

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

**Civil  
Case No. 15/73 SC/CIVL**

**BETWEEN: Dimitri Malvirlani**  
*Claimant*

**AND: Rocky Melteklesi**  
*First Defendant*

**AND: Republic of Vanuatu**  
*Second Defendant*

**Coram:** *Justice Aru*

**Counsel:** *Mr. J. Tari for the Claimant*  
*Mr. B. Livo for the First Defendant*  
*Mr. S. Aron for the Second Defendant*

---

## **JUDGMENT**

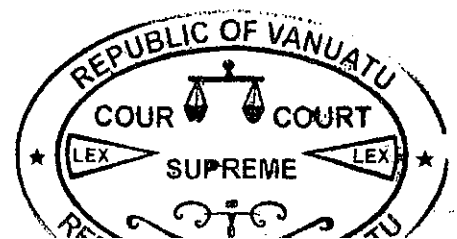
---

### **Introduction**

1. This is a claim for eviction. The claimant, Mr Dimitri Malvirani is seeking orders to evict the first defendants, Mr Rocky Melteklesi and Mr Barnabe Malvirani who are father and son and their families, relatives and agents from a property under lease title 11/0G21/050 (the **050 LEASE**).
2. The claimant claims that this property was transferred to him by Mr Melteklesi and he is now the registered proprietor. The first defendants deny any transfer of their property to the claimant and say that they cannot be evicted from their property. They filed a counterclaim alleging fraud and/or mistake and say that that they did not transfer or sign any transfer of their lease in favour of the claimant.

### **Background**

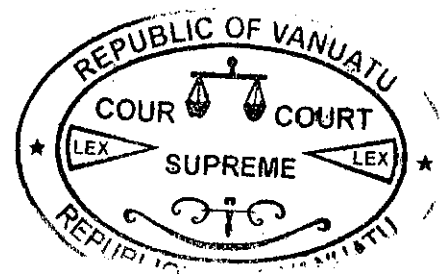
3. By way of background, on 12 November 1985 the **050 LEASE** was created and registered to Barnabe Raymond (deceased) and his wife Jeanette Toa (deceased) as lessees. The Minister of Lands was the lessor. Mrs Toa died on 22 May 1990 leaving Mr Raymond as the sole proprietor of the lease.



4. Mr Raymond died on 17 July 2006. Following his death, Mr Melteklesi as their adopted son was granted administration of the estate by this Court on 20 October 2006.
5. On 10 November 2006 Mr Melteklesi applied to have the **050 LEASE** registered in his name by transmission and became the registered proprietor.
6. Sometime in December 2006, Mr Rogatien Malvirani and Ms Jacqueline Rory who are related to both the claimant and first defendants applied for a loan with the National Bank of Vanuatu to buy a vehicle for use as a public transport. The bank agreed to lend them a sum of VT 3,541,053. The repayments were to be made from assignments of their salary.
7. In addition the bank also required security. The borrowers approached Mr Melteklesi to be their guarantor. The vehicle was purchased and registered to Rogatien Malvirani. On 19 June 2007 a third party mortgage was registered over the **050 LEASE** in favour of the bank.
8. Rogatien Malvirani and Jacqueline Rory are not parties in these proceedings. After some time, they defaulted on their loan repayments. The claimant alleges that Rogatien Malvirani and other family members met with him and agreed that he should settle the balance of the loan repayments with the bank and the **050 LEASE** will be transferred to him.
9. On 16 June 2013 the bank confirmed that they had discharged the mortgage following final settlement of the balance of the loan by the claimant. On 23 December 2014 the Minister of Lands consented to a transfer of the **050 LEASE** to the claimant. The transfer of lease was registered on 10 February 2015.
10. The claimant alleges that despite being registered as the proprietor, he is unable to get the first defendants and their families and relatives to vacate the property despite several attempts.

### Claim

11. Essentially the claimant's case is that he is now the registered proprietor and he is entitled to have vacant possession of the **050 LEASE**. As the defendants have refused to vacate the property he is seeking orders for:-
  - a) The defendants, their families, relatives and agents to vacate the property;
  - b) Damages for trespass to the property
  - c) Costs



## Counterclaim

12. The first defendants filed a defence and counterclaim. They deny the claim and say that they were living at Walarano, Malekula and only travelled to Vila to defend these proceedings. They assert that the people living on their property are their tenants who are renting their houses. The counterclaim is essentially a s.100 claim under the Land Leases Act [CAP 163]. They deny that the claimant is entitled to the orders sought and say that the transfer of lease was obtained by fraud and/or mistake. They allege that the Mr Melteklesi did not sign any transfer of the **050 LEASE**. That his signature was obtained by the claimant and the second defendant by fraud and /or mistake. The orders sought on the counterclaim are:-

- a) Cancellation of the registration of transfer of the **050 LEASE** to the claimant;
- b) That Mr Melteklesi be reinstated as lessee on the **050 LEASE**;
- c) Special damages;
- d) General damages;
- e) 5% interest.

13. The second defendant says that the registration was done in good faith on the documentation presented to the Director of Lands for registration.

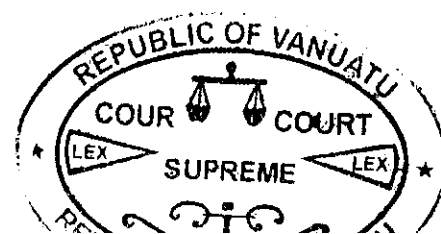
## Issues

14. The following issues arise:-

- (i) Whether the transfer of the **050 LEASE** to the claimant was obtained by fraud and /or mistake.
- (ii) If the answer is No, whether the claimant is entitled to seek eviction orders against the first defendants.
- (iii) If the answer to a) above is Yes , whether the first defendants are entitled to refund the claimant the sum of VT3,102,242 monies he paid to the NBV to settle the outstanding loan debt.

## Discussions

15. At the outset the **050 LEASE** was registered to Barnabe Raymond and Jeanette Toa. There is no evidence or records to show that they were holding the lease in trust for the community. The lease was registered in their names and they were therefore the registered proprietors. In effect they were the only persons who had good title to the property. (see s 14 and 15 Land Lease Act [CAP 163])



16. Mr Raymond remained on the title as the sole registered proprietor after his wife died. When he passed on 17 July 2006, Mr Melteklesi as their adopted son applied for probate of the deceased estate and was granted administration on 20 October 2006. Upon application, the **050 LEASE** was later transferred to him by transmission.

### Loan

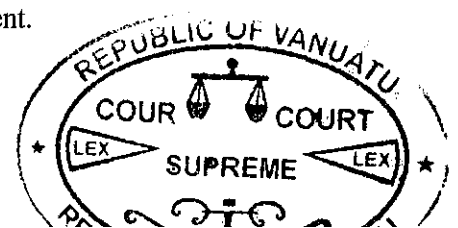
17. The evidence of Mr Dali, the Manager Recoveries section of the NBV, cannot be disputed that there was a loan approved by the bank and Rogatien Malvirani and Jacqueline Rory were the borrowers. Mr Melteklesi as the guarantor provided security for the loan by way of a third party mortgage registered over the **050 LEASE**. The claimant alleges that the borrowers defaulted on their loan repayments and Rogatien Malvirani approached him for financial assistance. He alleges that following a series of family meetings it was agreed that he will settle the debt and the lease will be transferred to him so that it remains with the family. This is also confirmed by Rogatien Malvirani in his evidence.

18. The debt was around VT 3 million. That is not a small sum of money. To disperse one's personal funds to fund a debt of that amount a prudent or reasonable person would be expected to ensure that the arrangement is recorded in writing and carries the consent of all parties concerned. Despite the claimant's assertions of family agreements, first there is no evidence that Mr Melteklesi being the registered proprietor was part of those meetings or consented to such arrangement and second, there are no records or minutes of such meetings put into evidence if there was any.

19. The land is not family land as Mr Melteklesi is the only registered proprietor. He holds good title unless he consents to the transfer. In this case the claimant and Rogatien Malvirani made arrangements of their own without the knowledge and consent of Mr Melteklesi.

### Issue (1): Whether the transfer of the **050 LEASE** to the claimant was obtained by fraud and/ or mistake

20. Mr Melteklesi disputes that he signed any transfer of the lease. His evidence is that he came to Vila in April 2015. On 22 January 2015 he was on Malekula and could not have signed the transfer as recorded on the transfer document. His evidence is that the claimant and Rogatien Malvirani had threatened him on many occasions to sign the transfer. This is confirmed by his son Barnabe Malvirani who is also the first defendant. Following these threats, in 2013 whilst living at Etas with Delphine Malvirani, Mr Melteklesi said that the claimant and Rogatien Malvirani whilst intoxicated approached him and threatened him to sign a paper which was not the transfer document. He wrote his name but did not sign as it now appears on the transfer document.



21. Delphine Malvirani says Mr Melteklesi was living with her at Etas in 2013 when he signed the transfer. She fails to say that she saw or witnessed Mr Melteklesi signing the transfer document as alleged by the claimant.

22. The claimant asserts that the transfer was signed in the presence of:-

Ephreme Weiranmal  
Damiano Weiranmal  
Jean Mattieu Weiranmal  
Delphine Malvirani  
Rogatien Malvirani

23. Apart Rogatien Malvirani, none of the others gave evidence that they witnessed Mr Melteklesi signing the transfer document. There is no other evidence that suggests that Melteklesi signed the transfer as alleged.

24. Section 78 of the Land Leases Act provides:-

**“78. Verification of execution**

*(1) Subject to subsection (5), a person other than a body corporate, executing an instrument required to be registered under this Act shall appear before an authorised officer for the purposes of this section and, unless he is personally known to the authorised officer, he shall be accompanied by a credible witness for the purpose of establishing his identity.*

*(2) The authorised officer shall satisfy himself as to the identity of the person appearing before him and ascertain whether he freely and voluntarily executed and appeared fully to understand the instrument and shall complete a certificate to that effect.*

....

*(5) The Director may dispense with verification under this subsection –*

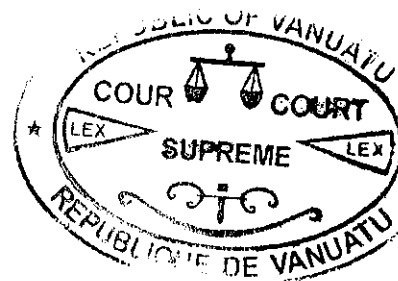
*(a) if he considers that it cannot be obtained or can be obtained only with difficulty and he is otherwise satisfied that the document has been properly executed; or*

*(b) in cases in which to his knowledge the document has been properly executed,*

*and shall record on the document his reasons for dispensing with verification.”*

*(emphasis added)*

25. These are mandatory requirements that must be completed before registration of the transfer is effected.



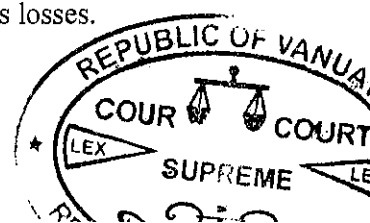
26. Mr Melteklesi's evidence is that on 22 January 2015 he did not sign any document witnessed by Mr Lino Saniel in front of the Commissioner of Oaths, Mr Tom Bethuel as he was on Malekula. Under cross examination he maintained his evidence. The claimant under cross examination said he gave the documents to Mr Saniel, Rogatien Malvirani and Delphine Malvirani when cross examined both said Mr Melteklessi never appeared or signed the transfer document before Mr Saniel and Mr Bethuel.
27. There is also no evidence filed by Mr Saniel and Mr Bethuel to say that Mr Melteklesi signed the transfer document in their presence. This evidence would have demonstrated that Mr Melteklesi "*freely and voluntarily executed* (the transfer document) *and appeared fully to understand the instrument*".
28. In the absence of such evidence coupled with Melteklesi's evidence of threats against him to sign, I am satisfied that there was fraud involved in obtaining Mr Melteklesi's signature on the transfer document. The claimant has not shown by his evidence that Mr Melteklesi consented to the signing. The fraud caused the transfer to be registered. (see **Nafalak Teufi Ltd v Kalsakau** [2005] VUCA 15; **Roqara v Takau** [2005] VUCA 5).
29. In answer to the first issue, I am of the view that the transfer of the **050 LEASE** was obtained by fraud.

**Issue (ii):** Whether the claimant is entitled to seek eviction orders against the first defendants.

30. Given my findings as to the first issue, the claimant is not entitled to seek any orders for eviction of the first defendants from the property as he obtained the transfer to his name by fraud and therefore the register must be rectified.

**Issue (iii):** whether the first defendants are entitled to refund the claimant the sum of VT3, 102,242 monies he paid to the NBV to settle the outstanding loan debt.

31. The third party mortgage registered over the **050 LEASE** was entered into between Mr Melteklesi as mortgagor, Rogatien Malvirani and Jacqueline Rory as the customers and the NBV as mortgagee. Clause 5.4 recognises that the bank as mortgagee has the powers of sale over the **050 LEASE** in the event of default. The evidence from the bank shows that the loan went into default. When the claimant settled the outstanding loan debt, the bank did not apply to sell the **050 LEASE** and the mortgage was discharged.
32. If the lease is rectified for fraud, the first defendants would continue to enjoy their lease although they failed to honour their legal obligations under the guarantee to the bank. Without the claimant's intervention I am satisfied that the bank as mortgagee would have exercised its rights under the mortgage to sell the property to recover its losses.



33. The first defendants benefitted from the payments made by the claimant to the bank therefore he should be refunded before the lease is rectified.

### Damages

34. The first defendants also sought general and special damages in their counter claim. Although these are pleaded at paragraphs 12 and 13 of their defence and counter claim, the first defendants have not proved by their evidence that they suffered any damage.

35. There is no evidence that Mr Melteklesi suffered emotional stress and was treated at the Norsup hospital on Malekula. Similarly there is no evidence to support the claim for special damages. The claim for damages must fail.

### Result

31. I now make the following orders:-

- 1) Subject to paragraph 2) below, the registration of the transfer of the **050 LEASE** to Dimitri Malvirani is hereby cancelled and the lease is to be restored in the name of Rocky Melteklesi as lessee;
- 2) Prior to making the cancellation, the first defendants must pay the claimant the sum of VT3,102,242;
- 3) The Director of the Department of Lands, Survey and Records is directed to make changes in the register to reflect the above orders upon prove of full payment.

### Conclusion

36. The claim is dismissed. The counterclaim is allowed and the first defendants are entitled to costs to be agreed or taxed.

DATED at Port Vila this 27<sup>th</sup> day of April, 2020

BY THE COURT

.....  
D. Aru  
Judge

