

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

**Civil Appeal  
Case No. 22/3033 CoA/CIVA**

**BETWEEN: Kalulu Kalsrap Family**  
Appellant

**AND: The Republic of Vanuatu**  
First Respondent

**AND: Leiwi Kalpoi and Nadia Kalpoi**  
Second Respondent

**AND: Claymore Limited**  
Third Respondent

**AND: Bruce Kalotiti Kalotrip**  
Fourth Respondent

**AND: Berry Kalotiti Kalotrip and Michel Kalotiti Kalotrip**  
Fifth Respondents

**Before:** *Hon. Chief Justice V Lunabek  
Hon. Justice J Hansen  
Hon. Justice R White  
Hon. Justice D Aru  
Hon. Justice E Goldsbrough*

**Appearances:** *S Hakwa for the Appellants  
F Samuels and with N Roberts for the First Respondent  
No appearance by the Second Respondent  
L Raikatalau for the Third Respondent  
D Yahwa for the Fourth and Fifth Respondents*

**Date of Hearing:** *8<sup>th</sup> February 2023*

**Date of Decision:** *17<sup>th</sup> February 2023*

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**JUDGMENT OF THE COURT**

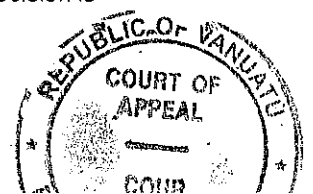
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1. The family Kalulu Kalsrap became parties to a land dispute case in the Supreme Court because of an order making them parties in Land Appeal Case 01 of 2019 (LAC 01/09). They had previously been parties in the Efate Island Court 03 of 1995 (EIC03/95) case and had not been successful. Following a request in LAC 01/09, a restraining order was made on 24 March 2010. That order remains in force today. It provides that all parties to the appeal and everyone not a party to the appeal are restrained from undertaking any



development work upon any part of the land. It provides an exception for anyone then already registered as a lessee.

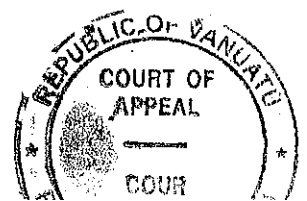
2. Shortly after that restraining order was made, on 11 May 20 a lease was registered over an area within the disputed land to the Second Respondents to this appeal by the then Minister of Lands, acting under s. 8 of the Land Reform Act [Cap 123]. In June 2010 that lease, 12/0844/238, was transferred, to Claymore Limited, who are now the Third Respondent to this appeal.
3. On 9 August 2021 a claim was filed in the Supreme Court by the present Appellant seeking rectification of the Register of Land Titles, in particular Lease Title 12/0844/238. The claim also sought orders for the present Respondents to either purge their contempt or to be punished for contempt and damages.
4. The alleged contempt was said to be a breach of the restraining order described above. The Appellant said that the rectification was sought under the inherent power of the Supreme Court to enforce its own orders, and not pursuant to s. 100 of the Land Leases Act
5. Except for the Second Respondent, all of the respondents to this appeal sought the striking out of the claim. Following a hearing in the Supreme Court, by a decision of 28 September 2022, the claim was indeed struck out: *Kalsrap v Republic of Vanuatu* [2022] VUSC 168.
6. The primary Judge reasoned as follows.
7. First, the appropriate place in which to seek enforcement of a court order is in the proceeding in which the order was made and not in separate proceedings before a different judge, at [31].
8. Secondly, the enforcement of a court order does not give rise to a separate cause of action, at [32].
9. Thirdly, the Appellant's Statement of Claim indicated that they were raising the statutory cause of action contained in s. 100 of the Land Leases Act, as they were in effect claiming that the registration of the lease and its transfer had been obtained by fraud or mistake, at [33].
10. Fourthly, the Appellant, as disputing custom land claimants, did not have standing to bring a claim under s.100, at [35].
11. Finally, until the custom ownership rights had been determined, the Appellant's claim was premature.
12. It is against that decision that this appeal is brought. Counsel for the Appellant sought leave from the Supreme Court to appeal, based on the understanding that the decision is



an interlocutory decision requiring leave. That application for leave to appeal was refused by the Supreme Court and is now renewed to this Court under Rule 21 of the Court of Appeal Rules 1973. We determined to deal with the application for leave and the substantive appeal together.

### **The application for leave and the proposed appeal**

13. The principal issue raised on this appeal concerns the identification of the Appellant's pleaded cause of action. As already noted, counsel for the Appellants submits that the claim is brought under the inherent power of the Supreme Court to enforce its own orders. He submits that the claim is not brought under section 100 of the Land Leases Act [Cap 163] which permits the Supreme Court to order rectification of entries in the Land Register when it is satisfied that a registration has been obtained or made by fraud or mistake.
14. Counsel conceded on this appeal that his clients would not have standing to bring an action for rectification under s. 100. Nor, given the passage of time since the lease was made and transferred would, without leave, an action for Judicial review of the Minister's decisions be available to the Appellants.
15. Hence the Appellant's attempted reliance upon enforcement of the restraining orders made in LAC 01/09. This was despite the acknowledgement of their counsel that the only power of the Supreme Court to order rectification of the register is to be found in s. 100 of the Land Leases Act.
16. During the strike-out, other questions arose. One question answered by the trial judge is that LAC 01/09 is still alive and pending a determination. It was part of the submission of the 1<sup>st</sup> Respondent that the land appeal had been dismissed. An unless order requiring the parties to show cause why the appeal should not be dismissed had been made, after a period of non-activity, but that order never came into effect, possibly because it was made by a judge alone and not a properly constituted land appeal court which must comprise a judge and two assessors. On this appeal, counsel for the 1<sup>st</sup> Respondents conceded that point. LAC 01/09 remains to be determined in the Supreme Court.
17. Another question arose from the unauthorised filing of submissions by the Appellant. They had filed submissions in response to the strike-out applications on 16 March 2022. On 17 March 2022, the Judge ordered the Respondents to file their submissions in response by 27 April and the Appellants to file any submissions in reply by 6 May. The Respondents complied with the order concerning them but the Appellant did not. Instead, on 4 July the Appellant filed further submissions which, as we understand it, went beyond the proper scope of a submission in reply
18. An order declaring the submissions filed on 4 July ineffectual was made under Rule 18 (10) (2) (c) of the Civil Procedure Rules 2002. The Judge explained in her reasons that



to allow the further submissions would be to give the Appellant a second opportunity to respond to the strike out application and without any right of reply by the Respondents. On this appeal, counsel for the Appellants sought to show that, if allowed, the further submissions would have shown serious triable issues that needed to proceed to trial.

19. Counsel further submitted that those submissions made it clear that the action was based on the enforcement of restraining orders and not section 100 of the Land Leases Act.
20. A third matter was that the Judge considered it unnecessary, given the striking out of the Appellant's claim, to consider their filed objections to some of the Respondent's proposed evidence. That decision is challenged on this appeal but that Ground must fail. As counsel for the Third Respondent submitted, the objections were immaterial to the issues on the strike out and there was no point in ruling on them once the claim had been struck out.

## Discussion

21. First, we are inclined to agree that the enforcement of a restraining order does not, by itself, give rise to a separate cause of action. The enforcement of a court order should usually be sought in the proceedings in which the order was made, in this case, LAC 01/09.
22. Secondly, the order in LAC 01/09 restrained "development", whereas the Appellant's concern is the granting and transfer of a lease of the property. Unless and until "development" takes place or is imminent, it may be difficult for the Appellant to show that the order is being breached.
23. Registration is the basis of lease title within this jurisdiction, often referred to as the Torrens system. It is regulated by the Land Leases Act which provides for registration, protection of title and the rights and responsibilities of parties to a lease. In particular, it provides for only limited circumstances in which the Supreme Court may make an order for rectification of the Land Register. It is not readily apparent that the Supreme Court has, in addition, an inherent power to order rectification of the Land Register. When registration is everything, care must be taken to ensure that there is compliance with the legislation lest the system of registration is fatally weakened.
24. Fourthly, we consider that the reasoning of the Judge, set out above, is sound for the reasons which Her Honour gave. No error has been shown.
25. Plainly, the Judge had the discretionary power under rule 18.10 (2)(c) to declare the late and unauthorised submission of the Appellant filed on 4 July to be ineffectual. The decision to do so involved an exercise of discretion, with which this Court may interfere in only limited circumstances. Not only has the Appellant failed to show a basis for this



Court to interfere, but they also have not shown that the additional submissions could have had a practical effect.

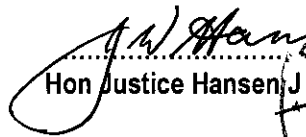
26. Turning to the question of leave to appeal, on such an application it is necessary to show that there is a reasonable basis on which to doubt the correctness of the trial judge's decision, or as it is put in Australia, whether there is sufficient doubt to warrant the matter being considered by the Court of Appeal. Here, for the reasons given above, there is no reasonable basis to doubt the correctness of the decision of the Judge.
27. The 3<sup>rd</sup> Respondent seek costs on an indemnity basis. It submits that additional work was necessitated by the incorrect way that Appeal Book A was constructed, including as it does every step taken in the court below. That is not the function of Appeal Book A and the attention of counsel is drawn to the Practice Direction 01 of 2020 in that regard. We do not, however, regard this as a reason in this instance to order indemnity costs.

### Decision

28. Leave to appeal is refused. Costs of the application are to be paid by the Appellants to those Respondents who participated in the application. Costs to the 1<sup>st</sup> and 3<sup>rd</sup> Respondents are set at VT 150,000 each and the 4<sup>th</sup> and 5<sup>th</sup> Respondents at VT150,000 in total as they were represented by the same counsel.

DATED at Port Vila this 17<sup>th</sup> day of February, 2023

BY THE COURT

  
Hon Justice Hansen J

