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

Civil Appeal
Case No. 19/2396 CoA/CIVA

BETWEEN: **McGLORY KALSAKAU representing FAMILY KALSAKAU**
First Appellants

AND: **RUSSEL BAKOKOTO representing NAFLAK TEUFI**
Second Appellants

AND: **VAVAUTALO SOPE representing FAMILY SOPE of Imere**
Third Appellants

AND: **SAUWI KALPUKAI representing FAMILY NUNU NAPERIK MALA**
Fourth Appellants

AND: **DIRECTOR OF LANDS**
First Respondent

AND: **NATIONAL COORDINATOR OF THE CUSTOM LAND MANAGEMENT OFFICE**
Second Respondent

AND: **ANDREW CHICHIRUA representing FAMILY GEORGE KANO**
Third Respondent

Civil Appeal
Case No.19/1749 CoA/CIVA

BETWEEN: **FAMILY CHICHIRUA**
Appellant

And: **HUMPREY TAMATA, NATIONAL COORDINATOR OF THE CUSTOM LAND MANAGEMENT OFFICE**
First Respondent

And: **FAMILY GEORGE KANO represented by ANDREW CHICHIRUA**
Second Respondent

AND: **FAMILY KALSAKAU and OTHERS**
Third Respondents

Coram:	***Hon. Justice John William von Doussa*** ***Hon. Justice John Hansen*** ***Hon. Justice Gus Andrée Wiltens*** ***Hon. Justice Viran Molisa Trief***
Counsel in CIVA19/2396:	*Mr Sakiusa Kalsakau for the First, Third and Fourth Appellants* *Mr Daniel Yawha for the Second Appellants* *Mr Sammy Aron for the First and Second Respondents* *Mr Willie Daniel for the Third Respondents*
Counsel in CIVA19/1749	*Mr Silas Hakwa for the Appellants* *Mr Sammy Aron for the First Respondent* *Mr Willie Daniel for the Second Respondents* *Mr Daniel Yawha for Naflak Teufi represented by Russel Bakokoto* *Mr Sakiusa Kalsakau for Family Kalsakau and the remaining respondents*
Date of Hearing:	*5th November 2019*
Date of Judgment:	*15th November 2019*

JUDGMENT

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1. These two appeals are being heard together as common questions arise in both matters concerning interests in custom held in the Marope Land in Efate.

2. The first appeal for consideration is CIVA19/2396 where McGlory Kalsakau representing Family Kalsakau and three other appellant families seek orders against the National Coordinator of Land Dispute Management (the Coordinator) and the Director of Lands as the first and second respondents, and against Family George Kano represented by Andrew Chichirua as the third respondents. The appellants seek to overturn the striking out in the Supreme Court of an application for judicial review commenced by them to quash a certificate of recorded interest issued on 5th July 2018 by the Coordinator to Family George Kano represented by Andrew Chichirua as custom owner of the Marope Land. We refer to this appeal as the Kalsakau Family appeal.

3. The second appeal is CIVA19/1749 where Family Chichirua as appellants seek orders against the Coordinator as first respondent, Family George Kano represented by Andrew Chichirua as second respondents and the families who are the appellants in CIVA19/2396 as the fourth respondents. In that appeal the appellants seek to overturn the dismissal of an application for judicial review brought by them to quash a certificate of recorded interest issued by the

Coordinator on 29th June 2018 to Family George Kano represented by Andrew Chichirua as custom owner of the Marope Land. We refer to this as the Chichirua Family appeal.

4. The challenged certificate of recorded interest in both cases certified that Family George Kano was custom owner of the Marope Land and that Andrew Chichirua was representative of the custom owner. Why two certificates in similar terms were issued a few days apart is not explained but nothing turns on that.

5. At the outset we deal with a preliminary issue that surfaced in a previous attempt by members of Family Kalsakau to challenge the correctness of the Coordinator's certificates about the Marope Land. In Kalsakau v Director of Lands [2019] VUCA 33 this court declined to hear an appeal which raised similar issues to those now before the Court as it was unclear who was representing the appellant families. To overcome these difficulties a fresh application for judicial review was issued by the appellants, and it is now agreed by all parties that the differing stances taken by members within the families are accommodated by the way in which the new proceedings have been structured. Nothing more need be said about those representation questions. Moreover on this occasion Mr S. Kalsakau of counsel appeared on behalf of the first, third and fourth appellants, and Mr Yawha counsel for the second appellant adopted Mr Kalsakau's submissions as part of his.

The purpose of the Coordinator's certificates

6. The Custom Land Management Act 2013 (the CLMA) makes provision for the recording of decisions of customary tribunals as to who the custom owners of an area of custom land are and once recorded the Coordinator is empowered to provide certification of the names of the custom owners and their representatives.

7. A recorded interest can come about by a determination as to custom ownership made by a nakamal under Part 3 of the CLMA, by the process for determining a disputed claim to custom ownership under Parts 4 and 5 of the CLMA or by the determination of a land dispute by a Custom Area Land Tribunal under Part 6. In any of these situations a written record of the determination made by the customary tribunal must be filed with the Coordinator. The Coordinator is then responsible for maintaining a list of all the decisions that have become a recorded interest in land and where requested by a custom owner will provide a certification of the names of the custom owners and their representatives: see ss19(3), 27(4) and 40(4). Where a determination as to custom ownership has been made by a decision of the Supreme Court or an Island Court made before the CLMA commenced, the decision is deemed to create a recorded interest in land in respect of the person or persons determined by the court to be the custom owners and will serve the same purpose as a recorded interest in land created under Parts 3, 4, 5 and 6 of the CLMA: see s.57. There is no provision in s.57 akin to ss.19(3), 27(4) and 40(4), but it is to be implied that the Coordinator will include those decisions in the list of determinations that he is required to maintain under those sections and will provide a similar certification when requested. Likewise for decisions of Customary Land Tribunals whose decisions may be deemed to be recorded interests under s.58.

8. A certification provided by the Coordinator is an evidentiary aid to establish that there is a recorded interest in a particular piece of land. The CLMA provides for the purpose and the uses of a recorded interest in the definition in s.2 of the CLMA:

> *"**recorded interest in land** is a decision made by a customary institution as to who the custom owners of an area of land are which when recorded, will be used by the National Coordinator as a basis for:*
>
> *(a) the identification of custom owners for the purposes of a negotiator's certificate application under the Land Reform Act [CAP 123]; or*
>
> *(b) the rectification of lessors in leases in existence prior to the commencement of this Act,*
>
> *and to avoid doubt a Supreme Court or Island Court decision made prior to the commencement of this Act is deemed to create a recorded interest in land."*

9. It is important to note that a recorded interest does not and cannot alter the determination as to custom ownership made by the Court or customary tribunal. If a dispute arises about who is the custom owner, that will be determined by going to the decision of the customary tribunal or Court, not to a certificate issued by the Coordinator; see Kwirinavanua v Toumata Tetrau Family [2018] VUCA 15 at (24).

10. The contentious issues in this appeal about the challenged certifications, colloquially called "*green certificates*", concern both the naming of the custom owners as Family George Kano and their representative as Andrew Chichirua.

11. The certifications of record interest under challenge in this case concern a decision of the Efate Island Court (the EIC) delivered in Land Case No. 1 of 1993, Family Sope Imere (Mele Village) v Mala [1994] VUIC 2. An appeal against this decision was dismissed by the Supreme Court on 23 December 2003: Family Sope Imere v Family Nikara [2003] VUSC 70. For present purposes it is the EIC decision to which reference must be made in these proceedings. That decision is deemed a recorded interest in land under s.57 of the CLMA.

Brief Summary of the contentions of the Parties

12. In the Kalsakau Family appeal the appellants contend that the challenge they sought to make against the correctness of the certificate was wrongly struck out at the first conference called under Rule 17.8 of the Civil Procedure Rules because the Judge wrongly determined that the appellants did not have an arguable case. The appellants argued that there was an arguable case on both law and fact. There were serious issues whether the EIC had in two respects exceeded its jurisdiction such that parts of the judgment in Land Case No. 1 of 1994 were made beyond jurisdiction and was therefore a nullity. There was not only an arguable case but a strong case that the Supreme Court had misconstrued the meaning of "*custom owner*", and thereby fallen into error in finding that the appellants were not declared custom owners whose name should appear on the certificate. As well they contended that to name Andrew Chichirua as representative was a serious misconstruction of the of the EIC decision as George Kano's appearance before the EIC was as a representative of the Naflak Teufi of Ifira. Further, by proper

application of custom in Naflak Teufi he could not be a representative of Family George Kano as inheritance in that clan is by matrilineal descent which excludes Andew Chichirua from being the family representative.

13. Mr Yawha on behalf of the second appellant supported the submission that the Supreme Court had misconstrued the EIC decision by not finding that as George Kano had appeared as a representative of the Naflak Teufi before the EIC, Naflak Teufi should have been found by the Supreme Court to be a custom owner. He also argued that the Supreme Court was in error in not accepting the second appellant's sworn statement that as Naflak Teufi followed the matrilineal side Andrew Chichirua was excluded from being the representative of Family George Kano.

14. In the Family Chichirua appeal the Supreme Court had dismissed the application by Family Chichirua as they had not been a party to Land Case No. 1 of 1994, and received no interest under it. On this basic point the Court held that Family Chichirua had no standing to bring their Judicial Review application. Before this Court Family Chichirua do not challenge any part of the Island Court decision. They say it continues to apply. However they claim that they are part of Family George Kano and should be recognised within the membership of the custom owner group and should share in the benefits that derive from the Marope Land. They argue that the narrow point on this appeal is whether they demonstrated an arguable case that justified them being given that leave to proceed to trial. They argue that their claimed family relationship to Family George Kano did that.

15. On both appeals the Coordinator and the Director of Lands took a neutral role and announced that they would abide by the decision of the court.

16. Mr Daniel for Andrew Chichirua in each appeal argued that the Coordinator's certificates were correct and accorded with the EIC decision. He traversed each ground of appeal asserting that the Supreme Court made no error of the kind alleged.

17. In particular he argued in the Kalsakau Family appeal that properly construed the EIC decision awarded the appellants only secondary rights of use which were under the ultimate control of Family George Kano. As such they were not "*custom owners*" as defined in the CLMA and the LRA. Further, Andrew Chichirua is the direct descendant of George Kano so that under the custom principles applying on Marope Land, as found by the EIC, he is the correct person to be named as representative.

18. In the Family Chichirua appeal Mr Daniel argued that the Supreme Court correctly held that Family Chichirua were not parties in the EIC and therefore had no standing to challenge the Coordinator's certificate. The Court was therefore correct to hold that the appellant had no arguable case, and the judicial review application was correctly dismissed.

The Island Court decision

19. At the outset the Court identifies the parties before the EIC, being the groups who had come forward as claimants. Those parties were:

- *Family SOPE of Mele Village (Original Land Claimant "O.L.C.2")*
- *Chief NUNU NAPERIK MALA (Land Claimant No. 1-L-C.1)*
- *NAFLAK TEUFI –IFIRA (Land Claimant No. 2-L.C.2)*
- *Family KALSAKAU – IFIRA (Land Claimant No. 3-L. C. 3)*
- *IFIRA TENUKU COMMUNITY HOLDINGS LIMTIED (Land Claimant No.4 L.C.4)*
- *FAMILY NIKARA (Land Claimant No.5-L.C.5)*
- *IFIRA COMMUNITY (Land Claimant No.6)*

20. The decision then summarises the evidence received from the parties and their witnesses, and makes findings leading to the ultimate result. The findings commence with general considerations to be applied to determine the true custom owner of the Marope Land. Those considerations include:

1. *According to Efate custom, particularly the Marope Land area, land ownership passes to the males. Custom Land ownership follows the Patrilineal system.*

2. *The custom land owner is normally a chief, sometimes there are exceptions when the custom owner is not a chief. The custom chief owns land on behalf of his people, who live and work on the land. The custom chief acquires land on behalf of his people who occupy the land.*

   Custom ownership is based on representation. The custom chief represents the custom boundary of the land he and his people live and work on. The custom land belongs to the custom chief and his people. Custom land ownership is different from individual ownership. The individual land owner may dispose off / sell land in whatever way he wishes.

   On the other hand, a custom chief cannot dispose off or sell custom land at his own free will.

3. *Every person under the authority of the custom chief has an interest or custom right, which is a perpetual right of occupying and using land which is owned by the custom chief.*

4. *According to the system of customary, land tenure, the chief is the custom owner of the whole boundary, and like his people he owns, small portion of land within the whole boundary.*

5. *The custom chief may observe his own tribe, or he may also have to lead a different tribe, hence it would make him the chief of different little tribes.*

6. *Custom land ownership is transferred from father to son (grandfather, to father, and then to son). Customary land ownership is a birth right.*

7. *If a custom owner dies, then customary land ownership transfers to the brother after him. If the custom owner doesn't have a brother, then this right gets transferred to the first son of his eldest sister, in that way land gets transferred through the "uncle relationship".*

8. *In the case of polygamy, land ownership rights go to the first born of the senior wife."*

21. Then follow the determinations and declarations of the Court. The EIC found that there were two different custom owners of the land. Pastor Pierre Nikara of Mele Village was held to be the true custom owner of Sowareo Land which is within the boundary of the Marope Land, and that Pastor George Kano was the custom owner of the balance of the land. It is only the decision concerning the land awarded to George Kano that is relevant in these proceedings. The relevant determination of the EIC was:

> *"4. The court is satisfied and thus declares Pastor George Kano the owner of the land marked blue on the map. The land area covers:*
>
> ** Narrowby Land Title: 57J, 57K, 57L, 57N, 329, 497, 2904, 1964, 1231, 2910, 3760, 128, 3762, 3899.*
>
> ** Malaroa Title: 534, 129;*
>
> ** Ebooka Land Title: 378;*
>
> ** Mapuana Nattapu Land Title: 519;*
>
> **One part of Erango Rongo Land Title: 3922;*
>
> *The court decision does not affect Land Title 57I, 57M, which are on the map, but both areas are outside the boundary claimed.*
>
> *5. The court is satisfied and declares that:*
>
> *(a) Natlak Teufi Ifira (LC.2) and their descendants;*
>
> *(b) Chief Nunu Naperik Mala and his family (LC.1) together with their descendants;*
>
> *(c) Family Sope of Mele village (OLC) and their descendants;*
>
> *According to custom laws, have perpetual rights to occupy, use and enjoy the area on the map marked in blue. These areas cover the Land Titles of:*
>
> ** Narrowby Land Title: 57J, 57K, 57L, 57N, 497, 2904, 1964, 1231, 3760, 3762, 3899,128, 2910.*
>
> ** Malaroa land Title: 534, 111, 129.*
>
> ** Ebooka Land Title: 378.*
>
> ** Mapuana Nattapu Land Title: 519*
>
> ** One part of Erango Rango land Title: 3922.*
>
> *This customary right includes the right to grow crops, make gardens, build houses, and live on the land subject to any government restrictions. This right also includes right to receive rents or any other form of profit.*
>
> *6. The court is satisfied and declares that the Kalsakau Family (LC.3) and their descendants have the same perpetual rights to occupy, use or enjoy the Narrowby and Title: 57J, 57K,*

57L, 57N, 497, 2904, 1964, 1231, 3760, 3762, 3899, 128, 2910, with the Naflak Teufi Ifira and their descendants, Chief Nunu Naperik Mala and his descendants and the Sope family of Mele village and their descendants.

The customary rights which the Kalsakau family have obtain includes the right to grow crops, make gardens, build houses, and live on the land subject to any government restrictions. This right also includes right to receive rents or any other form of profit.

7. *Perpetual right to occupy, use or enjoy the land and the other entitlement is to be instated under the control and direction of the custom land owner."*

Consideration and discussion of the arguments in the Kalsakau Family appeal

22. The submissions in this appeal commence with the contention that the orders striking out the application for judicial review was flawed by procedural error and irregularity as the judge failed to hold that in the complex issues raised by the appellants' pleadings there were disputed questions of law and fact that required resolution at trial. The appellants stressed that the Court's power to strike out a claim is one that should be exercised sparingly and only in a clear case where the court is satisfied that it has the requisite material; the claim must be so clearly untenable that it cannot possibly succeed: Noel v Champagne Beach Working Committee [2006] VUCA 18. That proposition is clearly established, but it remains the function of the court to carefully analyse the material placed before it by the claimant and to determine whether that material does really raise an arguable case. If a disputed question of law is said to arise, the resolution of that question will not usually depend on hearing evidence, and the court has an obligation to consider what is the correct legal position. If the court concludes that the law does not support the claimant, then the court will hold that there is no arguable case on that point. If it is alleged that there are disputed questions of facts that require a trial the Court must consider whether there is in reality a dispute about the facts, and, more importantly, whether the facts asserted by the claimant could, if correct, affect the outcome of the case. If the asserted facts are not relevant to the outcome sought by the claimant then any dispute about them cannot give rise to an arguable case that should proceed to trial.

23. The serious issues said to arise are to be found in the specific errors contended for in the balance of the appeal.

24. Two allegations of jurisdictional error are made. The appellants argue that these errors render null and void essential parts of the EIC decision and the Supreme Court should so hold notwithstanding that the appeal from the EIC decision was dismissed, and the decision is in all other respects final and beyond challenge.

25. The first jurisdictional error is said to lie in order 7 of the decision which reads:

"7. Perpetual right to occupy, use or enjoy the land and the other entitlement is to be instated under the control and direction of the custom land owner."

26. The appellants argued that this order imposes a condition or limitation on the enjoyment of the customary rights otherwise found in favour of the appellants which the court had no power to

impose. Carried to its logical conclusion, if that condition as to control and direction were found to be improperly imposed, the appellants would then have unrestricted and full rights as a custom owner.

27. In support of this argument the appellants rely on the decision of this Court in Iaus v Noam [2017] VUCA 40. In that case the Island Court determined that whilst the respondent was the custom owner of land two other families held secondary use rights. After declaring those rights of use the Island Court said:

> *"That family Ioukoupa and Nauanapkai be given the right to use the land areas of Langnapeuk declared to family Iouniwan. These family units will have to seek permission from the head of family Iouniwan should they wish to further develop the land for all purposes."*

28. On appeal, this court at [10] said:

> *"With reference to the right of use referred to in the Island Court judgment, it is unclear whether or not the court was purporting to confer a customary use right upon the families referred to or simply recognising an existing right. In any event, we consider that it would not be open to the Island Court to have imposed any conditions upon, or vary a customary right. (emphasis added).*

29. The appellants rely on the passage which is emphasised. It should be noted that the court did not find that the Island Court had exceeded its jurisdiction as it was unclear whether the terms of the Island Court order were merely describing the existing customary use right or were imposing a condition on the enjoyment of the rights otherwise found to exist.

30. In this case, the need to determine the meaning and effect of Order 7 similarly arises. Did the order impose a limitation on the enjoyment of use rights independently found to exist, or did the order do no more than describe the nature and extent of the right to occupy, use and enjoy the land which the court was then determining? In our opinion it is clear from a reading of the judgment, especially from paragraphs 2 and 3 of the general considerations to be applied by the court to define custom land ownership, that Order 7 describes the nature and extent of the rights being determined. That the perpetual right to occupy, use and enjoy was held under the control and direction of the custom land owner is descriptive of the right itself and not a condition imposed on a right otherwise existing. We do not consider that the Court exceeded its jurisdiction, and the decision in Iaus v Noam is of no assistance to the appellants.

31. The second jurisdictional error alleged attacks the central finding that George Kano was the custom owner. If this submission was upheld the appellants contend that the whole of the EIC decision in so far as it declares the George Kano to be custom owner should be declared a nullity. This would have the consequence that the parties are back to square one, and the EIC would be required to determine customary ownership of that part of the Marope Land awarded to George Kano afresh. This a bold submission to make some 25 years after the decision and 16 years after the appeal from that decision was dismissed. Why it has taken so long for the point to be raised is not explained.

32. The appellants' argument is that George Kano was before the EIC only as a representative of claimant No. 2, the Naflak Teufi of Ifira. In that representative capacity he claimed the customary ownership of the disputed land on behalf of the Naflak Teufi of Ifira and in his evidence he said that Naflak Teufi of Ifira is the only owner of the Marope Land.

33. As George Kano appeared before the court only as a representative and not as a party, the appellants argue that the Island Court had no jurisdiction to determine that he was the custom owner. In short he was not in his personal capacity a party before the court and the court fell into jurisdictional error in making a determination in his favour.

34. As we understand the EIC decision, the final determination has treated George Kano as a person who was before the court in two capacities. He was there as a representative of the Naflak Teufi of Ifira, and he was also there in his personal capacity. The determination in this favour reflected his presence before the court in the latter of these capacities.

35. The appellants' submissions seek to impose on the jurisdiction of the Island Court a very strict procedural requirement. The particulars of the claim must identify the person seeking the remedy, and precisely delineate all of the characteristics of the remedy and the relief sought with no power in the court thereafter to permit any variation of those particulars as the evidence unfolds. The rules are so strict that if the evidence led by the parties did not precisely support the pleaded claim, the claim must fail. This submission overlooks the informal nature of Island Court proceedings. The overriding objective in that court is to enable right to be done between those who come before it. It is not a place to allow strict form to dominate over substance. The informal and broad nature of the powers of the court is reflected in the Island Court (Civil Procedure Rules) 1984 in particular Order 8, Rule 2 dealing with the non-joinder or misjoinder of parties:

> *(1) If it appears to the court at or before the hearing of a cause that all the persons who may be entitled to, or who claim some share or interest in, the subject matter of the cause, or who may be likely to be affected by the result thereof, have not been made parties, the court may adjourned the proceedings to a further date to be fixed by the court and direct that such person shall be made parties to the cause either as plaintiffs or defendants, as the case served in the manner prescribed in these Rules for the service of a statement of claim or in such other matter as the court may think fit to direct, and on proof of the due service of such notice the person so served shall be bound by all proceedings in the cause.*
>
> *(2) The court may, at any stage of the proceedings and on such terms as appears to the court to be just, order that the name of any party, whether as plaintiff or defendant, improperly joined be struck out.*
>
> *(3) No cause shall be defeated by reason of non-joinder or mis-joinder of parties."*

36. Order 8.2(3) gives an ample power to in the Island Court to justify what happened in this case. George Kano was in person before the Court. The evidence at the end of the case led the court to hold that Naflak Teufi of Ifira was not the custom owner of the whole of the Marope Land, but that it held only a secondary right to occupy, use and enjoy the land under the control and direction of the custom owner. It was the function of the Island Court to ensure that the correct result as dictated by the evidence was not defeated by the misjoinder of George Kano in a

different capacity in the initial claim. All the other parties claiming an interest in the land were before the court to hear the evidence and to present their submissions. The determination of the court was one that found and determined custom rights as between the people before it, and in no way did the determination of custom ownership in favour of George Kano exceed the court's jurisdiction.

37. In our opinion there is no substance in the submissions of the appellants that the EIC decision is now open to attack because the court exceeded its jurisdiction.

38. There is a further matter that was not brought to the court's attention by counsel. By the Constitution (6th Amendment) Act No. 27 of 2013, which entered into force on 21st January 2014 Article 78 of the Constitution was introduced. That amendment is the source of constitutional power that underpins the CLMA and amendments made at that time to the LRA. Article 78(3) provides:

> *"Despite the provisions of Chapter 8 of the Constitution, the final substantive decisions reached by customary institutions or procedures in accordance with Article 74 after being recorded in writing, are binding in law and are not subject to appeal or any other form of review by any court of law."*

39. That constitutional provision would appear to prohibit any attack of the kind advanced by the appellants on an Island Court decision that has become a recorded interest in land.

40. The next ground of challenge to the Supreme Court decision raised by the appellants is that the primary judge misconstrued the meaning of "*custom owner*" in both the CLMA and the LRA. It does not appear that there was detailed argument on the meaning of this expression before the primary judge. Rather, by treating Family George Kano as the correctly named custom owner in the certificate of recorded interest, the judge has impliedly held that the appellants are not entitled within the meaning of "*custom owner*". The correct interpretation of "*custom owner*" as defined was one that the judge necessarily had to apply in reaching his decision to strike out the judicial review proceedings.

41. In the legislation custom owner is defined to mean:

> *"**Custom owners** means any lineage, family, clan, tribe or other group who are regarded by the rules of custom, following the custom of the area in which the land is situated, as the perpetual owners of that land and, in those custom areas where an individual person is regarded by custom as able to own custom land, such individual person."*

42. By holding that the Co-ordinator's certificate correctly identified Family George Kano as the custom owner, the judge has given the definition a meaning that excludes secondary rights holders and limited the meaning to those who have the ultimate right of control over the use and enjoyment of the land. To so construe the expression gives the notion of "*owner*" a strict meaning but one in common usage. By way of example in a different context, if a person buys a house that person after settlement becomes the owner. If the house is then leased to a tenant, the purchaser would be said to remain the owner of the house even though the tenant has now

acquired an immediate right to use and occupy it. The purchaser is said to remain the owner because he retains the ultimate right to control the property.

43. Counsel for the appellants recognised that the concept of ownership was generally understood to have this meaning. However he argued that in the context of the legislation "*custom owner*" must be more widely interpreted. Counsel emphasised that the definitions in both Acts apply "*unless the contrary intention appears*". He pointed to other sections of the legislation which he argued make it appear that the definition is not limited to those with the ultimate right of control, but includes those with more limited rights of use. Unless a broad meaning is given to the notion of custom owner he argues that the legislation will fail in its purpose to protect all those who have custom rights in land.

44. The argument was developed by reference to the obligations imposed on the Coordinator by s.19(3) of the CLMA and by like provisions to maintain a list of all decisions that have become recorded interests in land, including all decisions deemed to be recorded interest under s.57. The Court was then referred to Sections 50 and 51 of the CLMA in support of a wide interpretation. Section 50(1) requires the Coordinator to "*keep a custom owners' list of all recorded interests in land and determinations of custom owner*". Section 50(2) provides:

> *"(2) The National Coordinator is responsible for ensuring that information in the recorded interests in land and determination of custom owners relating to:*
>
> *(a) The identified custom owners of the land including the list of current members of the custom owner group of the land and; and*
> *(b) The names of the nominated representatives of the custom owner group; and*
> *(c) The location and description of the land; and*
> *(d) A sketch or survey map showing the boundaries of the land, is filed in the custom owners' list and any updates to the list are made as required."*

Section 51 provides for alteration to the list by custom owners. In particular reference is made to s.51(2) which provides:

> *"Membership of the custom owner group as detailed in a recorded interest in land may be reviewed by the custom owners at any time. Any review of the membership must be made at a meeting of all living members of the custom owner group and all members previously listed as descendants where original members have died."*

45. Sections 50 and 51 introduce a new notion in the expression "*membership of the custom owners group*". That expression is also defined in s.2 of the CLMA:

> *"**Membership of the custom owners group** means the members including all descendants of a custom owner group who are determined by customary processes and in accordance with the rules of custom to be members of that group and includes all people who hold ownership or use rights over land in accordance with the rules of custom."*

Finally reference is made to Section 6F of the LRA. That section concerns the obtaining of consent, if consent is required from a custom owner group for the issuing of a negotiator's certificate. Section 6F(3) provides:

> *"Membership of the custom owner group must be determined according to the rules of custom and by customary process and is to include all indigenous citizen (men, women and children) who hold ownership or use rights over land in accordance with the rules of custom."*

46. By reference to these sections the appellants argue that the expression "*custom owners*" must be modified to include all people who hold ownership or use rights over the land in accordance with the rules of custom, and the certification of who is the custom owner given under s.19(3) and like provisions must include those right holders. The argument does not inform how far down the order of rights of use the Coordinator would be required to go before it would no longer be necessary to identify the holders in a Coordinator's certificate as one of the custom owners. Perhaps the appellants will say that is a practical issue that does not impact on the correctness of their argument, but nonetheless the prospect of an interpretation of custom owner that would require multiple layers of people to be included in the Coordinator's certificate gives rise to the question whether this was the intention of the legislature.

47. In our opinion the argument advanced by the appellants fails to identify and distinguish between those provisions in the legislation that require the Coordinator to maintain two quite separate lists. The first list is that which the Coordinator is directed to maintain under s.19(3) and like provisions. That is a list of recorded decision and provides the basis for the Coordinator to provide certification of the names of custom owners and representatives for the limited purposes stated in the definition of "*recorded interest in land*". The second list which the Coordinator is required to maintain is the list required by s.50(1). This list, by s.50(2) is to include besides the custom owners all the current members of the custom owner group which as s.6F(3) illustrates, is a group that is to include "*all indigenous citizens (men, women and children) who hold ownership or use rights over land in accordance with the rules of custom*".

48. The list required under s.50(1) serves a much wider purpose than the list of recorded interests maintained under s.19(3) and like provisions. The s.50 list must include not only determinations as to custom owners but all interest held in custom in land. Those interest will go far beyond any common notion of being a custom owner of land.

49. Sections 50 and 51 and following provisions are in Part 11 of the CLMA which is headed "*Measures to Avoid Future Land Disputes*". Whereas the list kept for the purpose s.19(3) is to record determination that have in the past resolved issues of custom ownership, the more extensive information to be recorded in the list required by s.50 is intended to place on record the information that may help in the future to maintain and regulate the orderly and peaceful enjoyment of the whole range of possible custom rights.

50. We do not accept that the various provisions of the legislation to which the appellants have referred required that the ordinary meaning of "*owner*" in the definition of "*custom owners*" should be modified to the extent necessary to include holders of use rights such as the appellants have.

51. An additional reason why we think an extended meaning should not be given to the definition of custom owners is to be found in the Land Leases Act [CAP. 163]. That Act has the same definition of "*custom owner*" as appears in the CLMA and the LRA. The Act defines "*lease*" to mean the grant with or without consideration, by the owner of land of the right to exclusive possession of his land, and includes the rights so granted and the instrument granting it.

52. Under that definition a holder of secondary rights such as those held by the appellants could not be an owner capable of granting the right to the exclusive possession of the land. The inter-relationship between the Land Leases Act and the CLMA and the LRA is apparent from the provisions in the latter acts relating to the uses to which a Coordinator's certification of a recorded interest of land may be put.

53. We consider the Supreme Court was correct in not finding a serious question that should proceed to trial as to the definition of "*custom owners.*"

54. The appellants also argued that there was a serious question of fact which required a trial to determine whether Andrew Chichirua was properly named by the Coordinator as representative of family George Kano. This argument raises again the role of George Kano in the EIC. The Appellants argue that as he was before the Court as a representative of the Naflak Teufi of Ifira succession, including to the role of representative, is to be determined by the custom of Naflak Teufi. They argued that statements in the material before the Supreme Court showed that the Naflak system operated matrilineally and that George Kano was of the Naflak Teufi whereas his son, Aloani Chichirua was of the Naflak Wita (Octopus) through his (Aloani) mother. And the same evidence showed that upon his death George Kano's right reverted back to the Naflak and that he could not dispose of them to persons who were not of his tribe.

55. This submission again fails to distinguish between the two roles of George Kano that the EIC determination recognised. He was there in the role of representative of the Naflak Teufi of Ifira but he was also found to have a different interest in the claim namely that of custom owner arising because he was the closest relative of Chief Nareo, being the descendant of Chief Nareo's eldest sister Toumata Tatrau. In that capacity succession was not according to Naflak Teufi custom, but according to the general consideration number 6 to be applied by the court to define custom land ownership, namely that custom ownership is transferred from father to son (grandfather to father, and then to son). On this understanding of the EIC decision, the custom rules of Naflak Teufi of Ifira were not relevant to the decision made by the Coordinator when identifying Andrew Chichirua as representative, he being the direct descendant to George Kano. In striking out the application for judicial review, the judge correctly identified this to be the position on the materials before the court. The evidence put forward by the appellants about the succession according to Naflak Teufi custom was not relevant to the decision which the Coordinator was required to make when granting his certificate.

56. In our opinion the appeals of the first, third and fourth appellants in the Kalsakau appeal have not demonstrated any error on the part of the Supreme Court. Their application for judicial review was correctly struck out and their appeal must be dismissed.

57. In so far as the second appellants relied on the submissions of the other appellants their appeal must also fail. The additional submissions made by Mr Yawha were that the Supreme Court erred in not finding a serious issue for trial based on the second appellant's evidence that succession in the Naflak Teufi followed the maternal side, a custom which would disqualify Andrew Chichirua from being the representative of Family George Kano. Their submissions raise in substance the same issues as the concluding submissions of the other appellants, and fail on the ground that they do not recognise the basis on which the Coordinator determined that Andrew Chichirua is now the representative of Family George Kano. The second appellants' appeal must also be dismissed.

Consideration and discussion of arguments in the Family Chichirua appeal

58. The appeal by Family Chichirua contends that their application for judicial review should not have been dismissed. Whilst they do not challenge the EIC decision and accept its continuing application, they argue that there was a serious question for trial as they assert they should be treated as part of Family George Kano and hence entitled to share the benefits of the Family George Kano interests.

59. This submission does not challenge the ground on which their application was dismissed. They were not a party to the EIC proceedings. That in our opinion was a sufficient basis for the court to hold that they lacked standing to bring judicial review proceedings. In addition however the ground now advanced before this court that Family Chichirua are entitled to share the benefits of the Family George Kano interests raises an issue that the Supreme Court cannot decide. Whether and to what extent in custom Family Chichirua could be part of Family George Kano is a matter that falls within the jurisdiction of the Island Court. Moreover it is not an issue that goes to the correctness of the Coordinator's certification which the judicial review proceedings sought to challenge. We consider there is no substance in the appeal by Family Chichirua, and that appeal should be dismissed.

60. The conclusions which this Court has reached are in accord with the submissions made by counsel of Andrew Chichirua and there is no need for us to make further reference to them.

61. The orders of the court are therefore:-

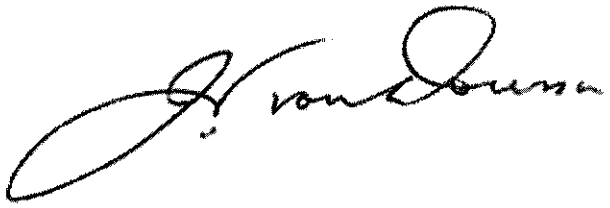
(1) Appeal in 19/2396 is dismissed with costs in favour of the respondents;

(2) Appeal in 19/1749 is dismissed with costs in favour of the respondents;

(3) The costs awarded against the appellants in each appeal are to be agreed or taxed on the standard basis.

DATED at Port Vila, this 15th day of November, 2019.

BY THE COURT



Hon. John William von Doussa
Judge.