

**IN THE SUPREME COURT OF
THE REPUBLIC OF VANUATU**
(Civil Jurisdiction)

Civil Case No. 138 of 2001

**BETWEEN: NAKOU JOSEPH and JEFFREY
IARUEL**
Plaintiffs

AND: TOM KAPAPA
First Defendant

AND: JACK NIKIAU
Second Defendant

Coram: Lunabek, CJ.

*Mr. Daniel Yawah for the plaintiffs
The First and Second Defendants are represented by Mr. Robyn Kapapa, the
son of the First defendant (as a law student)*

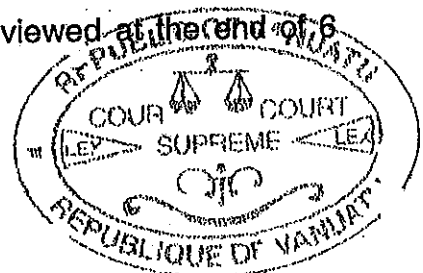
REASONS FOR ORAL JUDGMENT

On 20th December 2002, at Isangel, Tanna, in the southern province of the Republic of Vanuatu, at the end of 2 days trial, the Court issued oral judgment in favour of the plaintiffs in VT4,320,000 and costs.

The matter was then adjourned for enforcement conference in Port Vila on 30th January 2003 at 9 a.m. On 30th January 2003, the defendants did not attend the enforcement conference. It was then adjourned to 11th February 2003 at 8 a.m. The enforcement conference could not proceed. It was further adjourned to 10th March 2003 at 2 p.m. in the afternoon.

On 10th March 2003, the Court made the following enforcement order;-

1. That the defendant shall pay the amount of VT4,320,000 in the following way;
 - (a) The defendants agree to pay VT10,000 per month until total amount is fully paid.
 - (b) The defendants shall start to pay VT10,000 to the plaintiffs by 31st March 2003.
 - (c) The amount of VT10,000 per month will be reviewed at the end of 6 months period.



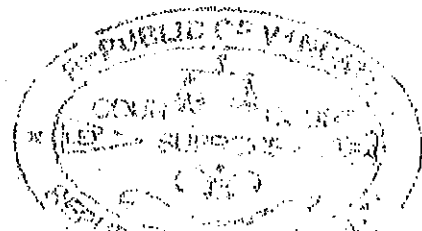
(d) A conference is set on 1st September 2003 at 8 a.m. in the forenoon.

2. That, the costs for the plaintiff are agreed to be fixed by the Court which is determined at VT60,000.
3. That, the defendants shall pay costs of VT60,000 before the 1st September 2003.

I set out below the brief reasons for the judgment.

By an amended Writ dated 17th July 2002, the plaintiff's claim against the defendants, the amount of VT4,320,000 for loss and/or damage suffered as a consequence of the First and Second Defendant's action depriving Mr. Joseph Nakou and others (plaintiffs) of obtaining and/or acquiring any lease proceeds. The plaintiffs claim damages of the entire lease proceeds between 1996 and 2001. The defendant says in substance that the defendants are entitled to the proceeds of the lease. On the evidence, the Court is satisfied that:

- Before the lease is granted in 1984, disputed the custom ownership of the land where Tanna Beach Resort was built.
- By an oral agreement held by the tribes of Namatutumane and Nakulamene, the plaintiff, Joseph Nakou, and the defendant, Tom Kapapa, be appointed as representative lessors of the indigenous land owners (which to be identified in future pending the ongoing ownership dispute of that land in the village court).
- Mr. Nakou Joseph and Tom Kapapa were appointed by the community to fulfil the requirement of the lease as lessors to proceed with the granting of consent to the lease, conduct the transactions of the lease premium and annual land rent, take necessary measures to conserve and protect the land for the benefit of the people of the above-mentioned two (2) tribes: Naikulamene and Namatautumene.
- The lease proceeds were intended in the initial arrangement to benefit the entire community of the said two (2) tribes. Mr. Joseph Nakou and Mr. Tom Kapapa were authorised by their representatives tribes to withdraw funds yearly and manage it for the benefit of the community.
- The evidence show that a class C (commercial/tourism) lease titled No. 14/2412/001 was signed on the island of Tanna on 15th June 1984 by Tom Kapapa (First Defendant) and Joseph Nakou (one of the plaintiffs), the indigenous custom owners, as lessors and Pacific Waters Limited as Lessees. The lease was approved on 4th July 1984 and registered on 24th July 1984.



The plaintiff, Joseph Nakou, is a lessor and not a witness as put forward by the defendants.

- Before 1984, there was dispute over the ownership of the land, the subject of the lease title No. 14/2412/001.

A claim over the custom ownership of the said land was registered before Tanna Island Court sometimes in October 1996.

The evidence show that on 10th September 1997, a consent for the registration of the variation of the subject leave was made by the defendant, Tom Kapapa and the second defendant, Jack Nikiau. The document (Exh. P9) bears the name of Joseph Nakou. The variations of the conditions of the lease were registered on 15th September 1997.

The plaintiff, Joseph Nakou was not aware about the change/variation of the condition of the lease. He was not consenting for such variations to be made. He was not happy about the way the First Defendant, Tom Kapapa, made use of the proceeds of the lease. He expressed his concerns. He wanted the village committee to be involved as it was initially intended. The defendant Tom kapapa refused. He claimed the money out of the proceeds are his. He is entitled to the money. He asked the second defendant, Jack Nikiau to sign the variation of the conditions of the lease. Mr. Jack Nikiau came to Vila and signed the consent instrument and registration "*because of the money*" as he says.

The minimum annual rental payable under the subject lease (as varied) commencing 1st June 1997 shall be VT1,020,000 payable in equal monthly instalments of VT85,000. Under his cross-examination, he told the Court he was lying when he said Mr. Silas Hakwa told him to sign the name "*Nako*".

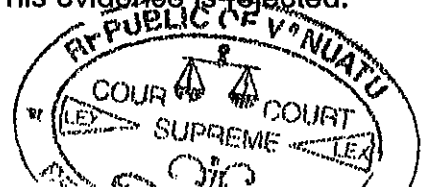
The evidence of the defendants are rejected. The variation of the conditions of the lease were done without the consent of the plaintiff, Joseph Nakou. This affects the validity of the variation of the said lease in 1997.

The evidence show that the defendant Tom Kapapa benefited from the proceeds of the lease. Plaintiff, Joseph Nakou and other member of his tribes did not profit from such a scheme as initially planned.

The defendant, Tom Kapapa, admitted he paid two (2) trucks with the proceeds of the lease. The second defendant, Jack Nikiau, admitted, he got at some stage, VT1,000,000 from the proceeds of the lease.

Tom Kapapa could not recall about the purchase price of the 2 vehicles. He was asked if it was about VT1,000,000. He said he could not remember. Tom Kapapa said his bank account are held in Vila. When he wants money, he travelled to Vila. He then obtained cash and return to his home island.

The defendant say, there are still outstanding rental payment in respect of the lease. There is no evidence produced to this effect. This evidence is rejected.



On balance, the plaintiff establish that they have suffered loss and they are entitled to compensation. The question, then, is how much? The plaintiffs claim for VT4,320,000.

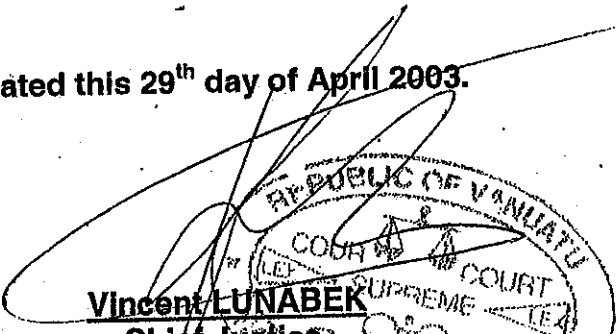
The evidence show that the defendant Tom Kapapa did not manage and distribute the funds proceeds of the lease as initially intended.

On the basis of original lease of 1984, the annual rental payment was VT100,000 and a turnover rent of 3 ½ % of gross turnover of the proceeding 12 calendar months. In 1984 to 1996, the proceeds were not distributed to the plaintiffs. They were used by the defendant, Tom Kapapa.

From 1996 to 2001, the evidence show that the defendant, Tom Kapapa, used money for the lease proceeds and purchased 2 trucks. I assess them at VT3,000,000 for both. The defendant Jack Nikiu admitted he was given VT1,000,000 and he used them with his tribe. The evidence show also payment received by the defendant Tom Kapapa of VT500,000 and other expenses. There is enough evidence as to quantum to justify the amount claimed. On the balance of the evidence, the Court makes judgment in favour of the plaintiffs in the sum of VT4,320,000 and costs.

These are the reasons for judgment.

Dated this 29th day of April 2003.


Vincent LUNABEK
Chief Justice.