

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

Civil
Case No. 13/3 SC/CIVL

**BETWEEN : KALKOT MORMOR AND RICHARD
MATANIK**

First Claimant

AND: KALCHIRAU THERSA ANATU

Second Claimant

AND: THE REPUBLIC OF VANUATU

First Defendant

AND: KALORIB POILAPA

Second Defendant

**AND: MICHEL MONVOISIN AND LUDOVIC
BOLLIET**

Third Defendant

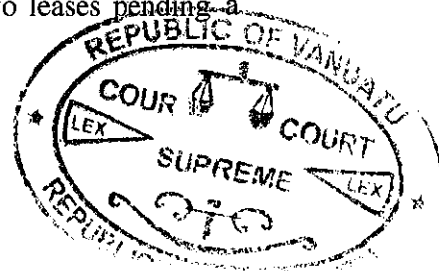
Coram: *Justice Aru*

Counsel: *Mr. G. Blake for the First Claimant*
Mr. B. Livo for the Second Defendant
Mr. L. Huri for the First Defendant
Mr. D. Yawha for the Second Defendant
Mr. J. Malcolm for the Third Defendant

RESERVED JUDGMENT

Introduction

1. This is claim which was started by the first claimants applying for restraining orders. The orders were then issued on 15 February 2013 by Consent. The orders were basically first to restrain the second and third defendants from dealing with lease title No 12/0543/032 (the 032 lease) and lease title No 12/0542/001 (the 001 lease). And secondly, to restrain the first defendant from registering any dealings with the two concerned leases. The claimants and the second and third defendants also agreed to restrain themselves from developing the areas covered by the two leases pending a decision on the claim.



- Both claims filed by the first and second claimants are section 100 claims seeking rectification of the 001 and 032 leases on the basis of fraud and/or mistake.

Background

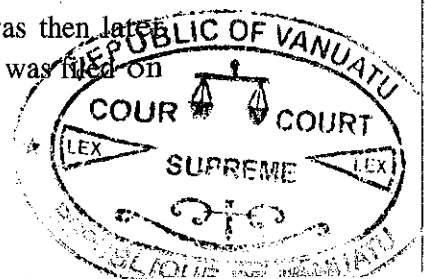
- The following chronology sets out a timeline of events leading up to the filing of the claims.
- Since 2010 the first claimants initiated a land use project. The aim was to obtain leases over the area concerned to protect and retain it for the future of their communities. These lands were within the same area covered by the 001 and 032 leases.
- From 2010 to 2012 the first claimants held various meetings with the officials from the lands department over their intended project.
- On 9 July 2012 the first claimants submitted their applications for lease to the Land Management Planning Committee (the LMPC) for consideration.
- On 22 August 2012 the 032 lease [Exhibit "C1-8"] was registered with the Minister of Lands as lessor pursuant to s 8 (2) b) of the Land Reform Act [CAP 123] and Article 78 (1) of the Constitution and Kalorib Poilapa as lessee.
- On 29 August 2012, the 001 lease [Exhibit "C1-7"] was registered with the Minister of lands as lessor pursuant to s 8 (2) b) of the Land Reform Act [CAP 123] and Article 78 (1) of the Constitution and Kalorib Poilapa as lessee.
- On 20 December 2012 the transfer of the 032 lease [Exhibit "C1-9"] was registered. The transfer was from the second defendant, Kalorib Poilapa as transferor to Michel Monvoisin and Ludovic Boillet as transferees for a consideration of VT 2, 000,000.
- When the first claimants became aware, of what had happened they applied to restrain any further dealings with the two leases concerned pending a decision on their claim for rectification.

Claims

- Both claims seek an order to cancel the registration of the transfer of the 032 lease in favour of the third defendants. Whilst only the first claimant seeks an order to cancel the registration of the 001 and 032 lease. The second claimant on the other hand only seeks the cancellation of the registration of the 032 lease and not the 001 lease.

First claimant

- The first claimants filed their claim on 18 January 2013. The claim was then later amended with the consent of the third defendant and an amended claim was filed on



14 March 2016. It alleges that that 001 and 032 lease were registered as a consequence of fraud and/or mistake. On the part of the Minister it alleges that:-

- He was wrong to issue leases on behalf of the disputing custom owners when no lease existed;
- He failed to take account of the interests of the claimants;
- His decision was unreasonable and could not have been properly made on the material before him;
- He failed to consult the undisputed custom owners and they did not approve the issuing of the two leases;
- The first defendant was aware of the claimants intentions to protect their lands;
- The Minister failed to apply fair and proper processes and procedures;
- There were irregularities in the processing of the registration of the two leases.

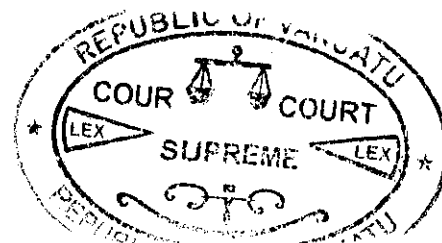
13. As against the third defendants, the first claimant alleges that the transfer was obtained with knowledge of fraud and or mistake resulting in registration of the transfer. It says:-

- The third defendants knowingly defrauded the first defendant of fees in respect of stamp duty and registration of the transfer by understating the consideration they paid for the transfer;
- Stamp duty and registration fees were paid on the consideration of VT 2,000,000 when the actual consideration paid to the second defendant was VT 20, 000, 000.

Second claimant

14. The second claimant alleges in their claim filed on 6 January 2014 that the Efate Island Court (EIC) around 2 March 2010 declared him custom owner of Llama custom land which is covered by the 032 lease. The decision was appealed to the Supreme Court and is pending final determination as Land Appeal Case No 2 of 2010 (LAC No2/10). He alleges that the 032 lease was registered by mistake:-

- There was no checklist to show that all requirements were complied with before the lease was registered;



- The Ministry and Department of Lands knew that LAC No 2/10 was still pending before the Supreme Court;
- The second defendant as a chief of Mele village knew that an appeal in LAC No 2/10 was still pending in the Supreme Court;
- The second defendant knew that the second claimant was declared custom owner of Llama custom land by the EIC yet he applied to the first defendant for a negotiator certificate;
- He says that the third defendants knew of the existence of the appeal before the Supreme Court; and
- The transfer was not for valuable consideration.

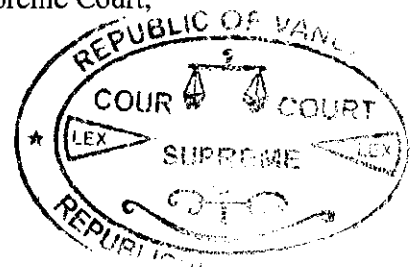
Defences

15. Defences were filed by the defendants to the two claims. As to the first claimant's claim, the first defendant in essence says that it acted in good faith based on the information supplied to it. It says:-

- The Minister acted on behalf of the custom owners in issuing the 001 and 032 leases;
- That no declaration of custom ownership has been made over the areas covered by the two leases;
- That the application for the two leases did not go through the department of lands but Mr Poilapa went directly to the Minister of lands;
- Admits that the Minister of lands did not consult the disputing custom owners;
- Admits there was no checklist for the two leases;
- Admits the two leases did not go through the lease execution officer at the Lands department.

16. As to the second claimant's claim it says that it acted in good faith and:-

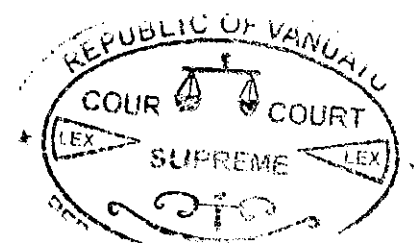
- LAC No 2/10 was still pending determination in the Supreme Court;



- Admits that the second claimant in EIC Land Case No 6 of 1993 (EIC No 6/93) was declared custom owner of Llama land;
 - Admits that the 032 lease covers part of Llama land and Ponatoka land.
17. The second defendant essentially says that the 001 and 032 leases are within Mele land boundary and that the claimants have no standing to bring the claim.
18. The third defendants defence to both claims is essentially that they are bona fide purchasers of the 032 lease for valuable consideration. By way of a counterclaim, they seek a permanent restraining order against the claimants from interfering with their enjoyment and use of the 032 lease.

Evidence

19. The evidence relied on by the first claimants are:-
- a) Sworn statement of Richard Matanik in support of claim [**Exhibit "C1-1"**];
 - b) Sworn statement of Jimmy Sano [**Exhibit "C1- 2"**];
 - c) Various documents tendered through witnesses [**Exhibit "C1- 3"** to **Exhibit "C1- 14"**].
20. The evidence for the second claimant is as follows:-
- a) Sworn statement of Kalchirau Thersa Anatu in support of application to become a party to the proceedings [**Exhibit "C2- 1"**];
 - b) Sworn statement of Kalchirau Thersa Anatu in support of Supreme Court claim [**Exhibit "C2- 2"**];
 - c) Further sworn statement of Kalchirau Thersa Anatu [**Exhibit "C2- 3"**];
 - d) Sworn statement of Kalori Korryaru in support of second claimant [**Exhibit "C2- 4"**].
21. As for the first defendant it relies on the following sworn statements:-
- a) Sworn statement of Peter Pata for the first defendant [**Exhibit "D1- 1"**];



- b) Sworn statement of Joe Ligo for the first defendant [Exhibit "D1- 2"].
22. The second defendant relies on the following sworn statements:
- a) Sworn statement of Chief Simeon Poilapa [Exhibit "D2- 1"];
 - b) Sworn statement of the second defendant in support of application to vary consent order dated 15 February 2013 [Exhibit "D2- 2"].
23. The third defendant relies on the following sworn statements:-
- a) Sworn statement of Jeremy Dick [Exhibit "D3- 1"];
 - b) Sworn Statement of Michel Monvoisin [Exhibit "D3- 2"];
 - c) Further sworn statement of Michel Monvoisin [Exhibit "D3- 3"];
 - d) Sworn statement of Michel Monvoisin in support of application to vary consent orders of Supreme Court [Exhibit "D3- 4"].

Issue

24. The main issue is essentially whether the 032 lease and the 001 lease were obtained by fraud and/or mistake.

Law

Land Reform Act [CAP 123]

25. Under section 6 anyone intending to negotiate with custom owners over custom land must apply to the Minister of Lands for a Certificate of Registered Negotiator:-

"6. Certificate of registered negotiator

(1) No alienator or other person may enter into negotiations with any custom owners concerning land unless he applies to the Minister and receives a certificate from the Minister that he is a registered negotiator.

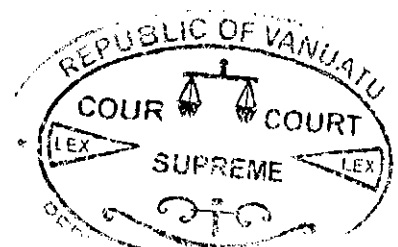
(2) A certificate issued in accordance with subsection (1) shall –

(a) state the names of the applicant and of the custom owners;

*(b) give brief details of the land in respect of which negotiations are registered;
and*

(c) state the object of the negotiations.

(3) If negotiations are completed without compliance with subsection (1) the Minister may refuse to approve the agreement between the custom owners and



the unregistered negotiator and if he is an alienator may declare the land unsettled land.

(emphasis added)

26. And section 8 at the relevant time provided for the management of land by the Minister of land where ownership is disputed:-

"8. Minister to have general management and control of certain land

(1) The Minister shall have general management and control over all land –

(a) occupied by alienators where either there is no approved agreement in accordance with sections 6 or 7 or the ownership is disputed; or

(b) not occupied by an alienator but where ownership is disputed; or

(c) not occupied by an alienator, and which in the opinion of the Minister is inadequately maintained.

(2) Where the Minister manages and controls land in accordance with subsection (1) he shall have power to –

(a) consent to a substitution of one alienator for another;

(b) conduct transactions in respect of the land including the granting of leases in the interests of and on behalf of the custom owners;

(c) take all necessary measures to conserve and protect the land on behalf of the custom owners.

(emphasis added)

Land Leases Act [CAP 163]

27. Section 14 provides for interests conferred by registration and states:-

"14. Interest conferred by registration

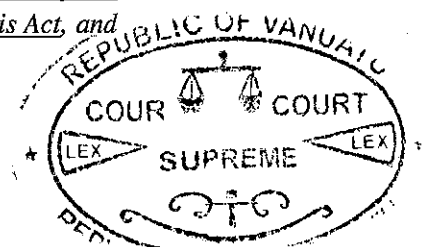
Subject to the provisions of this Act, the registration of a person as the proprietor of a lease shall vest in that person the leasehold interest described in the lease together with all implied and expressed rights belonging thereto and subject to all implied and expressed agreements, liabilities and incidents of the lease."

(emphasis added)

28. And section 15 provides for the rights of a proprietor of a registered lease:-

"15. Rights of proprietor

The rights of a proprietor of a registered interest, whether acquired on first registration or subsequently for valuable consideration or by an order of the Court shall be rights not liable to be defeated except as provided in this Act, and



shall be held by the proprietor together with all rights, privileges and appurtenances belonging thereto, free from all other interests and claims whatsoever, but subject –

(a) to the encumbrances and to the conditions and restrictions shown in the register;

(b) unless the contrary is expressed in the register, to such of the liabilities, rights and interests as are declared by this Act not to require registration and are subsisting:

Provided that nothing in this section shall be taken to relieve a proprietor from any duty or obligation to which he is subject as trustee.”

(emphasis added)

29. Section 100 provides for the rectification of the register by the Court and states:-

“100. Rectification by the Court

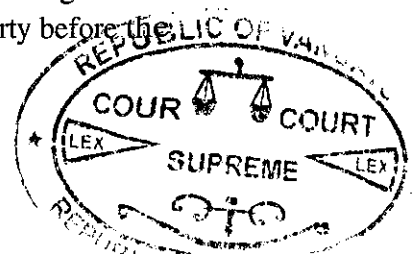
(1) Subject to subsection (2) the Court may order rectification of the register by directing that any registration be cancelled or amended where it is so empowered by this Act or where it is satisfied that any registration has been obtained, made or omitted by fraud or mistake.

(2) The register shall not be rectified so as to affect the title of a proprietor who is in possession and acquired the interest for valuable consideration, unless such proprietor had knowledge of the omission, fraud or mistake in consequence of which the rectification is sought, or caused such omission, fraud or mistake or substantially contributed to it by his act, neglect or default.”

(emphasis added)

Submissions

30. In brief the first defendant in its submissions admits and concedes that proper administrative processes of the department of lands for the registration of the 001 and 032 leases were not followed therefore both leases were not registered properly.
31. The first claimants submit that the two leases were obtained by fraud and or mistake and the defence offered by s 100 (2) was not demonstrated by the second defendant to be available. Similarly concerning the transfer of the 032 lease, it was submitted that the registration of the transfer was obtained by fraud and mistake therefore the third defendant was not entitled to the protection afforded by s 100(2).
32. The second claimant also submits that that due process was not followed to register the two leases which it says are within Llama land as declared EIC No 6/93 to the second claimant. Although the decision has been appealed, it is still pending before the Supreme Court. It was submitted that the second defendant was a party before



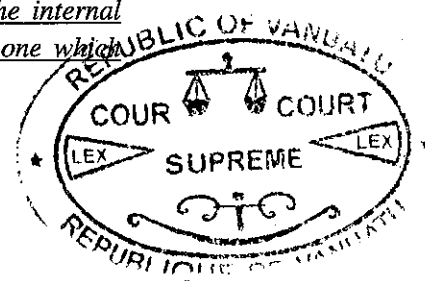
EIC and was aware of the land dispute and Mr Korryaru informed the third defendant in 2012 of the pending dispute .He finally submits that both the 001 and 032 leases must be cancelled as well as the transfer to the third defendant as he was not a bona fide purchaser.

33. The second defendant submits that the first claimant does not have standing to bring the claim. Regarding the second claimant's claim, it concedes that the second claimant has ownership interests in land covered by the 032 lease but says that the claimants must show that the second defendant obtained the lease fraudulently and the third defendant had knowledge of it.
34. The third defendant submitted that it relies on s 100 (2) to say that there is no evidence that Mr Monvoisin had knowledge or contributed to the mistake or fraud. It was further submitted that the claimants must prove that the third defendant had actual knowledge of the act or omission of fraud or mistake or contributed to it.

Discussion

35. The first claimants had an interest in the land concerned and had been in discussions with Lands department officials since 2010 over a land use project by which they intend to acquire leases over the lands covered by the two leases for the future use of their communities. This discussions culminated in the submission of their Applications for leases to the LMPC on 9 July 2002.
36. Unknown to them on 22 August 2012 the 032 lease was registered with the Minister of Lands as lessor on behalf of the custom owners and Kalorib Poilapa as lessee. Similarly they were not aware that on 29 August 2012, the 001 lease was registered with the Minister of lands as lessor on behalf of the custom owners and Kalorib Poilapa as lessee. The subsequent registration of the transfer of the 032 lease to the third defendants on 20 December 2012 was the same.
37. Section 15 of the Land Leases Act gives the proprietors of the two leases indefeasibility of title which cannot be defeated except as provided in the Land Lease Act. The claimants have therefore instituted these proceedings pursuant to s100 of the Act to seek rectification by the Court to cancel the registration of the two leases and the transfer of the 032 lease on the basis of fraud and/or mistake.
38. In their remarks on the meaning and intent of s100, the Court of Appeal in **Nafalak Teufi Ltd v Kalsakau** [2005] VUCA 15 said this:-

"In our view, the meaning of section 100 of the Land Leases Act CAP163 is not in doubt. We are satisfied that the object of the section is to ensure that the land register and the processes leading up to the registration of any instrument or interest is free of any mistakes, fraud or possible fraudulent activities. In other words, its purpose is to secure the integrity of the register and the internal processes culminating in registration. The section, in its terms, is one which



empowers the Supreme Court where it is satisfied that any registration has been obtained, made, or omitted by fraud or mistake, to order rectification of the register by directing that any registration may be cancelled or amended. We note without comment, the disjunctive nature of the rectification power.

(emphasis added)

39. The Court also noted and endorsed what was said in **Jone Roqara & Ors v Noel Takau & Ors** [2005] VUCA 5.

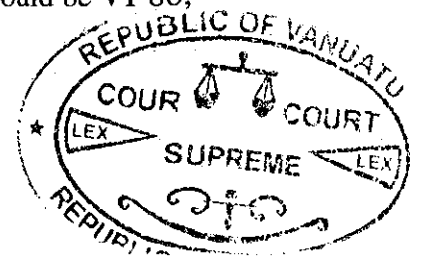
*We endorse what was said by this Court in Civil Appeal Case. 25 of 2004, [2005] VUCA 5, **Jone Roqara & Ors v Noel Takau & Ors** about section 100: -*

"For a party seeking rectification under s. 100 of the Land Leases Act, it is not sufficient to prove that a mistake occurred in the course of a transaction which ultimately concluded in registration of the interest which is sought to have removed from the register. In terms of s. 100, the Court must be satisfied that the "registration has been obtained, made or omitted by fraud or mistake". The section imposes a causal requirement. The mistake must lead to the impugned registration being made. The onus is on the party seeking rectification not only to establish a mistake, but also to satisfy the Court that it caused the registration to occur..."

(emphasis added)

Mistake

40. Concerning mistake, the first defendant admits and concedes that proper administrative procedures and processes of the Department of lands were not followed in obtaining registration of the 001 and 032 leases and as a result the leases were not properly registered. The evidence of Peter Pata and Joe Ligo confirms that the two leases did not satisfy the usual Department of lands checklist requirements and no certificate of registered negotiator was issued before Ministerial approval was given.
41. Section 8 of the Land Reform Act requires that where the Minister manages land on behalf of the custom owners, he has the power to conduct transactions including granting leases in the "*interest of and on behalf of the custom owners*". First the custom owners were known as declared by the EIC in EIC No.6/93 on 2 March 2010 although the decision was still under appeal in LAC No.2/10. The evidence of Kalchirau Thersa Anatu confirms that he as the declared custom owner of Llama land was never consulted by the Minister before the 032 lease was issued.
42. Secondly the premium stated on the two lease documents at the time of registration were as follows. For the 032 lease covering 485 hectares of land VT500, 000. For the 001 lease covering 1,805 hectares of land VT2, 000,000. The evidence of Jimmy Sano of the Valuer General's Office is that a realistic assessment of premium for the 001 lease would be VT 171,400,000 and like-wise for the 032 lease would be VT 80, 200, 000. I accept his evidence as a proper assessment of premium.



43. Jimmy Sano's evidence shows that there was a serious undervalue of the two leases. The leases could not have been granted in the interest of custom owners. Their interest would have been best served if the leases were progressed through the Department of lands processes and checklist so that the proper premium is determined.

Fraud

44. The evidence of Richard Matanik is that they were the only ones who were having discussions with the Department of lands to acquire leases over the areas covered by the two leases. They were not aware nor were they notified of any other interests until the leases were registered.

45. In view of Jimmy Sano's evidence, the Government was defrauded of the proper fees that would have been paid on the correct premium including stamp duties. Similarly the custom owners were defrauded in that monies paid into the Custom Owners Trust Account to be paid by the Government once the ownership dispute is resolved is not based on a proper assessment of premium.

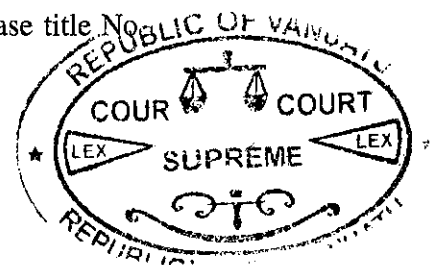
46. Regarding the transfer of the 032 lease, the Government was also defrauded of the registration fees and stamp duty. The consideration stated on the transfer document was VT 2,000,000. The premium paid to the first defendant was around VT 20,000,000. The third defendants perpetrated or contributed to the fraud regarding the transfer of the 032 lease by paying for all the fees for the registration of the said lease [Exhibit "C1-11"] and paid VT 19 305,369 to the credit of Kalorib Poilapa at the BRED Bank [Exhibit "C1-3"]. This was confirmed by Kalorib Poilapa under cross examination that he did receive those funds and instructed Franco Zuchetto to do the withdrawals on his behalf until the funds were exhausted.

47. The third defendants were therefore not bona fide purchasers for value as they contributed to the fraud and had knowledge that the land covered by the 032 lease was in dispute. The evidence of Kalori Korryaru and Kalchirau Thersa Anatu confirms that they both at different times informed Michel Monvoisin that the land was under dispute.

48. Therefore in terms of what the Court of Appeal said **Nafalak Teufi Ltd v Kalsakau and Jone Roqara & Ors v Noel Takau & Ors**, I am satisfied that the two leases were obtained by fraud and/or mistake and must therefore be set aside.

- (i) The third defendants' counter claim is dismissed;
- (ii) The Director of Lands is therefore ordered to rectify the land leases register by:-

- a) Cancelling the registration of the transfer of land lease title No 12/0543/032 in favour of the third defendants; and



b) Cancelling the registration of the land lease title No 12/0542/001 registered on 29 August 2012 and the land lease title No 12/0543/032 registered on 22 August 2012.

(iii) The claimants are entitled to costs to be agreed or taxed by the Master.

DATED at Port Vila this 6 day of July, 2018

BY THE COURT

.....
Dudley Aru
Judge

