

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

Civil Appeal  
Case No. 19/2172 CoA/CIVA

**BETWEEN:** NORRIS KALMET and KALKOT KALTATAK  
Appellants

**AND:** KALUAAT THOMAS  
First Respondent

**AND:** FAMILY KALMERMER  
Second Respondent

**AND:** NAFLAK KRAM NAOI  
Third Respondent

**AND:** KALMETABIL NAMA KALMET  
Fourth Respondent

**AND:** FAMILY SALSAL LAUTO  
Fifth Respondent

**AND:** FAMILY KALMAN KIRI  
Sixth Respondent

**AND:** KALONTAS KALFABUN  
Seventh Respondent

**AND:** AKAU KALTAMAT  
Eighth Respondent

**AND:** FAMILY KALWAS LAMLAMRU  
Ninth Respondent

**AND:** FAMILY KALWATONG  
Tenth Respondent

**Coram:** Hon. Chief Justice Vincent Lunabek  
Hon. Justice John William von Doussa  
Hon. Justice John Hansen  
Hon. Justice Oliver A. Sakak  
Hon. Justice G Andrée Wiltens  
Hon. Justice Viran Molisa Trief

**Counsel:** Mr James Tari for the Appellants  
Mr Silas Hakwa for the Respondents

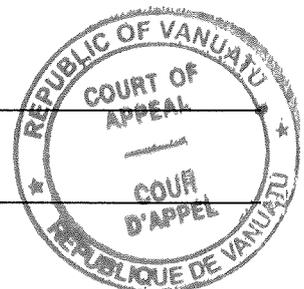
**Date of Hearing:** 8<sup>th</sup> November 2019

**Date of Judgment:** 15<sup>th</sup> November 2019

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**JUDGMENT**

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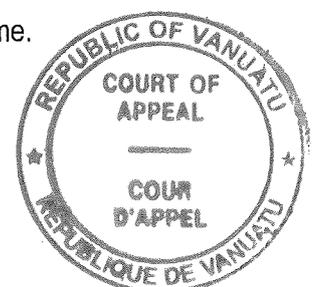


1. This appeal is brought against an order of the Supreme Court that struck out the appellants' application to extend time to appeal a decision of the Efate Island Court (EIC) in Land Case No. 1 of 1995 (LC1/95) concerning the custom ownership of the Bouffa and Belleview land in Efate. The parties to LC1/95 were the present respondents.
2. On 15<sup>th</sup> September 2003 the EIC made orders staying LC1/95 until further notice, and directed that a reconciliation meeting be held within two months. Later the parties each signed a document headed "*Judgment by Consent*" which recorded an agreement reached pursuant to the directed reconciliation to resolve all the issues between them. By the terms of this agreement the parties agreed that they are each equally declared custom owners of the Bouffa/Belleview land, and that the income and benefits of the land would be shared equally between the declared custom owners. The agreement contained a detailed description of the land. This document without more only records the agreement reached between the parties. In law it has no force as a declaration of custom ownership, and it is not a document that could be registered as a recorded interest in land under the Custom Land Management Act 2013 (the CLMA).
3. For an agreement which the parties intend to operate as a consent judgment to obtain the status of a court judgment, the agreement must first be approved by a properly constituted court acting within its jurisdiction. Consent judgments are commonly obtained by having an agreement in the form of the document, which the parties have signed in LC1/95, countersigned by the presiding member of the court; and after the court has approved it the agreement in this way becomes recorded as a judgment of the court.
4. Had this process been followed with the so-called Judgment by Consent in LC1/95, the agreement on being recorded by the court as a judgment would then have been deemed a recorded interest in land under Section 57 of the CLMA.
5. In an apparent endeavour to achieve this outcome on 23<sup>rd</sup> December 2010 the parties to LC1/95 appeared before Chief Magistrate Felix Stephen sitting alone as the EIC. The Chief Magistrate made the following orders:

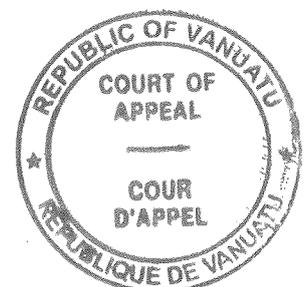
*"Having heard all parties, through their respective authorised representatives, and having also read the consent judgment signed by the parties and filed in the Efate Island Court on the 19<sup>th</sup> of October 2010, I hereby make the following as orders only relating to the management of the matter:*



1. *That the land case 01 of 1995 is discontinued upon the consent application of all parties in the dispute;*
  2. *That there is no longer any dispute pending before the Efate Island Court relating to the Bouffa/Bellevue Land as described and shown in the map attached to the consent document;*
  3. *That only the parties named in this proceeding be allowed to enter into agreements with each other with regards to the use, and enjoyment of the said land including sharing of any proceeds of any leases, subleases, easements, royalties and any other financial benefits derived from the said land;*
  4. *Each party bear their own costs."*
6. It seems that this order has been treated by the Department of Lands, Survey and Records and by the National Co-ordinator under the CLMA as a judgment of the court deemed by s. 57 to be a recorded interest in land for the purposes of the CLMA.
7. The appellants say they only recently became aware of the order made on 23<sup>rd</sup> December 2010. Their concern is that the land area described in the Judgment by Consent document extends into land beyond the boundaries of the land the subject of LC1/95, and into land which they claimed to be their custom land.
8. The appellants wish to challenge the claim by the respondents to custom ownership of land extending beyond the limits of the land claimed in LC1/95. Apparently there have been several different sets of proceedings filed in the Supreme Court by the appellants to seek a remedy, but this Court is only concerned with the application made by them to appeal against the order made on 23<sup>rd</sup> December 2010. The immediate difficulty which their proposed appeal faced was the time limit imposed on bringing an appeal against a decision of an Island Court in a land matter by Section 22 of the Island Courts Act. An appeal must be brought within 30 days of the decision, subject to the power of a court to extend time to 60 days. But beyond this 60 day period this court has held in *Kalsakau v Jong Kook Hong* [2004] VUCA 2 that:
- "... any application for grant of an extension of the 30 days period must be made within 60 days. Outside the 60 days no relief can be sought or granted".*
9. Not deterred by this, the appellants applied to the Supreme Court to extend time to appeal the order made on 23<sup>rd</sup> December 2010. The respondents applied to strike out the application and this was granted, principally on the ground that the appeal was way out of time.



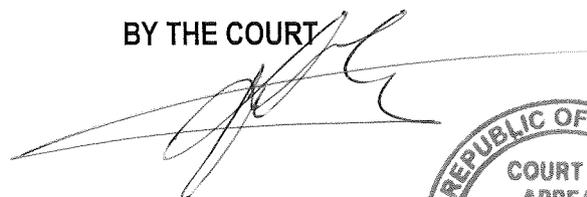
10. Still undeterred, the appellants have appealed to this court seeking to have the strike out overturned. They have also asked this court to make substantive orders that would go far beyond any order that the Supreme Court could have made on the application to extend time even if that application were not struck out.
11. The central ground on which the appellants rely as the basis for seeking relief against the order of 23<sup>rd</sup> December 2010 is that the order was not made by a properly constituted Island Court, and is therefore a nullity. They complained that the Chief Magistrate was sitting alone, whereas under s.3(4) of the Island Courts Act: "*An Island Court is properly constituted when three justices nominated by the clerk are sitting*".
12. Here there was only one justice sitting.
13. On the papers before this Court the appellants' contention that the order of 23<sup>rd</sup> December 2010 was not made by a properly constituted Island Court, and is therefore a nullity, is undoubtedly correct.
14. This Court has previously held that unless the Island Court is properly constituted by three justices, the court has no power to make orders that finally determine rights and interests in land: see *Family Molivakarua v Family Wonahese* [2011] VUCA 9 at [16] – [17]; *Tula v Weul* [2010] VUCA 42 at [14] and *Valele Family v Touru* [2002] VUCA 3.
15. As the order of 23<sup>rd</sup> December 2010 is not a valid order of the Island Court, two consequences must follow. First the order cannot constitute a recorded interest in land under the CLMA and must not be treated as a decision having that effect. Secondly, the proceedings in LC1/95 remain on foot and are yet to be resolved by the Island Court.
16. The appeal before this Court is not the proper procedural course for the appellants to have the invalid status of the order of 23<sup>rd</sup> December 2010 exposed and rectified. All this Court can do is deal with the appeal before it. If, as now seems clear, the judgment challenge by consent was not validly made, there is no judgment of the Island Court that could be the subject of an appeal and on this ground the application to extend time must be struck out.



17. In short, if there had been a valid decision made in LC1/95 on 23<sup>rd</sup> December 2010, any appeal from it is out of time. If the decision was a nullity because the court was not properly constituted, there can be no appeal from it. Either way this appeal must be dismissed.
18. On the hearing of the appeal possible ways forward were discussed with counsel. The appellants could issue Supreme Court proceedings seeking a declaration that the order made on 23<sup>rd</sup> December 2010 is a nullity, and directing that the Island Court continue to deal with LC1/95. However a more simple and less costly way would be for the respondents to concede now that the order of 23<sup>rd</sup> December 2010 cannot be upheld, and for them to return to the Island Court with a request that a properly constituted court consisting of three justices consider their agreement for a Judgment by Consent, and if the court thinks it appropriate to do so, then register it as a decision of the Court.
19. Even though the appellants were not parties to LC1/95, it will be the function of the Island Court before recording the judgment to check that the land description put forward by the parties is consistent with the boundaries of the land claimed in LC1/95. If not the Island Court should have the terms of the proposed judgment amended.
20. For the reasons given this appeal must be dismissed.
21. The respondents have brought the problem now identified on themselves by seeking an order from an Island Court not properly constituted, and by maintaining that the order obtained is a valid decision of the Court. For this reason there will be no order for costs on this appeal.
22. The order of the Court is that the appeal be dismissed with no order as to costs.

**DATED at Port Vila this 15<sup>th</sup> day of November 2019.**

**BY THE COURT**



**Hon. Vincent LUNABEK**  
**Chief Justice**

