

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

Judicial Review Case No. 05 of 2013

BETWEEN: ARVIN LAL
First Claimant

AND: JACKY BAKOKOTO
BILLY KIRKIRI BAKOKOTO
MAX BAKOKOTO
JERETH BAKOKOTO
Second Claimants

AND: DIRECTOR OF LANDS, SURVEY AND RECORDS
First Defendant

AND: DANIEL KALORIP
Second Defendant

AND: BENARD KALORIP KALOTITI
Third Defendant

Reserved Judgment: 12 May 2014

By: Justice Stephen Harrop

Distribution: Saling Stephens for the Claimants
Viran Molisa Trief (SLO) for the First Defendant
No steps taken by the Second or Third Defendant

**RESERVED JUDGMENT AS TO FIRST CLAIMANT'S APPLICATION FOR EXTENSION
OF TIME TO FILE CLAIM FOR JUDICIAL REVIEW**

Introduction

1. On 17 April 2013, Mr Lal filed an application for judicial review asking that the Court set aside a decision of the first defendant made on 16 December 2010 to rectify a survey plan in respect of lease title number 12/063/1072.

2. Because the decision under challenge was made well before the mandatory six-month period within which such a claim must be made under rule 17.5 (1) of the Civil Procedure Rules, it was necessary for Mr Lal to ask the Court to extend the time for making his claim , as it is empowered to do under rule 17.5 (2) if satisfied that substantial justice requires it.
3. Mr Lal filed an application for such leave on 2 October 2013 and an amended application on 18 February 2014. At one stage or another Mr Lal has filed no less than 4 sworn statements either directly or indirectly in support of this application. These are dated 25 January 2013, 6 September 2013, 11 February 2014 and 17 April 2014. He also relies on the sworn statement of Malangi Luru sworn on 22 January 2013.
4. The application is opposed by the first defendant who has filed a statement of Paul Gambetta, Acting Director of the first defendant sworn on 28 February 2014.

The history

5. On about 10 May 2004, lease title 12/0633/970 was registered between Kalorib Daniel as lessor and Kalorib Benard Kalotiti as lessee.
6. On or about 27 September 2007, lease title 12/0633/1072 was registered between Billy Kirkiri Bakokoto, Edward Bakokoto, Kaltoua Bakokoto and Kalori Bakokoto as lessors and Mr Lal as lessee.
7. On 21 January 2008, the Director of the Department of Lands, Survey and Records wrote to the affected parties indicating his intention to rectify lease title 12/0633/1072 because it had come to his attention that the latter had been registered by mistake. As he says in that letter: *“I realized that the survey plans for lease title 12/0633/1072 overlaps with the existing lease title 12/0633/970 which had been registered on 10 May 2004..... it is not right for there to be overlapping in the area of land subject to two different lease titles. Having realized the mistake in the overlap of the two lease titles, it is important that this be remedied by rectifying lease title 12/0633/1072.”*
8. On 6 May 2010, the first defendant issued a notice pursuant to section 11 of the Land Leases Act to interested parties including the claimant indicating his intention to rectify lease title

12/0633/1072. I note that that letter was copied to Mr Stephens who was already by then acting for Mr Lal.

9. For some reason that notice was not acted on and a further notice was given to the same effect on 22 September 2010. Mr Stephens responded by letter of the same date. He stated in that letter what remains the primary contention of Mr Lal :

“..... we wish to point out that the overlapping of boundaries in the title numbers 12/0633/1072 and 12/0633/970 is not a matter for the Director to determine under section 11 of the Land Lease Act [Cap.163] as the underlying issue is the custom boundary demarcated by way of customary marks adopted in the land use and management in ancient times.

It is therefore out client’s submission that since the original boundaries of the “Tamau” Land were drawn up by the Efate Island Court according to custom, it is only this forum that has jurisdiction to revisit the matter.”

10. At the end of that letter Mr Stephens gave notice of Mr Lal’s intention to be heard on the proposed rectification of the lease title 12/0633/1072.
11. On or about 18 October 2010, a meeting was held at the first defendant’s conference room which Mr Lal attended and where he presented his submissions opposing rectification.
12. After reflecting on the claimant’s submissions and other relevant evidence from interested parties, the first defendant decided to exercise his powers under section 11 of the Act to rectify the survey plan , as he had indicated he intended to do. On or about 16 November 2010 an advice of registration of dealings affecting the registered land was issued. This is the decision which Mr Lal seeks to challenge in this proceeding.
13. On 25 November 2011, more than 12 months after the decision made by the Director, Mr Lal filed a judicial review claim which was given the file number 8 of 2011. Obviously that claim was out of time but no application for extension of time was sought then or at any stage.

14. Another of the obligations resting on an applicant for judicial review is to ensure that the claim and sworn statement in support is served on the defendant within 28 days of filing. That was not done and so on 14 March 2012 the Chief Registrar issued a notice rightly informing Mr Lal that his claim was of no effect. It appears that that notice was placed on another file indirectly relating to this case namely Civil Case 85 of 2005. As a result Mr Stephens , and therefore Mr Lal was apparently not aware until early July 2013 of what had been done by the Chief Registrar on 14 March 2012. I note however that had Mr Stephens made any effort to pursue judicial review case 8 of 2011 prior to July 2013 he would have discovered much earlier what had happened.
15. Apparently Mr Stephens was advised by Court staff to issue a fresh judicial review proceeding. He did so and the case was given case number 5 of 2013. That was done on 17 April 2013 so Mr Stephens' reference to "*early July 2013*" in the application for leave cannot be correct.
16. Be that as it may, again there was , again, no application made by Mr Lal for an extension of time to file that judicial review claim. On 30 May 2013, Justice Spear made an order that that be done by 14 June 2013. It was not done.
17. In a further conference on 2 July 2013, Mr Stephens is recorded as saying that the application would be filed "*within a few days*". It was not filed within a period fitting that description.
18. It was not until 2 October 2013 that the original application for leave to file out of time was filed.
19. Judicial review case 8 of 2011 was formally discontinued on 30 October 2013.

Discussion and Decision

20. As is obvious from the six months mandatory time limit in rule 17.5, the law requires that judicial review claims are issued and served promptly after the impugned decision is made and , if passing the s17.8 conference inquiry, determined as soon as possible. I note too that one of the issues to be considered at such a conference is whether there has been no undue delay in making the claim. A judge is mandated not to hear such a claim if there has been

undue delay. The implication from this, in combination with the mandatory time limit in rule 17.15, is that even a claim filed within six months of the decision may not be allowed to proceed on the ground of delay.

21. In Avock v. Government of the Republic of Vanuatu [2002] VUCA 44, the Court of Appeal observed: *“When there is an application for leave which is at least 4 months out of time (and maybe even longer) there is a heavy onus on the person to explain why they have not commenced the proceedings in the time which is provided. Obtaining finality is always an important ingredient in matters which can lead to judicial review.”*
22. Mrs Trief referred me to several other authorities to similar effect; it is not necessary to refer to these as their statements of principle are not controversial. Despite being given express opportunity to do so, Mr Stephens made no submissions in opposition to Mrs Trief’s submissions. He did however take the opportunity provided to file Mr Lal’s sworn statement of 17 April 2014 in response to that of Mr Gambetta sworn on 28 February 2014.
23. In this case Mr Lal , as far as I know , did nothing relevant for more than a year after the decision of 16 November 2010 was made. He has made no attempt to explain that period of inactivity.
24. The delays however do not stop there. When he did file a claim, he made no application for extension of time and failed to serve it within the 28 days which is mandatory. The claim was then deemed to be of no effect. It was not the communication from the Chief Registrar which made that so , but rather the Rules themselves. Being represented at all times by an experienced solicitor, Mr Stephens, Mr Lal with Mr Stephens’ assistance, ought to have been well aware of his obligations. But nothing was done until the fresh claim was lodged on 17 April 2013, nearly 2 ½ years after the decision under challenge was made. That was nearly five times the length of period within which Rule 17.5 says an application for judicial review *must* be made.
25. Even then no application for extension of time was made and it took several directions by Justice Spear before that finally was done on 2 October 2013.

26. In my view the extensive delay in this case, and the almost complete absence of (justifiable) explanation for it, is fatal to the application for leave. To put it another way, the combination of the extent of the delay and the lack of explanation for it is such that substantial justice does not require that leave be given. The application will accordingly be dismissed.
27. In case I am wrong in that conclusion, it is in any event reinforced by my assessment of the merits of the application. An application for judicial review may only be based on error made by the decision-maker in the manner of reaching the decision. Judicial review is not an appeal against the merits of a decision. Judicial review is in the nature of a supervisory jurisdiction where the Court assesses what the decision-maker has done by way of process but the Court does not usurp the decision-maker's function by making a substantive decision. To put it bluntly, if a wrong decision is reached by a proper process, the Court will not interfere.
28. Here, there is no suggestion that Mr Lal was not given the appropriate opportunity to be heard on the Director's application, nor is it suggested that what he said was not taken into account. The fact that his viewpoint was rejected does not of itself provide a basis for a claim for judicial review. All kinds of legitimately-reached decisions are made every day in circumstances where at least one affected party is dissatisfied by the outcome.
29. In any event, the focus of Mr Lal's concern seems to me to be the correct identification of the underlying custom owners relating to the land in question covered by these two leases. A decision by the Director to ensure that the survey plans in respect of each lease do not overlap does not on the face of it make any difference at all to the custom ownership question.
30. When the director found that an error had been made as to the survey plan in respect of lease 12/0633/1072, he was obliged to put matters right. The situation could not be allowed to continue, once realized to exist, where the area of one leasehold title overlaps with another.
31. But the drawing of survey lines, does not in any way affect the underlying customary ownership of the land on which those lines are notionally drawn on a survey plan.

Accordingly whatever justification there may be to Mr Lal's concerns about the custom ownership, he remains able to pursue them regardless of the director's decision.

32. Indeed, I understand from Mr Gambetta's sworn statement that in Civil Case 85 of 2005, Mr Lal has launched a claim, apparently currently stayed pending the outcome of this case, in which he alleges negligence in the registration of lease title 12/0633/970. In that proceeding he may be able to advance the concerns that he has sought to raise in this judicial review case. I note that at a Rule 17.8 conference another of the matters of which the judge must be satisfied is that there is no other remedy that resolves the matter fully and directly. I emphasise that I am not saying that success in Civil Case 85/05 would necessarily do so (since I am not aware of the issues on that file, nor have I heard submissions about them) , but it may yet provide an vehicle for Mr Lal to achieve what he seeks.
33. Accordingly even if the extent of the delay had been relatively modest and an explanation for it provided, I would still have declined Mr Lal's application for leave having regard to the apparently poor prospects of success and the apparent absence of prejudice to him in being able to advance his fundamental concerns.
34. The application is dismissed because for these various reasons I am satisfied that substantial justice does not, in the particular circumstances here, require that extension of time be given.
35. The first defendant is entitled to costs which may be taxed if not agreed.

BY THE COURT