

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

**Civil Appeal
Case No. 22/2900 CoA/CIVA**

BETWEEN: Republic of Vanuatu
Appellant

AND: Taura Songi Harry Takurua
First Respondent

AND: Guan Kai
Second Respondent

AND: Willie John Sasamaki
Third Respondent

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

Counsel: *Mr. S. Aron for the Appellant
Mr. D. Yawha for the First Respondent
Mr. S. Kalsakau for the Second Respondent
Mr. J. Kilu for the Third Respondent (no-appearance)*

Date of Hearing: 6 February 2023

Date of Decision: 17 February 2023

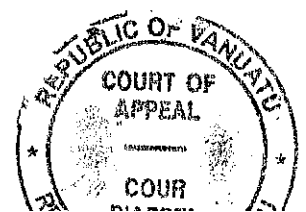
JUDGMENT OF THE COURT

Introduction

1. This is an appeal against a decision dismissing an application to strike out a claim in the Court below.

Background

2. On 30 April 2007 lease title No 12/0522/009 (the 009 lease) was registered as an agricultural lease between the Minister of Lands as lessor and the first respondent as lessee. The leased land is located within the Udaone lands at North Efate.



3. At the relevant time, the Minister of Lands had the general powers under the Land Reform Act [CAP 123] to act or issue leases over custom land on behalf of disputing custom owners. On 18 September 2015 a transfer of the 009 lease was registered from the third respondent to the second respondent.
4. Subsequently the first respondent filed his claim challenging the registration under s100 of the Land Leases Act [CAP 163] for fraud and mistake. An amended claim was later filed on 4 February 2022 seeking orders for cancellation of the lease or damages in the alternative.
5. The appellant responded by filing a defence to the claim then applied to have the matter struck out on the grounds that Udaone custom land is still under dispute and the first respondent as a party to the dispute lacked standing to bring the claim as his interest as a custom owner is yet to be determined.

Decision under appeal

6. The primary judge in dismissing the application to strike out found at paragraph 20 that:-

"...there was no evidence as to who are the disputing parties. There is no evidence that regarding the decision of the Tribunal of 9th January 2008 as to whether it has been quashed or set aside by any other Court or Tribunal. There is no evidence of any orders of a Court staying the enforcement of the Tribunal's decision.

7. And at paragraph 21 concluded that:-

"As such, unless and until set aside or quashed and/or stayed pending an impending decision, the decision and declarations and orders of the Tribunal stand. That decision gives standing to the claimant as one of the declared custom owners having a direct interest to Udaone Custom land to file this claim and proceeding."

8. The primary judge also noted at paragraph 26 that:-

"the claimant may not in the end succeed in his claim under s100 of the Act but he may stand a good chance of success in his alternative claim to damages or compensation under s 17 (g) of the Act, which is currently not specifically pleaded by the claimant in his claims. "

Appeal

9. Essentially the main thrust of the appeal is that the primary judge failed to take judicial notice of decisions indicating that the dispute over Udaone custom land is yet to be determined and second, that the first respondent lacked standing to bring the claim.

Discussions

10. In their written submissions, the appellant sets out the relevant decisions relating to Udaone custom land dispute starting with the decision of the Joint Village Land Tribunal of 9 January 2008 declaring chief Andrew Popovi as the custodian of the community land. That decision was challenged in Civil Case 66 of 2009 where the Court below ruled that that the matter had to be



determined pursuant to the Custom Land Management Act No 33 of 2013 as the Land Tribunal Act had been repealed. That decision was then appealed to this Court in Civil Appeal Case No 25 of 2014. In its decision, this Court encouraged the parties to have their dispute determined pursuant to the provisions of the *Custom Land Management Act*.

11. Accordingly, the matter was referred to the Farea Ni Tagimalo which gave its decision on 22 February 2017. That decision was subsequently reviewed by the Island Court (Land) in Civil Case 1040/2017. On 30 August 2017, the Island Court (Land) set aside the decision of the Farea Ni Tagimalo and referred the dispute to the West Efate Area Council of Chiefs to establish a Custom Area Land Tribunal to determine the dispute.
12. Linda Olul, the Acting National Coordinator of the Customary Land Management Office deposed in her sworn statement that the West Efate Area Council of Chiefs has yet to establish a tribunal to hear and determine the Udaone custom land dispute.
13. Mr Yahwa on behalf of the first respondent, conceded that the dispute over custom ownership of Udaone custom land is yet to be determined. By conceding this ground of appeal, the first respondent could no longer maintain the argument that he has standing to bring the claim. Mr Yahwa submitted, in the alternative, that the first respondent has s 17 (g) rights under the Land Leases Act and the fact that the Minister did not consult all the disputing parties before registration of the transfer of lease to the second respondent gave him standing as one of the disputing parties.

Section 17 (g) rights

14. The first respondent submitted that the application to strike out their claim was dismissed as the primary judge recognised that they had s17 (g) rights. In short, this was not pleaded in their statement of claim as correctly identified by the primary judge.

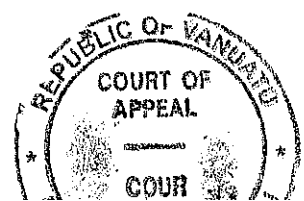
Consultation by the Minister

15. The first respondent further submitted that as a party to the dispute over Udaone custom land, they were not consulted by the Minister of lands before registration of the transfer of lease. They rely on s 6Z of the Land Reform (Amendment) Act No 31 of 2013 which states:-

"6Z. Consent of the Minister to transactions over rural leases where there is a dispute

(1) If there is a dispute as to ownership of the land or the land is the subject of a customary or legal proceeding where the custom owners have not yet been determined and there is an application to conduct an initial mortgage or transfer, subdivide, extend the lease instrument or change the lease type, the Minister must consult the parties to the dispute before the Minister grants a consent to a transaction of a lease instrument."

16. Under s 6Z the Minister must consult the parties to a dispute over ownership of custom land before granting consent to a transaction involving a lease. The appellant submitted that there



was consultation as confirmed by Paul Gambetta, the Director of the Department of Land Records and Survey. At paragraphs 17 to 19 of his sworn statement, he states:-

"17. On 26 September 2014, the Minister as lessor for lease 009 acted on the interest of the disputing custom owners issued a notice before forfeiture to the first defendant (lessee) for forfeiture of lease 009.

18. On 2 October 2014 the first defendant filed a judicial review claim in *Willie John Sasamaki v Republic of Vanuatu*, Judicial Review Case No 2 of 2014 (JRC 22,2014) in which the first defendant challenged the decision of the Minister for unreasonably withholding his consent and refused to sign the consent to transfer lease 009 from the first defendant to Mr Guan Kai (the second defendant). Attached and marked PG5 is the true copies of the Court documents filed in JRC 22/2014 including the orders of the Court issued in that proceeding.

19. I believe that throughout the events and circumstances in relation to the forfeiture of lease 009 and the JRC 22/2014 the disputing custom owners were fully aware through their consultation and meetings with the Minister of lands that the forfeiture of lease 009 which was pursued on their behalf by the Minister of Lands was not successful and that the Minister's decision not to consent to the transfer of lease 009 was under challenge by the first defendant who is also a disputing custom owner. Attached and marked PG6 is a true copy of a letter dated 25 September 2015 from the Minister of Lands to Willie John Sasamaki."

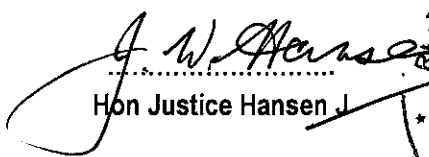
17. This sworn statement was available before the primary judge and the above paragraphs were drawn to the primary judge's attention in the appellant's submissions as recorded in the primary judge's notes of evidence.
18. In the absence of any contrary evidence, we agree with the appellant's submissions that during the course of the proceedings mentioned, the Minister consulted the disputing custom owners.
19. We are of the view that the first respondent's claim in the Court below was "*so clearly untenable that it cannot possibly succeed*": **Noel v Champagne Beach Working Committee** [2006] VUCA 18.

Result

20. The appeal is allowed and the claim is struck out. The appellant is entitled to costs from the First Respondent in the sum of VT 75,000.

DATED at Port Vila this 17th day of February 2023

BY THE COURT


Hon Justice Hansen J

