

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

Constitutional
Case No. 18/1977 SC/CNST

BETWEEN: **Richard Kaltonga** representing Family Tokorua and
Rongoadalo
Applicants

AND: **The Republic of Vanuatu**
Respondent

Date of First Conference hearing and decision: 7 August 2020

Date of Delivery of Reasons 16 September 2020

Before: Chief Justice Lunabek

In Attendance: Mr. Daniel Yawha for the Applicants
Mr. Sammy Aron for the Respondent

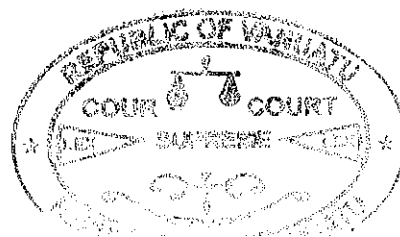
REASONS FOR STRIKING OUT OF CONSTITUTIONAL APPLICATION DATED 7 AUGUST 2020

I. Introduction

1. This is a constitutional application ("*the application*") filed by Mr Richard Kaltonga for himself and representing Family Tokorua and Rongoadalo of Ifira Tenuku against the Republic of Vanuatu.
2. It was filed on 20 July 2018 with a sworn statement in support. Another statement was further filed on 10 August 2018 in support. The application with the sworn statements were also served on the Attorney General in December 2018 and on 19 February 2020.

II. Relief sought

3. The Applicants apply:
 - (i) For breach of their constitutional rights under Article 5(1)(d) – protection of the law and (k) – equal treatment under the law or administrative action pursuant to Article 6(1) and Article 53(1) of the Constitution;
 - (ii) For a declaration that the judgments of the Efate Island Court in Land Case No. 03 of 1994 and Land Case No. 01 of 1995 are null and void and of no effect;
 - (iii) An order for compensation pursuant to Article 6(2) of the Vanuatu Constitution;
 - (iv) Costs of and incidental to this application.



III. Grounds of Application

4. The application was advanced on eight (8) grounds:-

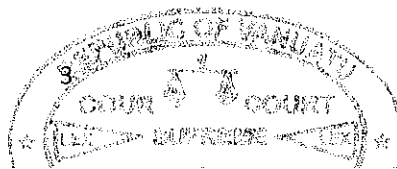
- (a) The first is that the applicants lodged their ownership claim to Port Vila Urban land in the Efate Island Court in Land Case No. 03 of 1993 and have paid the filing fees of VT30,000 as required by the Island Court Act [CAP. 167] and Island Court (Civil Procedure Rules) Order of 1983;
- (b) The Applicants' claim filed in Land No. 03 of 1993 concerns the Port Vila land ownership as declared by the Land Reform (Declaration of Public Land) Order No. 26 of 1981;
- (c) Whilst waiting for the hearing of the Efate Island Court hearing of Land Case No. 03 of 1993, but without the Applicants' knowledge, the Efate Island Court in Land Case No. 03 of 1994 and Efate Island Court Land Case No. 01 of 1995, proceeded to determine the Port Vila land customary ownership as declared by the Land Reform (Declaration of Public Land) Order NO. 26 of 1981;
- (d) In Efate Land Case No. 03 of 1994, the Efate Island Court determined the Port Vila Urban land customary claim without the Applicants' knowledge and is therefore in breach of the Article 74 of the Constitution, Section 10 of the Island Court Act, Order 6 Rule 8, Order 8 Rule 2 and Order 18 Rule 2 and 9 of the Island Court (Civil Procedure Rules) Order of 1983;
- (e) In Land Case No. 03 of 1994, the Respondent Efate Island Court has no jurisdiction to sign a Consent Order dated 12 November 2014 conferring ownership of Port Vila Urban land customary claim to chief Tangraro, Family Bakokoto, Matau Gorry, Calvory Kaltapang, Family Kalsakau and others and Family Pomal Nmak in the manner in which it was done as that amounts to breaches of the laws;
- (f) The Applicants say the Respondent Efate Island Court Consent Order signed on 12 November 2014 is in breach of the Applicants' right to a fair hearing, right to natural justice, and was made to deny the Applicants' opportunity to claim Port Vila Urban land customary claim under Article 74 of the Constitution, Section 10 of the Island Courts Act, Order 6 Rule 8, Order 8 Rule 2 and Order 18 Rule 2 and 9 of the Island Courts (Civil Procedure Rule) Order of 1983;
- (g) In addition, the Applicants say the Respondent Efate Island Court had no jurisdiction to sign the consent order dated 12 November 2014 obtained in Efate Land Case No. 03 of 1994 since the Presiding Magistrate court was no longer the magistrate appointed to execute such consent order;
- (h) Further without the Applicants' knowledge the Respondent Efate Island Court was in breach of the Article 74 of the Constitution, Section 10 of the Island Courts Act, Order 6 Rule 8, Order 8 Rule 2 and Order 18 Rule 2 and 9 of the Island Court (Civil Procedure Rule) Order of 1983, when it signed the Consent Order of 12 November 2014 whereupon the Respondent proceeded to issue to chief Tangraro, Family Bakokoto, Matau Gorry, Calvory Kaltapang, Family Kalsakau and others and Family Pomal Nmak certificate of registered interest in land over Port Vila Urban land pursuant to Section 19 of the Customary Land Management Act No. 33 of 2013;



- (i) The applicants refer to paragraphs (a) to (i) and say the Respondent Efate Island Court actions as aforesaid breach Article 5(1)(d) regarding the Applicants' right to protection of the law;
- (j – 1) It was particularised that by determining the Efate Island Court Land Case No. 03 of 1994 and Efate Island Land Case No. 01 of 1995 in the manner asserted above and that these breached the Applicants' constitutional rights to protection of the law, natural justice and fair hearing;
- (j) The Applicants refer to paragraphs 1 to 9 above and say that the Respondent Efate Island Court actions as aforesaid breached Article 5(1)(k) regarding equal treatment under administrative law;
- (k – 1) It was also particularised that by determining the Efate Island Court Land Case No. 03 of 1994 and Efate Land Case No. 01 of 1995 in the manner asserted above and that these breached the Applicants' constitutional rights to equal treatment under administrative law.

IV. First conference hearing pursuant to Rules 2.7 and 2.8 of Constitutional Application Rules

- 5. A first conference hearing was held on Friday 7 August 2020 at 8:30am o'clock.
- 6. I note this application was served on the State Law Office on behalf of the Republic of Vanuatu. A sworn statement as to proof of service by one Freddy Charlie dated 12 December 2018.
- 7. I also noted a response to this application was filed on 5 December 2018.
- 8. On 7 August 2020, I enquire into the application. I ask Mr Daniel Yawha to show me whether this application has a foundation in the Constitution. Mr Yawha informed the Court of the following:
 - (a) This application was a constitutional application alleging breaches of Applicants' fundamental rights of the protection of law and equal treatment under Article 5(1)(d) and 5(1)(k) of the Constitution respectively;
 - (b) The application is supported by two (2) sworn statements of Richard Kaltonga filed respectively on 20 July 2018 and 10 August 2018;
 - (c) The statements show that Family Tokorua and Rongoadalo filed a claim disputing customary ownership to Port Vila Urban land in the Efate Island Court in Land Case No. 03 of 1993. The claim was filed on 09 June 1986;
 - (d) The receipt of a sum of VT30,000 which Family Tokorua and Rongoadalo paid for filing the customary land claim of Port Vila Urban land was produced. The fees were paid and receipted on 24 April 1995;
 - (e) The Port Vila Urban Land Boundary as declared by the Land Reform (Declaration of Public Land) Order No. 26 of 1981 was attached;
 - (f) Mr Richard Kaltonga deposed what followed:



- (i) That since the filing of the customary ownership claim to Port Vila Urban Land in 1993, the Island Court has not published a notice and or summon for Family Tokorua and Rongoadalo to attend the hearing and progress the claim;
 - (ii) The Efate Island Court in Land Case No. 03 of 1994 determined in isolation the land ownership of part of the Port Vila Urban Land without Family Tokorua and Rongoadalo's participation. A copy of the Efate Island Court decision in Land Case No. 03 of 1994 was attached;
 - (iii) The Efate Island Court in Land Case No. 01 of 1995 determined in isolation the land ownership of part of the Port Vila Urban Land without Family Tokorua and Rongoadalo's participation. A copy of the Efate Island Court decision in Land Case No. 01 of 1995 was attached;
 - (iv) It was stated that the judgment of the Efate Island Court in Land Case No. 03 of 1994 and Land Case No. 01 of 1995 and the consent order dated 12 November 2014 have effectively meant that the subject land matter of Family Tokorua and Rongoadalo in Land Case No. 03 of 1993 have been determined in isolation and without their knowledge and participation;
 - (v) It was stated that the Efate Island Court was wrong to have presided over Land Case No. 03 of 1994, Land Case No. 01 of 1995 and more so by executing the consent orders of 12 November 2014. Family Tokorua and Rongoadalo say that by such actions of the Efate Island Court, they were denied their rights in the Efate Island Court to convene and determine their claim to Port Vila Urban in Land Case No. 03 of 1993;
 - (vi) It is wrong that Port Vila Urban land customary land ownership was simply decided in isolation and based on consent orders of 12 November 2014 without the parties and without site visitation;
 - (vii) It is said that based on the consent order of 12 November 2014 in Land Case No. 03 of 1994, the National Coordinator of the Customary Land Management Office had on 20 November 2017 proceeded to issue certain persons whose names appeared on the certificate of registered interests in land under Section 19 of the Customary Land Management Act No. 33 of 2013. A copy of the certificate of Registered Interest in land was attached;
 - (viii) It is also said that the Efate Island Court should have determined Family Tokorua and Rongoadalo in Land Case No. 03 of 1993 before Land Case No. 01 of 1994 and Land Case NO. 01 of 1995 because these land cases were filed later and Family Tokorua and Rongoadalo's land claim was filed on 1993;
 - (ix) It is said that the manner in which the Efate Island Court determined Land Case No. 03 of 1994 and Land Case No. 01 of 1995 in effect deny the constitutional rights to protection of the law and equal treatment under the Constitution;
- (g) Mr Richard Kaltonga deposed in his further statement the following:



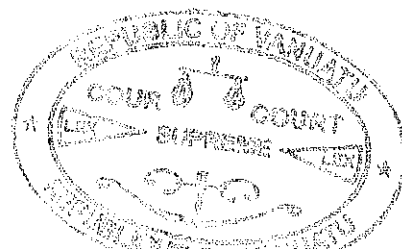
- i. In 1992 the Korman led government paid certain monies to people from Pango Village, Erakor Village, and Ifira Tenuku all from Efate. The government stated that the money was for compensation of Port Vila Urban Land to these people as custom land owners;
- ii. Mr Kaltonga stated that his family being the Sope's of Ifira, descendants of Sope's eldest son Rongoadalo, as well as being descendants of Tokorua and Rongoadalo refused to receive that money because at that time, the Island Court must first declare the custom landowners of Port Vila Urban land before the Government can proceed to pay out compensation to the land owners;
- iii. He insisted that Family Tokorua and Rongoadalo had filed a customary ownership claim to Port Vila Urban land in 1986. They re-submitted the same claim in 1993 as they could not locate the receipt for the payment of the registration of that claim after the passage of cyclone Uma in 1988. A new claim was re-submitted in 1993. Mr Kaltonga deposed his family was waiting the hearing by Efate Island Court since then;
- iv. He further deposed that in their claim to Port Vila Urban Land, they were also claiming their customary lineage and birthrights to Nareo who, as historical document "*Notes sur les chefs de la tribu de Vila*" Memorandum of the Chief of Vila Tribe dated 1923 tendered in the Marope land Case No. 01 of 1993 which stated that Sope & Kano inherited many lands from their uncle Nareo;
- v. He also annexed the Agreement which the Government executed between the chiefs of Ifira Tenuku, Pango Village and Erakor Village;
- vi. He further annexed a list of names of persons being persons to have received payments made by the government to certain people of Ifira Tenuku. He stated that from that list Family Tokorua and Rongoadalo never received such payments;

V. Court Considerations

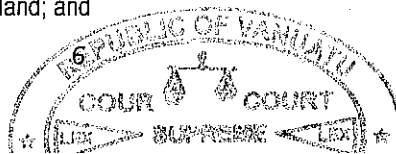
9. I have read this constitutional case with sworn statements filed in support and the grounds advanced in it. I saw the State Law Office filed a response and an application to strike it out on behalf of the Respondent Republic. At the conference hearing I noted but I did not consider the response and the application by the Respondent. I have just considered the application and sworn statements filed in support of the provisions of the Constitutional rights said to have been breached – Article 5(1)(d) and Article 5(1)(k). I asked myself the question how the Efate Island would have breached these rights and if I came up to a likelihood of a breach or breaches then I would be satisfied that the constitutional case has a cause of action which is founded in the Constitution and issued the consequential directions to the Respondent.
10. I will first deal with a few preliminary matters so as to ensure that there is no confusion or amalgamation of the cases numbers, issues and parties.

A. Preliminary matters

1. Efate Island Court Land Cases Numbers 03 of 1993



11. For some reasons, there were two customary land claims initially filed in the Efate Island Court bearing **Number 03 of 1993**. The first customary land claim bearing that number was the claim that **Ifira Community filed in the Efate Island Court on 03 May 1993 (as original claimant) claiming ownership of Public land of Port Vila urban area**. The following parties were the counter-claimants in that first customary land claim Numbered 03 of 1993:-
1. Naflak Teufi
 2. Dick Kalouri
 3. Pastor Pierre Nikara
 4. Tokoroa
 5. Family Tangraro
 6. Chief Manarewo
 7. George Kalsakau
 8. Family Tarisaliu
 9. Family Korua Kon
 10. Family Sope.
12. **The second customary land claim in the Efate Island Court bearing that same case Number 03 of 1993, was Malawora Custom Land**. This land claim was over rural customary lands in the areas of Mele village including Mele Golf area and beyond. Parties consented to have this claim to be dealt with by the Efate Island Court. A Judgment was delivered in the Efate Island Court on 2 April 2004. That Judgment of Efate Island Court was appealed in the Supreme Court. The appeal was heard on 1 November 2005 and on the same date Patrick Treston J. quashed the judgment of the Efate Island Court of 2 April 2004 and remitted the case back to the Efate Island Court to rehearing by a differently constituted court. The Efate Island Court reheard the Malawora custom land claim on 28 June 2011. An appeal before the Supreme Court of that Island Court decision of 28 June 2011 was heard and delivered on 18 February 2016 which was then final.
13. It was noted that the customary land claim No. 03 of 1993 filed by Ifira Community claiming ownership of Port Vila area was filed on 03 May 1993. It was also noted that the Efate Island Court customary land registration book recorded that this customary land claim over Port Vila was transferred to Land Tribunal by a court order dated 4 March 2003.
14. This order of transfer was the result of the processes undertaken by the Island Courts in the country after the enactment of the Customary Land Tribunal No. of 2001 coming into force on 10 December 2001 ("*the Act*"). This Act took away the jurisdiction of the Island Courts to hear disputes over customary land, save for the customary land claims pending before the Island Courts that were filed before the coming into force of the new Act and also subject to the consent of the parties and the view of the court in each case.
15. Conferences were held by the Island Courts of Vanuatu including Efate Island Court to give effect to the intention of Parliament pursuant to Section 5 of the Customary Land Tribunal Act 2001 and Section 8 of the Island Courts (Amendment) Act 2001.
16. Section 5 of the Customary Land Tribunal provides:
- "(1) If:
- (a) a person is a party to a proceeding before the Supreme Court or an Island Court relating to a dispute about customary land; and



- (b) the person applies to that Court to have the proceeding withdrawn and the dispute dealt with under this Act; and
- (c) the other party or parties to the proceeding consent to the withdrawal and to the dispute being dealt with under this Act; and
- (d) that Court consents to the withdrawal and to the dispute being dealt with under this Act;

the dispute must be dealt with under this Act and one of the parties must give notice under section 7.

- (2) The Supreme Court or an Island Court may:
 - (a) order that any fees paid to that Court in respect of such proceedings be refunded in full or in part to the applicant or any of the other parties; and
 - (b) make such other orders as it thinks necessary.
- (3) To avoid doubt, if proceedings before the Supreme Court or an Island Court relating to a dispute about customary land are pending, the dispute cannot be dealt with under this Act.

17. Section 8 of the Island Court (Amendment) Act 2001 provides:

"If:

- (a) *Proceedings concerning disputes as to ownership of land are pending in an Island Court immediately before the commencement of this Act; and*
- (b) *The proceedings continue on and after that commencement;*

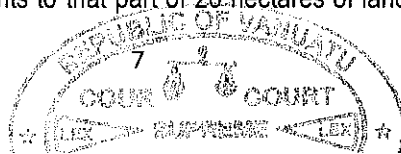
The Island Court is to hear and determine the proceedings as if the amendments made by items 1 to 7 of this Schedule had not been made."

18. As a result of these conferences, **the customary land claim of Public Land of Port Vila area (03 of 1993) was transferred by the Efate Island Court to the Customary Land Tribunal** by orders of the presiding magistrate dated 04 March 2003 to this effect. This order of transfer was not even referred and included in the sworn statements of the Applicants in support of their constitutional application.

2. Efate Island Court Land Case No. 03 of 1994

19. This matter was filed by old Kalosil Tangraro and Kalsaf Tangraro and other claimants on 8th July 1994. The Land claim was over Titles 376 and 81. They partly covered land areas of public land of Port Vila and rural lands surrounding Port Vila. They covered a land mass of approximately 245 hectares of land areas. It is of note that three (3) different decisions affecting different areas of land in the Titles 376 and 81.

20. A first part of the custom land Titles 376 and 81 covering 26 hectares was effected by the Efate Island Court orders dated 9 December 1994 and was declared to four (4) claimants in accordance with customary land dispute procedures and rules including the Notice of Publicity. There were no counter-claimants to that part of 26 hectares of land areas. The following were

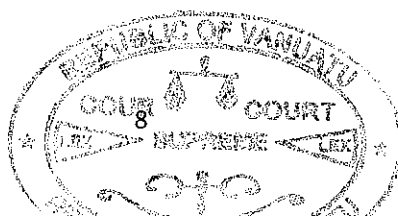


the four (4) declared custom land owners of the 26 hectares over Title 376: John Kalsarur, Henry Arsen, Abiu Joseph and Selerik Michel (All of Erakor village). No appeal was lodged against the Efate Island Court decision of 9 December 1994 by any aggrieved person of that decision including the Applicants in accordance with section 22 of the Island Courts Act [Cap. 167].

21. A second part of the custom land claim over Title 376 and 81 covered 219 hectares of land areas (less 26 hectares) undisputed. But the land mass of 219 hectares was affected by the Efate Island Court orders made on the 23rd December 2010 in a different custom land claim over Bouffa and Bellevue land claim No 01 of 1995 and the boundaries of Bouffa and Bellevue Land encroached on this custom land claim. This will be rectified by the appeal against that decision of 16 December 2010 (as we shall see in the analysis of this customary land claim below under: **"3. Efate Island Court Customary land claim No. 01 of 1995"**). However, in the second part of land claim No.03 of 1994, the Efate Island Court found and declared on 16 December 2011 that Family Tangraro was the custom owners of parts of the land covering 85 hectares of land areas in the claim following the Island court custom land disputes rules and the Notice of Publicity. There were no counter-claimants to that second part of the claim over 85 hectares of land areas on the Title 376. No appeal was lodged against the decision of the Efate Island Court of 16 December 2011 by any aggrieved person of that decision including the Applicants pursuant to section 22 of the Island Courts Act.
22. A third part of Land case no. 03 of 1994 covered Title 81. Chief Tangraro was the original land claimant over Titles 376 and Titles 81 which was filed on 8th July 1994. On this Title 81 claim, the following Five (5) counter-claimants were disputing custom ownership over areas of land inside Title 81: Family Bakokoto, Matau Gorry, Calvory Kaltabang, Family Kalsakau and others and Family Pomal Nmak. All the six (6) parties (including Chief Tangraro as original land claimant) agreed to the land areas they claimed in Title 81. The Efate Island Court effected consent orders to this effect on 29th September 2017. No appeal was lodged against the decision of the Efate Island Court of 29th September 2017 by any aggrieved person of that decision including the Applicants pursuant to section 22 of the Island Courts Act.
23. The applicants were not parties to this claim (03 of 1994), although, it covered part of Port Vila.

3. Efate Island Court customary land case No. 01 of 1995

24. This customary land claim was over land at Bouffa and Bellevue. It was mainly rural lands with some portions covering public land of Port Vila made initially on the maps of disputed areas. Adjustments were made consequent upon other adjoining customary land claims which were decided on by the Efate Island Court. Kaluat Thomas was the original claimant. The following are the counter-claimants: Family Kalmermer, Naflak Kram Naoi, Kalmetabil Namak Kalmet, Family Salsal Lauto, Family Kalurau Kiki, Kalontas Kalfabun, Akau Kaltamat, Family Kaluas Lamlamru, and Family Kaluatong.
25. On 23 December 2010, the presiding magistrate entered orders discontinuing the disputes upon the consent of the parties in the dispute. An appeal was lodged against that order. That appeal set aside the consent orders and the discontinuance of the disputes as the Island Court was not properly constituted and remitted the dispute back to the Efate Island Court so as to ensure that if a consent order is made, it must be signed by the presiding magistrate and three justices as required by law. The case is still pending before the Efate Island Court.



B. Were there any breach of the Rights of the Applicants under Articles 5(1)(d) and (k) of the Constitution?

26. The Customary land case No. 03 of 1993 where the Ifira Community filed the claim as the original claimant, was filed on 03 May 1993. It was dealt with by the Efate Island Court and transferred to Customary Land Tribunal pursuant to Sections 5 of the Customary Land Tribunal and Section 8 of the Island Courts (Amendment) Act of 2001.
27. The Land claim 03 of 1993 was dealt with in accordance with the law. The parties expressed their consent for the case to be transferred to the Customary Land Tribunal, the court agreed with the parties and issued the transfer order dated 04 March 2003 (see case authority: Francois v Ozols [1998] VUCA 5 Appeal case 155 of 1996 (25 June 1998)).
28. The parties in customary land claims no. 03 of 1994 and customary land claim no. 01 of 1995 decided to maintain their respective custom land disputes before the Efate Island Court.
29. The exercise of consent by the parties is envisaged by the effect or combined effect of the Sections 5 and 8 of the respectful Acts referred to above.
30. Custom land claim 03 of 1994 was partly over Port Vila urban land and partly rural in the circumstances of this case. It was initially the same for the customary land claim in No. 01 of 1995.
31. The Applicants were not parties to the custom land claims Nos. 03 of 1994 and 01 of 1995.
32. A conclusion is obvious. There were no breaches of the rights of the Applicants in the Protection of the law nor in the equal treatment under the law or administrative action in Articles 5(1)(d) and 5(1)(k) of the constitution respectively.
33. What the Applicants argued in advancing their case cannot be pursued because they do not have foundation in any breach of the constitutional rights of the Applicants in Articles 5 (1)(d) and (k).

C. The Applicants sought compensation orders pursuant to Article 6(2) of the constitution over arrears of the public land of Port-Vila.

34. As far as it is relevant to the public land of Port Vila in the context of this case, I do not see the need to dwell on the other aspects of this case relating to individual(s) obtaining negotiator certificate(s) on the public land after a declaration of public land was made under the Land Reform (Declaration of Public Land) Order No. 26 of 1981 and compensations were paid by the Government of the Republic of Vanuatu to the custom owners and or their representatives in terms of a 1992 Agreement. The public land of Port Vila belonged exclusively and beneficially to the Government. (See **Kalomtak Wiwi Family v Minister of Lands [2005] VUCA 29; Kalourai v Republic of Vanuatu [2015] VUCA 4; Combera v Sope [2016] VUCA 42 and Tangraro v Republic of Vanuatu [2020] VUCA 8** and others).
35. Breaches of constitutional rights are unlikely in the circumstances of this constitutional application. It follows that there will be no award of compensation pursuant to Article 6(2) of the constitution either.



36. I am therefore satisfied that, in the present case, the constitutional application has no cause which was founded in the constitution. It has to be struck out.
37. These are the reasons of the striking out orders and orally made on 07 August 2020.

VI. **ORDERS**

1. The Constitutional Application filed by the Applicants on 20 July 2018 is struck out as having no constitutional basis.
2. There are no orders as to costs.

Dated at Port Vila, this 16th day of September, 2020.

BY THE COURT

**Vincent Lunabek
Chief Justice**

