

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

Civil Appeal
Case No. 21/3344 CoA/CIVA

BETWEEN: Bernard Lauto
First Appellant

AND: Kevin Nathan
Second Appellant

**AND: Vanesa, Seline Sabbon, Nicola
Nalpini, Mary Jack, Lea (Paama),
Stanley Lango, Samuel (Tongoa),
Alexander Sablon, Roy Charlie,
Noel Buleban, Natuka Philip,
Nalau, Lonsdale Sam, John
Joshua, Jeffery George, Kalo
Joel, Joel Willie, Jimmy Jonah,
Jimmy Yau, Jeffery, Jean Pascal,
Javen Sam, Fredson Lolo, Eric
Joseph, Douglas, David Joseph,
Cladue Atuary, Bernard Daniel,
Alick Jimmy, James Bice, Paul
Tari, Jean Damien and John Bill**
Third Appellants

AND: Samuel Iolu Kaltack
Respondent

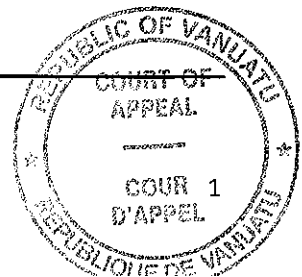
Coram: *Hon. Chief Justice Vincent Lunabek
Hon. Justice John William von Doussa
Hon. Justice Raynor Asher
Hon. Justice Dudley Aru
Hon. Justice Viran Molisa Trief*

In Attendance: *Appellants in person with Mr K. Nathan as McKenzie friend for Mr B. Lauto
Mr W. Kapalu for the Respondent*

Date of Hearing: 16 November 2021

Date of Judgment: 19 November 2021

JUDGMENT



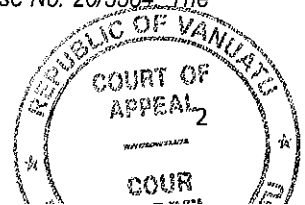
A. Introduction

1. This is an appeal against summary judgment entered on a Claim without allegedly firstly hearing the other Claim filed in the consolidated proceedings.

B. Background

2. On 6 August 2014, leasehold title no. 12/0912/1025 between Kaltabang Kaltak (lessor)(now deceased) and the Respondent Samuel lolu Kaltack (lessee) was registered ('Mr Kaltack's lease').
3. On 10 September 2020, Mr Kaltack filed his Claim in Civil Case No. 2487 of 2020 ('CC 20/2487') seeking the eviction of the named Defendants, one of whom is the Second Appellant Kevin Nathan. The rest of the named Defendants were named as Third Appellants in this appeal but did not take any steps.
4. On 8 October 2020, Mr Kaltack obtained orders in CC 20/2487 restraining the Defendants from disturbing or threatening surveyors while they repositioned the survey pegs and established the correct boundaries of Mr Kaltack's lease.
5. On 3 December 2020, Mr Kaltack's lease was rectified by way of registration of a new survey plan.
6. On 22 December 2020, Mr Lauto filed his Claim in Civil Case No. 3584 of 2020 ('CC 20/3584') challenging the rectification of Mr Kaltack's lease by way of registration of the new survey plan. He also filed his Sworn statement in support of the Claim.
7. No Defence has been filed in CC 20/3584.
8. By Orders dated 5 February 2021, CC 20/2487 and CC 20/3584 were consolidated.
9. On 18 March 2021, Mr Kaltack filed his Amended Claim in CC 20/2487 seeking eviction orders and costs. He alleged that when his lease was registered, the survey plan did not correspond with the actual physical location of the survey pegs on the land that his family had been declared custom owner of. The survey plan had now been rectified. He alleged too that he and the surveyors had never fraudulently or mistakenly repositioned the survey pegs in order to establish the correct boundary of the lease.
10. The Court stated in its Orders dated 23 March 2021 in CC 20/2487 and CC 20/3584 (consolidated):

1. *By consent Civil Case No. 20/2487 was consolidated with Civil Case No. 20/3584. The latter file can now be closed.*



11. On 27 April 2021, the defendants in CC 20/2487 filed their defence to the Amended Claim (entitled "Defendants' Reply to Claimant's Amended Claim").
12. On 4 August 2021, Mr Kaltack filed an Application for Summary Judgment on the basis that the defence to the Amended Claim had no prospect of success.
13. On 27 September 2021, the Application for Summary Judgment was granted.

C. The Decision

14. By Orders dated 27 September 2021, the primary Judge granted the Application for Summary Judgment and ordered the Defendants to vacate the property within 31 days. The Judge noted that Mr Kaltack has a registered lease over the relevant land and that it was accepted that the Defendants do occupy part of that land. Further, the Defendants had not alleged rights under section 17 of the *Land Leases Act* [CAP. 163] and alleged that he came by his title by nefarious means of one sort or another. The Judge concluded that the Defendants had no legal basis on which they could challenge Mr Kaltack's title and entered summary judgment.

D. Grounds of Appeal

14. It was submitted for the Appellants that the orders appealed against should not have been made without the Court first determining the Claim in CC 20/3584 as the two proceedings CC 20/2487 and CC 20/3584 had been consolidated. It was submitted too that there has not been any final determination of custom ownership in Mr Kaltack's family's favour to underpin his lease and justify the physical location of survey pegs.
15. Mr Kapalu submitted that Mr Kaltack is the registered proprietor of his lease hence his trespass claim filed in CC 20/2487. Mr Kapalu submitted that the primary Judge's closing of the file in CC 20/3584 removed the need for a determination of the Claim filed in CC 20/3584. He accepted that there has not yet been a determination of that Claim. He conceded that there is not a final determination as to custom ownership in Mr Kaltack's family's favour to justify the placement of survey pegs. He stated that Mr Kaltack's family had an Erakor Village Council of Chiefs decision as to custom ownership in their favour however this was not in evidence and he did not have a copy of it.

E. Discussion

16. It is accepted that there has not been a trial or determination of the Claim in CC 20/3584. Timetabling orders have not been made in that matter including for the filing of Defences.
17. It appears that the parties and the Court proceeded on a misunderstanding that when the file in CC 20/3584 was closed, there was no longer any need to determine the Claim filed



in CC 20/3584. However, the closing of the file could not dispose of that Claim. All the primary Judge was saying was that all the pleadings were put into one file for the purposes of case management, however the Claim remains for determination.

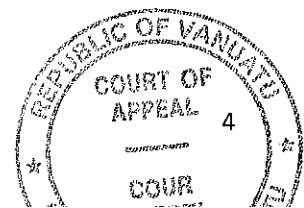
18. In the circumstances, the primary Judge erred in entering summary judgment on the Claim in CC 20/2487 when the Claim in CC 20/3584 has not yet been determined. There must be a determination of the Claim in CC 20/3584 before the Claim in 20/2487 is determined. The appeal must be allowed and the Orders entering summary judgment set aside.
19. The Appellants having succeeded, they are entitled to reimbursement of their disbursements.
20. Both Mr Kaltack and Mr Lauto rely on a Council of Chiefs decision as to their custom ownership. However, it is also accepted that a Council of Chiefs decision is not determinative of custom ownership. Further, that there has not been any declaration of custom ownership of the relevant land by a competent Court, Customary Land Tribunal or under the *Custom Land Management Act* 2013.
21. We are concerned therefore that custom ownership of the relevant land has not yet been determined which can be put into evidence in the Supreme Court to consider in its determination of the Claim in CC 20/3584.

22. Section 13 of the *Custom Land Management Act* 2013 provides:

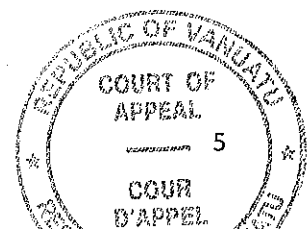
13. (1) *Custom owners whose land is already the subject of a lease before the commencement of this Act, including those for which the Minister of Lands is the designated lessor may request the National Coordinator to apply section 6B of the Land Reform Act to create a recorded interest in land.*
- (2) *The written request must:*
 - (a) *be signed by members of the custom owner group; and*
 - (b) *indicate clearly the title number for the existing lease; and*
 - (c) *the location of the leased land.*
- (3) *Upon receipt of a request under subsection (1), the National Coordinator must, as soon as practicable, arrange for notice to be given of the intention to determine the custom owners of the leased land in accordance with the provisions of section 6B of the Land Reform Act.*

23. Section 6B of the *Land Reform Act* [CAP. 123] provides:

- 6B. (1) *Upon receiving an application to approve a negotiator's certificate being referred under section 6A, the National Coordinator must determine if the custom owners are already identified by a recorded interest in land in accordance with the Custom Land Management Act.*



- (2) *If the custom owners are not identified by a recorded interest in land under the Custom Land Management Act, the National Coordinator is to:*
- (a) *arrange for a notice to be given of the intention to identify the custom owners of the land which is the subject of the application, in the following manner:*
- (i) *on at least 3 occasions in 1 month, a notice in English, French and Bislama:*
- (A) *is to be broadcasted on the radio at the time of the announcement of service messages; and*
- (B) *is to be published as part of a table produced by the Director of Lands in the newspaper which includes with it a short description of the area of location, size of land and nearby localities, for all applications for a negotiator's certificate for the month; and*
- (ii) *direct the responsible custom land officer to make arrangements to place the notice at the Local Government Council headquarters, the nearest Area Council headquarters, the nearest Sub-Area Council headquarters (if applicable) and at any village or villages located near the land for at least 1 month; and*
- (iii) *direct the responsible custom land officer to make arrangements to place the notice on the land to which the approval to negotiate relates for at least 1 month requiring all persons having an interest in the land to notify the custom land officer; and*
- (iv) *if there is a determination of custom owners, the National Coordinator must also ensure that the custom owners listed in the determination are also notified; and*
- (b) *when the notification period has lapsed, allocate a custom land officer to facilitate the identification of the custom owners in accordance with the provisions of the Custom Land Management Act.*
- (3) *The notice referred to in subparagraph (2)(a) (i) must identify the land in a manner that will be understood by the people of that island and require all persons having an interest in the land to notify the custom land officer who is responsible for that area or the office of the National Coordinator.*
- (4) *The signage associated with the notice in subparagraph (2)(a)(iii) must:*
- (a) *be in large black font on a white background; and*
- (b) *be placed facing the nearest public road or pathway; and*
- (c) *measure at least 2 meters long and 1 meter wide; and*
- (d) *include all details associated with the application for a negotiator's certificate.*
- (5) *If:*



- (a) *there is no dispute as to ownership of the land - the custom land officer must proceed in accordance with Part 3 of the Custom Land Management Act; or*
 - (b) *there is a dispute as to ownership of the land - the custom land officer must apply Part 4, 5 or 6 of the Custom Land Management Act.*
- (6) *The custom land officer is required to attend meetings in accordance with the process outlined in section 6C and furnish a full report to the National Coordinator.*

24. We note that either Mr Lauto or Mr Kaltack or indeed another person could make a request to the National Coordinator of the Custom Land Management Office pursuant to section 13 of the *Custom Land Management Act*. We consider this to be an essential next step.

25. Once the Claim in CC 20/3584 has been determined (which may only be possible once custom ownership has been determined under the *Custom Land Management Act*), the boundary of Mr Kaltack's lease will be clear and it can be assessed whether the named Defendants in CC 20/2487 are within or outside the boundary, and the Claim in that matter determined.

F. Result

26. The appeal is allowed.

27. The Orders dated 27 September 2021 in CC 20/2487 are set aside.

28. The Respondent is to reimburse the Appellants' disbursements set at VT30,000.

DATED at Port Vila this 19th day of November 2021

BY THE COURT

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Hon. Chief Justice Vincent Lunabe

