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

Civil Appeal
Case No.24/1963 COA/CIVA

BETWEEN: MALASIKOTO FAMILY
Appellants

AND: JOHN NALWANG
First Respondent

AND: SILAS VATOKO, NAKMAU SAMBO, EDWIN MALAS and DEE-JONES VATOKO
Second Respondent

Dates of Hearing:	***12 August 2024***
Coram:	***Hon. Chief Justice V. Lunabek*** ***Hon. Justice J Mansfield*** ***Hon. Justice R. Young*** ***Hon. Justice O.A. Saksak*** ***Hon. Justice D. Aru*** ***Hon. Justice V. M. Trief***
Counsel:	***W. Daniel for the Appellants*** ***F. Bong for the First Respondent*** ***E. I. Nalyal for Silas Vatoko and Edwin Malas*** ***G. M. Blake for Nakmau Sambo and Dee-Jones Vatoko***
Date of Decision:	***16 August 2024***

REASONS FOR JUDGMENT

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1. This appeal is yet another chapter in the regrettable struggle to secure management control or representative control of the Pangona Custom Land.

2. The Efate Island Court on 20 July 2004 decided custom ownership of the Pangona Land. It decided the custom ownership was Chief Malasikoto on behalf of the families under him. Unfortunately, since 2011 after his death, those families have been jostling for the appointment as the representatives of the custom owners. That appointment is then recorded in a Certificate of Recorded Interest in Land (Green Certificate) under the Customary Land Management Act No. 33 of 2013, and subsequently the Land Reform Act [CAP. 123]. Section 6G of the Land Reform Act provides for appointment as representatives of the custom owner group.

3. The procedure to change the representative or representatives of the custom owners is by a meeting as described in Section 6H of the Land Reform Act.

4. It is not necessary to record the full history of the lengthy litigation between the Family Malasikoto members on the one hand and (broadly speaking) Family Vatoko on the other hand. The most recent decision of the Court of Appeal in Malasikoto v Vatoko [2022] VUCA 4 describes much of that history. It is also set out in detail in the earlier decision of Vatoko v Tamata [2021] VUCA 44. We note that the character and responsibilities under a Green Certificate is described in detail in that earlier decision of Vatoko v Tamata at paras. 9 and 10. We shall not repeat it in these reasons for judgment.

5. The present appeal is yet a further step in that ongoing dispute between the interested groups as part of the custom owners of the Pangona Land. We shall call the Malasikoto Family the appellants. The First Respondent is the Acting National Coordinator of Custom Land Management Office. He has filed a submitting appearance on this appeal and did not wish to be heard. The interest of the second respondents, although general on the principal issues, differ because it is only the second respondents Nakmau Sambo and Dee-Jones Vatoko who may be affected by that part of this appeal which concerns the issue of costs. We shall call the second respondents together in the Supreme Court as defendants, and where necessary those respondents affected by the costs order which is the subject of the appeal the costs respondents.

6. The proceeding in the Supreme Court was a challenge by the appellants to the grant to the defendants of a Green Certificate on 11 November 2023 as the representatives of the custom owners of the Pangona Land following a meeting purportedly held under Section 6A of the Land Reform Act on 21 October 2021.

7. It is not necessary to refer to the nature of the proceedings in detail before the Supreme Court in the particular circumstances. That is because, before any hearing, the appellants filed and served a notice of discontinuance of their claim under Rule. 9.9 of the civil Procedure Rules on 13 May 2024. Subsequently, on 12 June 2024 the primary judge noted the discontinuance of the proceedings, and entertained an application by the respondents for costs of that proceeding as he was entitled to do under Rule 9.9(4)(c) of the Civil Procedure rules. On that date, he made an order that the appellants pay the costs of the respondents, their costs of the proceedings fixed on an indemnity basis at VT200,000.

The issues on the appeal

8. There were four issues raised by the notice of appeal.

9. The first was for an order to set aside the whole of the judgment of the Supreme Court, so that the matter could proceed to hearing. The second was against the costs order. The third was for an order to re-establish an exparte injunction order issued by the Supreme Court on 19 January 2023, but which came to an end at the determination of the claim. And the fourth is for an order

that the appellants have the right to "*re-launch another fresh judicial review claim*" within a specified time.

10. We shall address those issues in turn.

11. The first application to restore the proceeding and so (it was said) to set aside the order of the court bringing the proceeding to an end must fail. The court made no order bringing the proceeding to an end. As there is no such order, there is no order from which the appeal from that aspect can be made. The proceeding was brought to an end by the notice of discontinuance itself filed by the appellants on 13 May 2024. In the course of submissions, counsel for the appellants acknowledged that much.

12. We are not satisfied that the costs order made by the primary judge is shown to have been erroneous, and so it is not set aside. The primary judge properly considered the material upon which submissions were made as to costs, and reached a conclusion. As it happened, he reduced the claim for indemnity costs from that made by the costs respondents of VT800,000 to VT200,000. Counsel for the appellants, at one point, disputed the primary judge's description that the appellants walked out from the meeting of 21 October 2021, but withdrew that submission when the record of the meeting through its minutes was drawn to his attention. Having regard to the amount of work involved in defending the proceedings, in our view it is not shown that the amount of the costs awarded was unreasonable, even on a normal party and party basis. That part of the appeal is dismissed.

13. It follows that the injunction which came to an end upon the termination of the proceedings by the discontinuance should not itself be re-enliven.

14. We also do not consider that a fresh order should be made giving the appellants leave to institute a fresh judicial review application, apparently much in the form of that which has been brought to an end by the notice of discontinuance. It is not the role of the Court of Appeal to hear and determine the evidence about, or the circumstances in which, the appellants came to file their notice of discontinuance. We note that they have apparently waived their legal professional privilege to expose publicly the advice they were given and the circumstances surrounding it, but counsel concerned has not been given an opportunity to be heard with respect to those circumstances (and in any event it is not the role of the Court of Appeal to hear and determine such issues). It is a matter for the appellants to decide whether, and if so how, they continue to maintain the allegation and its relevance to the future conduct of any proceeding. We note that, in their submissions, their counsel referred to the fact that they had already issued in the Supreme Court further proceedings apparently related to the present issue. Finally, we note that the Civil Procedure Rules themselves provide that a proceeding, once discontinued, cannot be re-enliven: see Rule 9.9(4)(a) of the Civil Procedure Rules.

15. Accordingly, for the reasons given, the appeal is dismissed to the extent which it legitimately raised a ground of appeal relating to the orders of the Court made on 12 June 2024 namely the

costs order. The appellants are to pay the costs of the appeal to the costs respondents which we fix at VT50,000.

DATED at Port Vila, this 16th day of August, 2024.

BY THE COURT

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Hon. Chief Justice Vincent Lunabek