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

Civil Appeal
Case No.24/52 COA/CIVA

BETWEEN: **JOE JOHNNY**
Appellant

AND: **LAURENCE SOLOMON**
Second Appellants

AND: **JOHN TARI MOLBARAV**
Second Respondent

AND: **JEROME NATU**
Third Respondent

AND: **MOSES MOLVATOL**
Fourth Respondent

AND: **THE ESTATE OF LATE FELIX LAUMAE TALOINAO KABINI**
Fifth Respondent

AND: **REPUBLIC OF VANUATU**
Sixth Respondent

AND: **NATIONAL BANK OF VANUATU**
Interested Party

Dates of Hearing: ***10 May 2024***

Coram: ***Hon. Chief Justice V. Lunabek***
Hon. Justice J.W. von Doussa
Hon. Justice R. Asher
Hon. Justice O.A. Saksak
Hon. Justice D. Aru
Hon Justice E.P. Goldsbrough

Counsel: ***A. Godden and D. Liu for the Appellant***
J. Tari for the First, Second, Third and Fifth Respondents
F. Bong for the Sixth Respondent
No appearance for Fourth Respondent and Interested Party

Date of Decision: ***17 May 2024***

JUDGMENT OF THE COURT

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1. This appeal concerns registered Lease No. 04/3021/1038 (lease 1038) covering part of the Belbarav Land in Santo. The custom ownership of this land has been the subject of much litigation in the courts in Vanuatu. This appeal is against a decision of the Supreme Court which struck out an application brought by the appellant seeking rectification and cancellation of lease 1038 pursuant to s.100 of the Land Leases Act. The action was struck out on the ground that the appellant did not have the necessary standing to bring the action, and under r.9.9(4) of the Civil Procedure Rules.

2. Lease 1038 had been registered on or shortly after 22 June 2015 showing the First, Second and Third respondents as lessors and Felix Laumae Taloinao Kabini (Mr Laumae) as the lessee. As we understand the pleadings and other material placed before the Supreme Court on the strike out application that lease came into existence in the following circumstances.

3. On 30 May 2005 the Veriondali Customary Land Tribunal (VCLT) ruled that the Zebedee Molvatol and the Boetara Family were the custom owners of the Belbarav land. The VCLT had been hearing the custom land dispute over the Belbarav land on reference from the Santo/Malo Island Court. The First, Second and Third respondents as lessors had granted lease 1038 on the basis that they were members of the Boetara Family entitled to act on its behalf.

4. By decision of the Supreme Court delivered on 19 December 2017 the VCLT decision of 30 May 2005 was set-aside as the reference of the Belbarav land dispute to the VCLT was irregularly made. The land dispute was returned to the Santo/Malo Island Court which should have heard the claim in the first place. That claim has not yet been determined by the Santo/Malo Island Court.

5. In the course of prosecuting their claim for custom ownership of the Belbarav land the First, Second and Third respondents engaged the services of Mr Laumae, a Vanuatu lawyer, and incurred extensive legal fees which were not paid. By way of settlement of a Supreme Court action brought by Mr Laumae to recover his fees the First, Second and Third respondents agreed to, and did, grant a lease to him being Lease 1038. The settlement had been recorded in a judgement of the Supreme Court on 22 June 2015. The subsequent decision of the Supreme Court setting aside the ruling of the VCLT meant that the First, Second and Third respondents no longer had standing as custom owners to be registered as lessors, but remained as such on the Register.

6. The appellants' application for relief under s.100 of the Land Leases Act was based on the assertion that the registered lessors were not declared custom owners entitled to be so registered.

7. In his pleadings to rectify lease 1038 the appellant pleaded that by reason of historical dealings over the subject land his family had been receiving land rent in respect of it without opposition or dispute from the First to Fourth respondents. This, he said, indicated his entitlement as a person holding a custom ownership right to bring his claim.

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8. The applicant acknowledged that he was not a declared custom owner but pleaded that as he and the First to Fourth applicants were all claimants to the land his consent to the granting of Lease 1038 was required and as he had not given his consent the lease had been registered by fraud or mistake. The appellant also contended that Lease 1038 should be cancelled as it was misleading the public to allow the Register to show the names of people as lessors who were not declared custom owners.

9. The Supreme Court application for rectification named as respondents, in addition to the named to lessors, Moses Molvatol (presumably as of the successor to Zebedee Molvatol), the estate of Mr Laumae, the Republic of Vanuatu as the authority responsible for the land register, and the National Bank of Vanuatu as an interested party. The bank was named as it had taken action on a security given by Mr Laumae.

10. The application to strike out the claim was made by the First, Second and Third applicants but supported by the fourth applicant, Mr Laumae's estate and by the Republic. The bank did not participate in the hearing of the application.

11. The respondents argued two grounds why the application should be struck out. First, that the applicant had no standing to bring the claim as he and his family had not been declared to hold an interest as custom owners by a recognised customary institution, and secondly because the same issues raised in the application had been raised by the applicant in an earlier application which he had discontinued before trial. The present application had been brought without leave pursuant to r.9.9(4) of the Civil Procedure Rules.

12. The Supreme Court struck out the application on both grounds, and the appellant now appeals against that decision.

13. On the hearing before this court the appellant applied to adduce fresh evidence to the effect that his standing as a custom owner had been established by the issue of a Certificate of Recorded Interest (by a "*green certificate*") in the Mete land on 24th of February 2024. His supporting sworn statement said the green certificate was based on a decision of the Santo/Malo Island Court in Land Case No. 1 of 2012 which had been brought to his attention for the first time on 9 February 2024. The Court received the fresh evidence. However, after consideration we do not think it adds anything of relevance to the information that was before the Supreme Court.

14. The respondents all dispute that the green certificate put forward by the appellant relates to the same land which is covered by Lease 1038. The green certificate purports to be based on a decision of the Santo/Malo Island Court dated 16 November 2017 which declared Family Narotioutiou represented by Joe Johnny and three other named people as custom owner of METE LAND. It is to be assumed that Joe Johnny is the applicant. Regrettably no satisfactory mapping information was given to the Court to show any relationship between the Mete Land the subject of the green certificate and Lease 1038. Even if the Island Court decision concerned the same land the correct party to make application under s.100 would be Family Narotioutiou, not one of four of its representatives.

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15. Moreover, the decision given on 16 November 2017 was in Land Case No.01 of 2012 whereas the Belbarav land the subject of Lease 1038 was under consideration in Land Case No. 5 of 1992. It is unlikely that the Island Court would register a claim in 2012 over land that was already the subject of a then existing determination, albeit one given by the VCLT on reference from the Santo/Malo Island Court. It is also unlikely that if the same land was involved in both cases that there was no cross reference between the two made in 2017 when both matters were being heard – the Belbarav land matter in the Supreme Court and the Mete Land matter in the Island Court, both matters involving some related parties.

16. In any event the Island Court reasons and orders in its decision of 16 November 2017 do not establish any custom entitlement by Joe Johnny whose claims in those proceedings were rejected as not established by the evidence.

17. Although the applicant claimed before the Supreme Court to have standing because of his families' historical collection of land rents from the land, the material before the Supreme Court did not establish custom ownership, a fact which the applicant acknowledged in his pleadings.

18. The Supreme Court based its decision on standing on *Ishmael v Kalsev* [2014] VUCA at [14] and *Mataskelekele v Bakotoko* [2020] VUCA 31 at [26]. Both cases hold that a person merely claiming as a customer owner does not have the required legitimate interest or standing to apply for rectification. The Mataskelekele decision is indistinguishable from the present case. It concerned a situation where there was a dispute as to custom ownership, and one of the claimants for custom ownership sought to have a lease over the land rectified on the ground that it was registered as the result of fraud or mistake. At [26] the Court of Appeal said:

> *"In the appellant's case it was a case of challenging the validity of a lease under section 100 of the Land Leases Act. The appellant was neither the lessor nor the lessee. And neither had he nor his family been declared custom-owners by any Court or tribunal of competent jurisdiction. In this case the appellant had no standing."*

19. The authorities relied in the Supreme Court were binding on it and were correctly applied. Those decisions of the Court of Appeal are not now challenged, and inevitably lead to the result that this appeal must be dismissed.

20. The Supreme Court also struck out the application relying on r9.9(4) of the Civil Procedure Rules which provides:

> *(4) If the claimant discontinues:*
>
> *(a) the claimant may not revive the claim; and*
>
> ...

21. Earlier proceedings commenced by the appellant had been discontinued by him before trial. The finding by the Supreme Court that the subject matter of those proceedings concerned the same parties and the same set of facts has not been disputed before this Court, nor is the finding that

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leave to bring the proceedings notwithstanding r.9.9(4) was not obtained. That failure therefore appears to be a proper ground for striking out the application, but that is because of the failure to get leave, not *res judicata* as stated in the judgement under appeal as there had been no judicial determination of the earlier proceedings.

22. The argument made by the appellant that Lease 1038 should be cancelled as its continued presence on the land register was misleading was based on observations made about the importance of the register in *Ratua Development Ltd. v Ndai & Ors.* [2007] VUCA 23 at [19] – [20]. That decision concerned the importance of the accuracy of the registration of a leasehold interest which is essential to the notion of indefeasibility of title. Here the alleged error on the register concerned the lessors' interest. We do not think the decision assists the appellant.

23. In argument before this Court there was discussion whether s.6Z of the Land Reform Act introduced in the 2013 amendments to that Act might allow the Minister to manage the lease until the issue of custom ownership is determined by the Island Court. However, a close reading of the section shows that it has no application to the circumstances of this case.

24. In due course when the true custom ownership of those entitled to grant Lease 1038 is determined, if they are not the First, Second and Third appellants, there will be a need for an assessment of compensation for the lost value of the lease from the time it was granted in 2015. That may provide an avenue for protection of any rights which Joe Johnny may have in the land.

25. The appeal must be dismissed. The appellant must pay the costs of the First, Second and Third respondents fixed at VT100,000 and the costs of the Republic fixed at the same amount.

DATED at Port Vila, this 17th day of May, 2024.

BY THE COURT

Hon. Chief Justice Vincent LUNABEK

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