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

Civil Appeal
Case No. 25/208 COA/CIVA
[2025] VUCA 17

BETWEEN: **FAMILY MOLBARAV represented by TIMOTHY MOLBARAV, KERRY MOLBARAV and JASON MOLBARAV**
Appellants

AND: **REPUBLIC OF VANUATU**
First Respondent

AND: **FAMILY LOY and ADMINISTRATORS OF THE ESTATE OF DANIEL LOY**
Second Respondent

AND: **PAULINE LOY**
Third Respondent

AND: **PHILEMON LOY as Administrator of the Estate of Daniel LOY**
Fourth Respondent

Date of Hearing:	***6 May 2025***
Coram:	***Hon. Chief Justice V Lunabek*** ***Hon. Justice J Mansfield*** ***Hon. Justice R Asher*** ***Hon. Justice D Aru*** ***Hon. Justice VM Trief*** ***Hon. Justice EP Goldsbrough***
Counsel:	***Mr Philip Fiuka for the Appellant*** ***Mrs Jelinda Toa Tari for the First Respondent*** ***Mr Justin Ngwele for the Second and Third Respondents*** ***Mr Tom Joe Botleng for the Fourth Respondent***
Date of Judgment:	***16th May 2025***

JUDGMENT OF THE COURT

REPUBLIC OF VANUATU COURT OF APPEAL COUR D'APPEL REPUBLIQUE DE VANUATU

Introduction

1. This appeal is from a decision of the Supreme Court made on 4 February 2025. It was a judgment given in a consolidated proceeding involving three separate Supreme Court claims each concerned land known as Sarautu land on Santo Island.

2. The starting point is a judgment of the Supreme Court of 28 June 1986. The Supreme Court, hearing an appeal from the Island Court concerning disputed land identified as "*part of Title No. 479 called Sarautu and its custom ownership*". The Supreme Court quashed the decision of the Island Court and found: "*that Daniel Loy, being the adopted son of MOLSAKEL and by the record of his family as I have stated, then in IS THE TRUE CUSTOM OWNER OF "SARAUTU" PLANTATION with the exception of that portion which in my opinion belongs to Paul Livo*".

3. Nothing turns on that small exception.

4. The Supreme Court then ordered that the alternative contenders for the status of custom ownership of Sarautu Land Timothy Molbarav and Tangis Sisi removed themselves from Sarautu Plantation. It further ordered that all leases of Sarautu property now belong to Daniel Loy, and that any leases registered in the name of Timothy Molbarav or Tangis Sisi be altered by substituting the name Daniel Loy.

5. All parties agree that that is a final decision of custom ownership of the Sarautu Land which cannot be disturbed.

6. It is then appropriate to jump forward a considerable period. The Sarautu Land subsequently included the Vanuatu Agricultural Research Training and Centre (Training Centre). For that reason the Republic determined to compulsorily acquire the land of the Training Centre, and again to effectively do so it established Sarautu Land under Lease 04/2641/019 in the period from 2013 to 10 November 2017. That latter date is the final date of the Lease 019.

7. Subsequently, a Deed of Release was executed under which the agreed compensation for the compulsorily acquisition of the land was to be paid. That Deed is dated 4 December 2020. The agreed amount of compensation for the acquired land was VT435,690,000. The Deed of Release was executed by the Republic represented by the Minister of Lands and Natural Resources, and by the Daniel Loy Family by Marie Loy.

8. The recital to the Deed records that the Daniel Loy Family is the confirmed custom owner of the lease Title 019 located over the land formerly known as IRHO Land on which the Training Centre was located on South East Santo. It describes the Daniel Loy Family as having the customary land holding rights over the leased land by the declaration of the Land Appeal Case No. 12 of 1986 (the Supreme Court decision referred to: *Loy v Molbarav* [1986] VUSC 17. It also notes that the Daniel Loy Family is confirmed by the Certificate of Recorded Interest in land which was issued in their

name on part of the Sarautu Land on 13 October 2016 by the National Coordinator of the Customary Land Management Act. It provided for payment of the compensation for the compulsory acquired land in instalments.

9. That all appears quite straight forward.

10. However, as the three proceedings instituted in the Supreme Court and then consolidated indicate, the apparent circumstances produced a further series of disputes heard together. In Civil Case No. 1393 of 2021 the Third Respondent as Administrator of the Estate of Saul Loy sought payment from the Republic of the balance outstanding of the compensation payable under the Deed of Release. By Civil Case 1631 of 2021 the Second Respondent as the authorised representative of Daniel Loy Family sought much the same relief. It is noted that only the first periodic payment of VT45,690,000 had been paid by them. Those proceedings, to the extent to which there was a dispute, involved only the dispute about which member or members of the Loy Family should receive the outstanding amounts and distribute it in accordance with the law.

11. It is civil proceeding 1713 of 2021 which extended the dispute. It was brought by the Appellants. It asserted that at all material times the Appellants were the declared custom owners of land "*commonly known as Nabuloaru customary land including old titles 465 and 466 located at Sarautu area*". Consequently, it asserted that the land acquisition process itself had miscarried because the Appellants were not involved in the acquisition process and that the Deed of Release should also be set aside because it was not a deed with the appropriate custom owners of the land.

12. That was the state of disputes when the Supreme Court came to consider the consolidated proceeding on 4 February 2025 by delivering judgment. The First Respondent, the Republic, defended all those proceedings. It acknowledged the history referred to above including the payment of the first instalment of VT45,690,000 to Marie Loy on 18 December 2020.

13. Its defence then referred to the need to properly identify the representative of Daniel Loy Family and the administration of his estate. In fact upon Daniel Loy's death it alleges (and it is not contentious) that the administration order for his estate was granted jointly to Saul Loy, Sakaria Daniel and Philemon Loy. It is also common ground that Saul Loy and Sakaria Daniel are also since deceased leaving Philemon Loy as the sole person charged with the administration of the estate of Daniel Loy.

14. The balance of its defence is somewhat bizarre. It refers to the acquisition process in respect of the area to be acquired (then held under an unregistered lease) being negotiated with John Tari Molbarav rather than with Family Loy and that "*for reasons unknown*" the Deed of Release was entered into between the Minister and Marie Loy as the representative of the Daniel Loy Family. Why that response was made is mysterious. It then pleads communications with the State Law Office and asserts that the Sarautu area of the 1986 Supreme Court judgment which was described briefly above was outside the area of land on which the unregistered lease then to become Lease 019 was intended and was also outside the granted area of the Sarautu Land of the 1986 Supreme Court

decisions. All that is inconsistent with its own documentation in evidence and its decision that the Training Centre Land is on former Lease 479 within Sarautu Land. It records several Supreme Court decisions somehow related to resolution of that dispute. It then refers to a reference to Land Case No. 5 of 1992 "*Molsakel*" South East Santo having been referred to the Santo/Malo Island Court. That decision, when made, cannot alter the 1986 Supreme Court decision. Consequently, it asserts that there is no court or tribunal decision which declares the Loy Family as custom owner of the unregistered lease (then incorporated into Lease 019). Again, the First Respondent initiated and continued the process which records exactly the opposite. It asserts that the National Coordinator of the Customary Land Management Office when issuing to the Daniel Loy Family the certificate of recorded interest for the relevant part of Sarautu land and then that the Minister was "*misguided*" by certain factual circumstances into executing the Deed of Release. Again that is not explained or particularised. It claims privilege in respect of communications between the State Law officer, the Minister of Lands and the Minister of Finance. But that claim may be debatable. It is not necessary to refer to the extensive and more detailed allegations in its defence.

The Judgment

15. The issues were brought to a head by an interlocutory application by the Second Respondent. There were three questions identified for determination which, it appears, the primary Judge was prepared to hear and determine on that application. Having regard to the lengthy history, it was then he can hardly be criticised for attempting to bring this matter to a head. The three questions were:

16. Whether the present Appellant has legal standing to continue with their proceeding? That is effectively whether the Lease 019 to the Loy Family, being over former Lease 479 within the Sarautu Land is shown, at least arguably, to be wrong and that the Appellants have an arguable claim that they are the custom owners of that land.

17. Whether the Second Respondents are entitled to the monies owed to them under the Deed of Release? and

18. Whether the Supreme Court is *functus officio* from revisiting matters that have been conclusively resolved, in particular whether certain restraining orders relating to the payment of monies under the Deed of Release should be set aside and whether the Appellants' claims have previously been determined in other Supreme Court proceedings.

19. The Supreme Court decided that the Appellants has no standing, and that therefore the Deed of Release was enforceable, and the moneys were payable to the Second Respondent. The interlocutory orders restraining payment under the Deed were set aside.

The Appeal

20. The Appellants contend that the judgment should be set aside first because the factual conclusions were wrong, and second because it was not procedurally correct to have decided those matters on a strike out application.

Consideration

21. One preliminary issue may be easily dealt with. Because the judgment referred to was given on an application to have the Appellants' claims in the consolidated proceeding struck out, they have taken the precaution that it may not be treated as a final judgment but as an interlocutory judgment. In that event the time for appeal is somewhat shorter, and the appeal was not instituted within that shorter period, and in addition they need leave to appeal. The other parties acquiesced in granting the enlargement of the time to appeal and leave to appeal in the event that it is treated as an interlocutory judgment rather than a final judgment. In fact the orders finally determine the rights of the Appellants adversely to them. Their claim was struck out.

22. In those circumstances, we need not to address that particular issue. We regard the appeal as competent dealing finally with the claim of the Appellants in the consolidated proceeding, but if necessary we would enlarge the time within which to appeal and give leave to appeal, so that the appeal is competent.

(a) The Merits

23. As the discussion above indicates, there is no challenge to the decision of the Supreme Court in 1986 that Daniel Loy was the custom owner of the Sarautu Plantation Land. Although there is reference to another Santo/Malo Island Court hearing as a claim on the part of the Appellants (and others) to be recognised as custom owners of certain land called Nabuloanu Land, that Island Court cannot make an order inconsistent with the determined custom ownership of the Sarautu land.

24. It was also uncontested context is that the Republic in about 2013 decided that it wished to acquire the land on which its Training Centre was established. It then progressively went through the process of acquiring that land and identifying the relevant custom owners. It identified the relevant land as being within former lot 479, and that lot 479 was within Sarautu land. Once that step was taken, the Republic converted the land into leased land with Lease 019 in the names of the Loy Family. It negotiated with them about the price to be paid for the compulsory acquisition of the land, and an agreed price for compensation was fixed. The Republic has made the first payment under the Deed. The entitlement of the Loy Family in respect of the acquired land (if it is their land) is not now as custom owners but under the Deed of Release. We will refer to that relatively minor aspect at the completion of these reasons for judgment.

25. It is also clear that the Training Centre, and the acquired land under the survey plan 019 indicates that the Training Centre is part of old title 479. The map in evidence depicting the area of that title and the map in evidence depicting the old title 479 correspond almost exactly in shape and size.

26. Consequently, as the boundaries of Sarautu Land include old title 479, there is a sound basis for the primary Judge determining that Sarautu Land, including old title 479, was land encompassed within that survey plan 019.

27. The First Respondent in submissions both before the primary Judge and on this appeal contends that, somehow, its work in a period 2013 to 2019 resulting in the survey plan may erroneously have identified that land as Sarautu Land. It has not explained why that is so. It has not produced any map or document which contradicts the 1986 Supreme Court decision fixing the boundaries of Sarautu Land with its attached map. It is not explained how any alleged errors may have arisen. Its evidence includes contradictory advice from the Minister and from government officers about whether the Deed of Release should be honoured by payment or should be disputed.

28. As it obvious that the real dispute between Family Molbarav and Family Loy is whether or not the Training Centre is on Sarautu Land or not, it should have been a straight forward exercise (albeit it taking some time) to produce a map in which the Sarautu Land as determined by the Supreme Court in 1986 is shown, the location of the Training Centre is also shown, and if the Training Centre is shown to be outside the Sarautu Land in whole or in part, then the other allotments or title references which the Training Centre was established. It has not done so. Having regard to the pleadings in each of the three claims which were consolidated, that was an obvious step to take.

29. As we have indicated, on the material before the primary Judge, there seems to be little doubt that the Training Centre was located on Lot 479 and that Lot 479 was within the area of the Sarautu Land as determined by the Supreme Court in 1986. That is also recorded in the documents of the Republic on which it proceeded to acquire the land.

30. In our view, there is no cogent material which could present an arguable proposition that the contrary was true, namely that the Training Centre was not located on the Sarautu Land.

31. Counsel for the Appellants argued forcefully by reference to a range of old title allotments and the limited mapping available that the Sarautu Land did not include Lot 479. It is noteworthy that the argument was to claim weaknesses in the claim. It did not include evidence capable of positively showing that the Training Centre was on Nabuloaru land, which the Appellant say is their custom land.

32. In the absence of cogent evidence to contradict the conclusion to which the First Respondent came when preparing Lot 019, and the evidence of the other Respondents, in our view it has not been established that the primary Judge erred in taking that step. It is not necessary then to explore the extent to which Nabuloaru Land reached, or its relationship to Sarautu Land. Counsel for the

Appellants acknowledge that his clients could not change the determined area of Sarautu Land as fixed by the Supreme Court in 1986, and acknowledged also that any subsequent Tribunal or Court fixing the extent of Nabuloaru Land could not contradict that earlier decision.

33. So, once the primary Judge concluded that the evidence supported the claim of the Family Loy, the Appellants did not have the standing to dispute the validity of the Deed or the entitlement of Daniel Loy as custom owner of the land on which the Training Centre was established, namely Lot 479, to the benefit of the Deed as it was land of which he was the custom owner.

(b) The Procedural submission

34. The additional matter contended by the Appellants on this appeal was a procedural matter, that is a contention that the primary Judge wrongly proceeded to make that determination on an application for striking out the claim made by the Appellants in the consolidated proceedings and determining the question to which we have just made reference.

35. They contend that it was simply not available to the primary Judge to entertain the strike out application, because of previous interlocutory applications and orders made by the Supreme Court in the proceedings, so that the final determination of the issue described above should not have been made.

36. It is trite to refer to Section 28(1)(b) and Section 65(1) of the Judicial Services and Courts Act [CAP. 270] about the powers of the Supreme Court. We note also the decision of the Court of Appeal in *Noel v Champagne Beach Working Committee* [2006] VUCA 15 confirming that the Supreme Court has power to strike out proceedings which when there is a lack of a reasonable prospect of success on the part of the claimant. Of course, such a power should be exercised with caution, and only in clear cases where the material before the Court demonstrates that the claim under consideration is not reasonably sustainable. It is a discretionary power.

37. Like many claims involving disputation about the identity of custom owners, the history of the consolidated proceeding, and the separate proceedings instituted before the consolidation, show a number of interlocutory applications, some contested, to preserve the status quo prior to the final hearing of the claim. Some are attempts to dispose of the claim or claims for delay, non-compliance with directions, or on other grounds. The Supreme Court in the consolidated proceeding had made restraining orders precluding the Second to Fourth Respondents from seeking payment under the Deed on their claim pending the hearing and determination of the proceedings.

38. We agree with the primary Judge that the making of the strike out application upon which the judgment was based did not demonstrate any contempt of Court as asserted or any impropriety on the part of the Second to Fourth Respondents. The available material before the Supreme Court was developing over time with the filing of sworn statements and contentions and the completion of pleadings. As such material evolves, a party in any proceeding may take the view that the time has

been reached on which it is apparent that the claimant (or in this case one claimant) has no reasonable prospect of success. That is the step which was taken here.

39. We see no error on the part of the primary Judge in entertaining and determining the claim in the present circumstances.

40. There was no suggestion that the Appellants were taken by surprise by the application, or that they sought any additional time to respond to it or had further material which they wished to adduce before the Judge, or that in any other way the finally disposing of the claim in that way failed to accord proceed fairness to them. There is no suggestion that they applied to challenge by cross-examination any of the existing sworn statements. Their position seems to have been that the Court should simply await the outcome of the Santo/Malo Island Court hearing and the determination of the Nabuloaru custom ownership land before finally resolving the proceeding.

41. As the critical question was whether the location of the Training Centre on Lot 479 was within the Sarautu Land as determined by the Supreme Court in 1986, those other considerations were peripheral, if not "*obstacles to the finality of the 1986 Judgment ... instituted to merely obstruct the course of justice for the Family Loy ...*" [see at 13 of the reason of the primary Judge].

42. For those reasons we consider that the appeal of the Appellants should be dismissed. It is not necessary for the Court to await the outcome of the Santo/Malo Island Court apparently made by the Molbarav Family or some member of it and now the Molsakel Family to determine the scope of Sarautu Land or the location of Lot 479 within it on which the Training Centre was built.

43. The order that the claims brought by the Appellants in claim 1713 of 2021 be struck out stand.

44. The Orders of the Supreme Court vacating the interlocutory orders of 28 May 2021 and 21 July 2021 are to stand.

Cross-Appeal

45. The order is that the claim of Philemon Loy, that is the claim in the proceeding 1393 of 2021 is successful and she is entitled to continue to receive the payments under the Deed agreed to by the Republic.

46. The primary Judge made an order that the balance of the compensation monies under the Deed of Release dated 4 December 2020 be paid by instalments as agreed to Philemon Loy as the sole surviving administrator of the estate of Daniel Loy, to distribute and account for according to law.

47. There was a challenge to that order by the Third Respondent.

48. We have noted above that the asset of the Estate of Daniel Loy which is the subject of the consolidated proceeding is the entitlement to payment under the Deed. It was not to restore the land to that estate. The benefits of custom ownership by Daniel Loy have been converted to the payment of compensation for compulsory acquisition of his land.

49. We did not receive full argument between the Second to Fourth Respondents about whether the normal laws of intestacy apply to the disposition of those monies, or whether in the circumstances they are held for the benefit of those who were the custom owners of the land before its acquisition.

50. We agree with the primary Judge that the monies should be payable to Philemon Loy as surviving Administrator of the Estate of Daniel Loy *"to distribute and account for according to law"*.

51. The cross-appeal is therefore dismissed.

52. The consolidated proceeding is otherwise remitted to the Supreme Court. The only remaining issue can be as to how the money received under the Deed should be applied. Philemon Loy may choose to seek directions on that issue, if Family Loy member indicate a dispute on that topic.

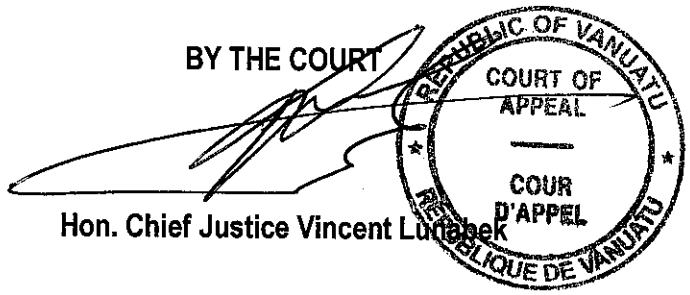
Costs

53. We consider that the Appellant should pay costs of the appeal to the Respondent Philemon Loy as Administrator of the Estate of Daniel Loy fixed at VT100,000. We so order.

54. There is no order as to costs in relation to the other Respondents, including the First Respondent.

DATED at Port Vila, this 16th day of May, 2025.

BY THE COURT



Hon. Chief Justice Vincent Lunabek