hectare blocks.

26. It follows that the unqualified orders made in both the No. 14 and No 15 proceedings requiring the appellants and their families to remove

themselves from the leasehold titles and authorizing the Police to arrest those who fail to comply, are too general in their wording. They do not recognize that the Williams have the right to be on the 2.5 hectare lots on the Western boundary in accordance with the consent orders, and to access those 2.5 hectare lots by using the access road.

27. Nevertheless, the Williams have no right to be on any other parts of the leasehold land. Like other Courts we reiterate that the appellants have no right to be on any of the leasehold land other than the 2.5 hectare lots and the access road.

The way forward

28. We have considered amending the Supreme Court orders to state that the Williams may be removed from all areas of the leasehold land that are not part of the 2.5 hectare lots. The difficulty with this is that the configuration of the area covered by the 2.5 hectare lots, and the boundary between those lots and the rest of the leasehold land, is not delineated in any accepted or proven survey plan or by any mark.

29. The lots need to be surveyed and a boundary established. Importantly the boundary should be able to be seen. We agree with Mr.Malcolm's observation that ideally a line should be cut on the boundary between the 2.5 hectare lots and the balance of the leasehold land to clearly mark it.

30. Mr. Stephens and Mr. Malcolm helpfully agreed to a consent direction in relation to such a survey with the matter to come back to this Court in the November 2014 sessions. The direction we make is that there will be a survey carried out by the respondents' surveyor to take place within six weeks, to establish and mark a boundary line between five 2.5 hectare blocks on and within the western boundary of 04/2621/030 and 04/2621/008, roughly in the shaded area shown on the plan attached to the 4 October 2006 consent orders.

31. The costs of that survey will be paid for by the respondents, but be a disbursement in the cause. We recommend that the survey be carried out at a date and time agreed to by Mr. Stephens and Mr. Malcolm, and that they both be present at the time. Whether some or all of the parties involved should be present we leave to counsel.

32. Counsel should file a joint memorandum by 20 October 2014 i.e. two weeks before the November 2014 appeal sessions setting out the result of the survey.

33. We expect the parties to ensure that there are no breaches of the peace when the survey takes place. The Williams must not in any way hinder the surveyor in his/her work.

Result

34. While we have indicated that the appeal will be allowed, the appeal is adjourned to the November 2014 sessions when it will be called and determined.

35. By consent we direct that within six weeks a survey be carried out by the respondents' surveyor, to establish and mark a boundary line between the five 2.5 hectares blocks on and within the western boundary of 04/2621/030 and 04/262/008 in terms of paragraph [30] of this judgment. The costs will be met by the respondents and become costs in the cause.

36. There may be further complications, as it may be that the houses that the appellants want to preserve are not strictly within the 2.5 hectare lots on the western boundary. It may be that some different configuration would better meet the needs of both groups of parties. That would be a matter for the parties to agree.

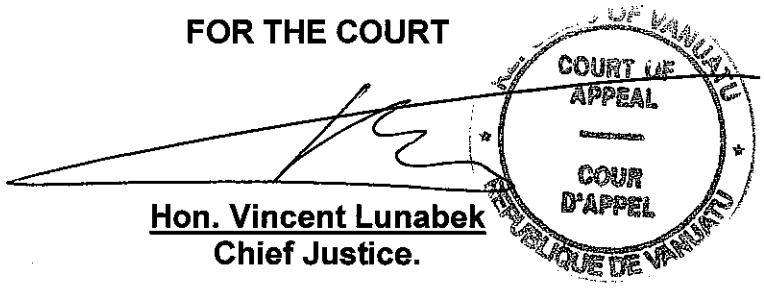
Costs

37. Costs of VT52.000 were awarded against the Williams in the Supreme Court. The Williams should have been successful in part in the Supreme Court. However they would also have failed in some respects. Given the behaviour of the Williams in obstructing all development (which has not been denied), we are not prepared to interfere with the costs orders made in the discretion of the judge. He had a good deal of evidence before him of deliberate threatening behavior by the Williams on areas that were not within the 2.5 hectare blocks.

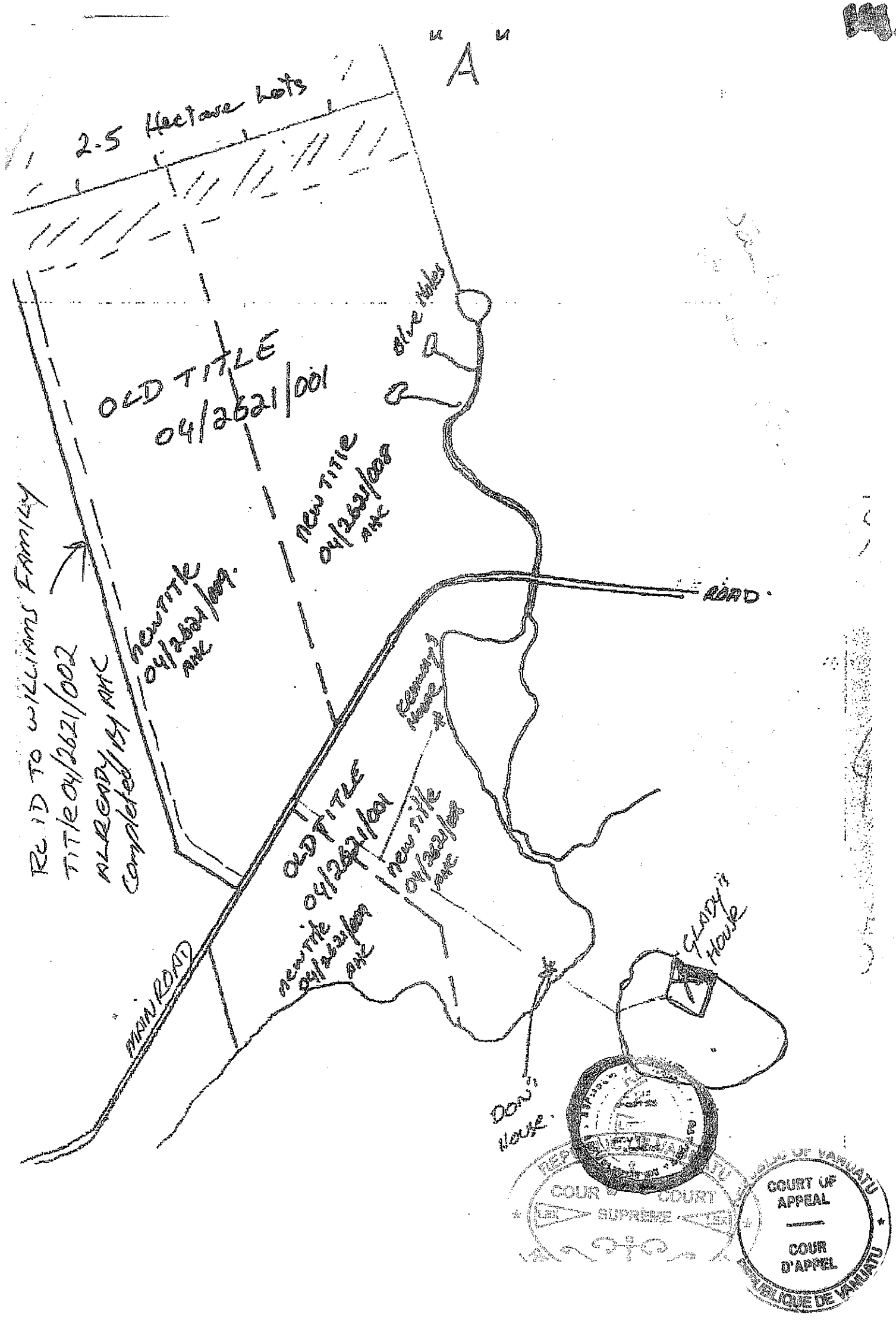
38. We have decided that there should be costs in favor of the Williams in this Court, where they have been largely successful. It should be for the same sum as was awarded against them in the Supreme Court of VT52.000.

39. Therefore the respondents are to pay the appellants' costs in this appeal to date in the sum of VT52.000. This has the effect of off-setting the orders made in the respondents' favour in the Supreme Court.

FOR THE COURT



Hon. Vincent Lunabek
Chief Justice.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2.5 Hectare Lots
OLD TITLE 04/2621/001
new title 04/2621/001 ANC
new title 04/2621/001 ANC
Olive Nakou
ROAD
community house
OLD TITLE 04/2621/001
new title 04/2621/001 ANC
MAIN ROAD
Glory's House
Don's House
Reid to Williams family
Title 04/2621/002
already in ANC
completed