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

Appeal Case No. 02 of 2000.

BETWEEN: BETTY KALSAKAU
Appellant

AND: PANOVE MAIAU
First Respondent

AND: PELENATITA SIALE
Second Respondent

AND: JOHN KWARI (Deceased)
Third Respondent

Coram: Mr. Justice John W. von Doussa
Mr. Justice Reggett Marum
Mr. Justice Daniel Fatiaki
Mr. Justice Roger J. Coventry

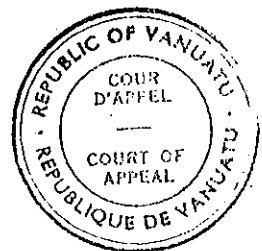
Representative: Mr. Hendon Kalsakau as agent for the Appellant

Counsel: Mr. Stephen Joel for the Third Respondent
No appearance by the First and Second Respondents

Hearing Date: 24th October 2000.

Judgment Date: 27th October 2000.

JUDGMENT



This is an appeal against the judgment of Acting Chief Justice Lunabek delivered on 22nd December 1999.

The proceedings concern a dispute as to which of two people were entitled to be registered as the owners of the leasehold property title No.

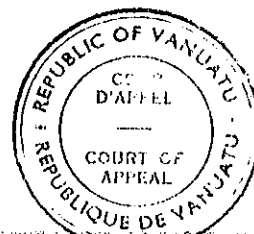
11/OA22/35 (the land). In action No. 156 of 1993 the plaintiff Mr. John Kwari sought from the Defendants Mr. Panove Maiau and Mrs. Pelenatita Siale.

- (a) A declaration that the agreement for sale of leasehold property title No. 11/OA22.35 made between the plaintiff as buyer and the second defendant as seller on 17 September 1990 is valid;*
- (b) An order for specific performance by the defendants to do everything necessary to register the title;*
- (c) Further or in the alternative to the above, damages for breach of contract in lieu of or in addition to specific performance;*
- (d) In the alternative to orders (a) and (b) above, if the agreement is not specifically performed, damages;*
- (e) Costs.*

In the course of the proceedings a transfer of the land to the appellant Mrs. Betty Kalsakau was registered. The Statement of Claim in action 156 of 1993 was then amended to seek additional orders declaring the transfer to Mrs. Kalsakau void, and seeking the cancellation of her registration on the title.

In action No. 45 of 1994 Mrs. Betty Kalsakau as plaintiff sought from Mr. Panove Maiau, Mrs. Pelenatita Siale and Mr. John Kwari:

- (a) A declaration that the agreement for sale of leasehold property title No. 11/OA22/35 made between the plaintiff as buyer and the second defendant as seller is valid;*
- (b) An order for specific performance by the defendants to do everything necessary to register the title;*
- (c) Further or in the alternative to the above, damages for breach of contract in lieu of or in addition to specific performance;*
- (d) An order that the caution dated 20 February 1991 lodged by the third defendant, Mr. Kwari, be removed from the Lands Record Register;*



(e) Damages against the third defendant, Mr. Kwari;

(f) An order that these proceedings be heard together with proceedings No. 156 of 1993 and that the evidence in one serve as evidence in the other;

(g) Costs.

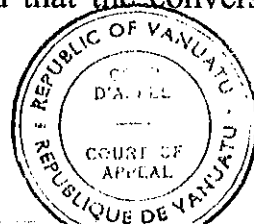
The two actions were consolidated, and the consolidated proceedings were heard by the Acting Chief Justice. In his judgment now under appeal his Lordship decided the essential issues in favour of the personal representatives of Mr. Kwari who died before the delivery of judgment. His Lordship made orders declaring valid the agreement for sale to Mr. Kwari, declaring that the registration of the land in the name of Mrs. Betty Kalsakau was ultra vires, and directing that the Director of Land Records cancel the registration and rectify the title in accordance with s. 100 (1) of the Land Leases Act [CAP 163]. It was ordered that the name of John Kwari be registered in lieu of Mrs. Kalsakau. Consequential orders were also made.

On this appeal Mrs. Kalsakau seeks to overturn the orders of the Acting Chief Justice. She seeks a declaration to the effect that her registration as leaseholder is valid, and that the agreement for sale to Mr. Kwari is invalid.

It is common ground that Mr. Maiiau, who lived in New Caledonia, was the registered proprietor of the leasehold interest in the land. Mr. Maiiau granted his daughter, Mrs. Siale, a power of attorney to deal with the land. Both Mr. Maiiau and Mrs. Siale were defendants in both sets of proceedings. At the trial of the consolidated proceedings they were not represented by counsel, but Mrs. Siale gave evidence.

Lunabek ACJ accepted evidence led on Mr. Kwari's behalf that he reached an agreement with Mrs. Siale to buy the land for VT1,300,000. The terms of an agreement for sale were drawn up by Mr. Kwari, and signed by him and Mrs. Siale on 17th September 1990. At the same time Mr. Kwari paid Mrs. Siale the agreed purchase price in cash.

Mr. Kwari was a senior police officer. The agreement for sale was signed in the police station, in the presence Mrs. Siale's husband and Police Officer Cyprian Bila. Mr. Kwari in evidence said that the conversation



between them was in bislama, everyone knew what was being said, and no coercion was applied to Mrs. Siale to enter into the agreement. This evidence was confirmed by Police Officer Bila.

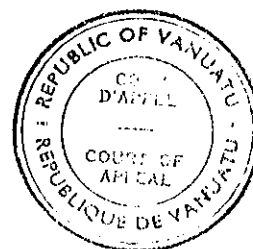
After 17th September 1990 Mr. Kwari did not live on the property but instead rented it out, and collected the rents.

On about 31st October 1990 an application for transfer of the land to Mr. Kwari was considered by the Urban Land Leases Selection Committee (ULLSC). Consideration of the application was deferred, but was later approved by the ULLSC on 16th November 1990, Mr. Kwari being advised of that approval on 20th November 1990.

The agreement for sale provided that it was subject to the approval of the proposed transfer by the Minister of Lands. The agreement provided that in case of non-approval, the purchase price would be returned to Mr. Kwari in full, and he would account to Mrs. Siale for any rent that he had received in the meantime.

In late 1990 Mrs. Kalsakau and her husband became aware that Mr. Maiau intended to sell the property, and took steps to negotiate with Mrs. Siale to acquire it. On 20th November 1990 Mr. Hendon Kalsakau (the appellant's husband) applied to the Department of Lands requesting that the ULLSC reconsider Mr. Kwari's application and consider granting approval to Mr. and Mrs. Kalsakau.

On 23rd January 1991 the Minister of Lands granted consent to a transfer of the land to Mrs. Kalsakau, and on the same day a transfer instrument was signed by Mrs. Kalsakau and Mrs. Siale in the offices of the Department of Lands, in the presence of a number of witnesses. Evidence was given at trial by Mrs. Kalsakau and Mrs. Siale that Mr. Kwari was present on that occasion and consented to Mrs. Kalsakau signing an agreement with Mrs. Siale to purchase the land. Mrs. Siale said in evidence that she signed this agreement as she had been informed that it was in order to do so as the agreement with Mr. Kwari provided for the refund of monies in the event that a transfer to Mr. Kwari did not proceed. She said that it was because the transfer to Mr. Kwari had not proceeded by 23rd January 1991 that she agreed to sell the property to Mr. Kwari.



No payment of the purchase price was made by Mrs. Kalsakau on or about 23rd January 1991. Indeed the purchase price has never been paid by her to Mrs. Siale, and Mrs. Siale has never taken any steps to refund the sum of VT1,300,000 to Mr. Kwari.

Shortly before 7th February 1991 Mrs. Kalsakau lodged the transfer instrument signed on 23rd January 1991 with the Land Records Office. On 7th February 1991 the Director of Land Records wrote to Mrs. Kalsakau requesting information, including the production of a copy of Mrs. Siale's power of attorney. Information produced on the hearing of the appeal from Mr. Tarosa, at one time the Acting Director of Land Records, confirms that because there had been instances of misuse of powers of attorney this was a proper requisition.

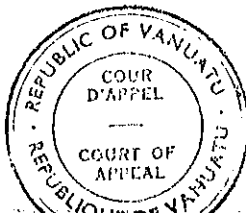
On 11th February 1991 Mrs. Siale required Mrs. Kalsakau to pay the purchase price by 15th February 1991 and to comply with the requirements of the Director of Land Records. Apparently this did not occur as on 19th February 1991 the Director of Land Records wrote to the Public Solicitor, acting for Mr. Kwari, informing him that the transfer application by Mrs. Kalsakau had been rejected.

On 20th February 1991 the Public Solicitor lodged a caution at the Land Records Office to protect the interest of Mr. Kwari under the agreement for sale which he had with Mrs. Siale. The caution was lodged under Section 93 of the Land Leases Act.

On 23rd April 1991 Mrs. Kalsakau made another attempt to lodge the transfer instrument which she and Mrs. Siale had signed on 23rd January 1991. The following day the Director of Land Records advised Mrs. Kalsakau that her application to register the transfer could not be accepted until original documents had been filed, and, of most importance, the caution lodged by Mr. Kwari had been removed.

On 6th May 1991 an instrument of transfer between Mrs. Siale and Mr. Kwari was apparently signed, and the Minister of Lands consented to a transfer in favour of Mr. Kwari on 7th May 1991.

On 22nd September 1992 Mrs. Kalsakau wrote to the Director of Land Records seeking the removal of Mr. Kwari's caution under Section 97 of the Land Leases Act. The Director rejected that application because, he says, Mrs. Siale informed him that she had already sold the land to Mr. Kwari and had received the purchase price. This was confirmed to the



Director by Mr. Kwari at that time. Mrs. Siale also informed the Director that Mrs. Kalsakau was not able to pay Mrs. Siale the purchase price.

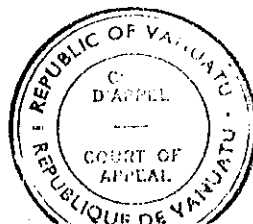
On 7th December 1993 Mrs. Kalsakau lodged for registration the instrument of transfer which had been signed by herself and Mrs. Siale on 23rd January 1991. On this occasion the fact that the document was lodged was recorded on it by the Land Records Office, and the document now bares an endorsement "*Registered at Port Vila at 09.30 hours the 7th day of December 1993*". Stamp duty had been by that time paid by Mrs. Kalsakau on the instrument, and she also paid a late registration fee on 7th December 1993. On Mrs. Kalsakau's behalf it is argued before this Court that because of the notation of registration now appearing on the instrument it is conclusively presumed to be a valid and effective document registered in accordance with Part VI of the Land Leases Act. However at the trial evidence was given by the Director of Lands Records, Mr. Tamata that although the instrument of transfer was lodged, it was not in fact registered. The instrument was held pending the removal of the caution.

That the Land Records Office did not actually register the instrument of transfer on 7th December 1993 is not only attested to by the evidence of Mr. Tamata but also by the fact that it was not until 12th January 1996 that Mrs. Kalsakau's interest was noted on the title.

On 6th December 1993 the Director of Land Records had written to Mr. Kwari warning the caution, and advising that it would be removed unless proceedings were commenced within thirty days in the Supreme Court to substantiate the interest claimed by him in the land. What prompted the Director to warn the caution on that date is not entirely clear, but presumably it was some action taken about that time on behalf of Mrs. Kalsakau to facilitate the registration of the instrument of transfer in her favour.

Action No. 156 of 1993 was commenced before the expiration of the thirty days warning. Shortly afterwards action No. 45 of 1994 was commenced by Mrs. Kalsakau, in effect seeking orders of a like kind as those sought by Mr. Kwari, but in her favour.

On 24th February 1995 Mr. Maiau wrote a number of documents informing the First Secretary of the Ministry of Lands, and a number of other government agencies, that he wished to transfer title to the land to Mr. and Mrs. Kalsakau, and to withdraw the sale to Mr. Kwari. That, of

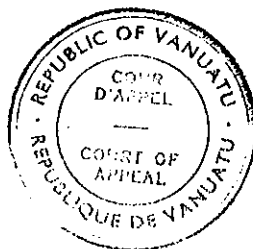


course, he could not do if the agreement for sale to Mr. Kwari was valid and in force.

On 12th June 1996 two events which Mrs. Kalsakau now argues are crucial to the resolution of the dispute in her favour occurred. First, the instrument of transfer in her favour was registered, notwithstanding the fact that the caution remained in place and the Court proceedings had not been resolved. The second event was a hearing in the Court proceedings which occurred before Chief Justice Vaudin D'Imecourt. Mrs. Kalsakau argues that the merits of the case were decided in her favour by the former Chief Justice on that day.

It is clear from the reasons for judgment of Lunabek ACJ that his Lordship accepted the evidence of Mr. Tamata generally, and in particular his explanation why the instrument of transfer in favour of Mrs. Kalsakau was registered on 12th June 1996. Mr. Tamata said that the registration was forced upon his office by politicians in the Ministry of Lands and other officials working with Mr. Kalsakau. He gave evidence that Mr. Kalsakau had used intimidation and had assaulted Mr. Tamata over the matter. Mr. Kalsakau was convicted of assault in the Island Court over that incident. Mr. Tamata said that on 12th June 1996 the First Secretary of the Ministry of Lands, Mr. Alfred Carlot, Mr. Michael Magawai, Mr. Kalsakau, and another person tried to force him to register the deed. Mr. Tamata refused to do so as he had been twice advised by the Attorney General that registration would be unlawful and should await the resolution of the Court proceedings. After Mr. Tamata refused to register the instrument of transfer, Mrs. Lloyd Russel was forced to do so. Mrs. Russel was described in evidence as a senior Lands Officer. In doing so Mrs. Russel acted without authority from Mr. Tamata, and contrary to his instruction which prohibited the registration.

In his reasons for judgment Lunabek ACJ held that there was a valid agreement for sale of the property between Mrs. Siale and Mr. Kwari. The agreement was initially subject to the approval of the Ministry of Lands. The agreement remained on foot in January 1991 when Mrs. Siale purported to sell the land to Mrs. Kalsakau. As the contract remained on foot, Mr. Kwari was at the time the equitable owner of the lease, and Mrs. Siale had no interest in the lease which she was capable of selling to Mrs. Kalsakau. The agreement for sale between Mrs. Siale and Mr. Kwari became unconditional when the Minister of Lands gave his consent on 7th May 1991.



His Lordship held that under the terms of Section 93 of the Land Leases Act, so long as the caution remained in force, the Director was prohibited from registering any other dealing on the title except in accordance with the provisions of the caution or with the consent in writing of the cautioner or his legal representative. Under the provision of Section 3 of the Land Leases Act, the Director is responsible for administering the Land Records Office. Mrs. Russel had no authority to make the particular entry on the register which she did, and that entry was an irregular procedure on her part. Section 100 (1) of the Act empowers the Court to order cancellation of any registration where the Court is satisfied that the registration has been obtained by fraud or mistake. His Lordship considered that the procedural irregularity on the part of Mrs. Russel fell within Section 100 (1), and accordingly empowered the Court to order cancellation of the registration to Mrs. Kalsakau.

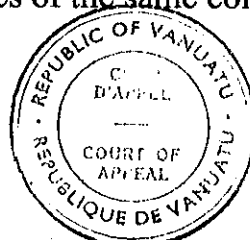
The Notice of Appeal does not specify grounds upon which it is contended that the judgment of Lunabek ACJ should be set aside. This omission is probably to be explained by the fact that Mrs. Kalsakau has encountered difficulties with her legal representation. She was without legal counsel when the matter came on for hearing before this Court, and she was represented by her husband who has in a very full way explained Mrs. Kalsakau's case.

From the papers filed by Mr. Kalsakau in his Appeal Book, and in discussion with him, the Court identified ten topics where Mrs. Kalsakau contends errors occurred. We treat those topics as the grounds of appeal and deal with them one by one.

Improper consolidation

Mrs. Kalsakau contends that the two Supreme Court actions should not have been consolidated. It is argued that the proceedings by Mr. Kalsakau concerned only his monetary or commercial interest whereas the second proceedings concerned Mrs. Kalsakau's interest in law and in equity in the land.

In our opinion, the proceedings were correctly consolidated. At the time that consolidation was ordered, each set of proceedings sought recognition of an equitable interest in favour of the plaintiff. In that respect the proceedings sought to enforce identical interests. The two sets of proceedings were in reality opposite sides of the same coin. The parties



were the same, and the matters in dispute were the same. Plainly the two cases had to be heard together.

In any event, no argument has been advanced as to why the result would have been any different to had the proceedings being heard separately.

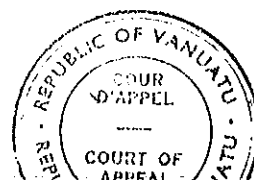
Judgment on the merits of 12 June 1996.

Mr. Kalsakau on his wife's behalf asserts from the bar table that the former Chief Justice decided the merits of the dispute in favour of Mrs. Kalsakau. There is no evidence either on the Court file or from any other source which bears out this surprising assertion. A Summons for Directions had been issued in May 1996 requesting that a trial date be fixed. It was this Summons which the former Chief Justice heard on the 12th June 1996. The Summons was heard in chambers. It is a plain that on 12th June 1996 the Court was not constituted in a way that would have permitted any resolution of the case. Further, Mr. Kalsakau in the papers filed in support of the appeal included a letter from Mr. Silas Hakwa written on 13th June 1996. Whilst Mr. Kalsakau disputes certain assertions in that letter, he did not dispute that part of the letter wherein Mr. Hakwa observed that the proceedings before the former Chief Justice had been adjourned to enable certain matters to be clarified.

The fact that the parties for more than two years thereafter continued to prepare their respective cases for trial, and then conducted the trial before Lunabek ACJ, provides convincing proof that the case had not already been decided.

The agreement between Mr. Kwari and Mrs. Siale is invalid because it was induced by duress and undue pressure exerted by Mr. Kwari.

At trial, and before this Court, Mrs. Kalsakau has contended that the agreement between Mrs. Siale and Mr. Kwari was entered into by Mr. Kwari whilst he was at work as a senior uniformed police officer, in the confines of the police station. Mr. Kalsakau described the nature of the alleged harassment of Mrs. Siale by him in strong terms which reflected political overtones from the days before and shortly after Independence. In her evidence Mrs. Siale says that she only agreed to accept Mr. Kwari's offer because of his intimidatory conduct. The Acting Chief Justice rejected this evidence. He had the benefit of seeing and hearing the witnesses at trial, and an Appeal Court will not interfere with findings

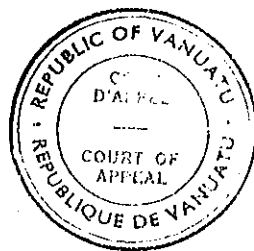


as to credit made by the trial judge save in an exceptional case where there is independent evidence which shows that the findings as to credit made by the trial judge cannot be supported.

In the present case there is no such evidence. On the contrary, there is information from other sources which strongly suggest that Mrs. Siale's evidence was a recent invention that should not be accepted. On 12th July 1994 Mrs. Siale on her own behalf and on behalf of Mr. Maiau filed a Defence and Counter Claim in action No. 156 of 1993. This would have been the occasion for Mrs. Siale to assert that the agreement with Mr. Kwari was unenforceable because it was entered into under duress. However no such suggestion was made. On the contrary, by paragraph 1 of her Defence she admits that she entered into the agreement on 17th September 1990 alleged by Mr. Kwari and received the purchase price of VT1,300,000, and paragraphs 1, 2 and 3 of her Counterclaim go on to read:-

- "1. The First Defendant (Mr. Maiau) who at the material time lived in New Caledonia has had an accident in or about early 1990 and urgently needed money thus authorising the quick sale of his Property described as Title No. 11/OA22/35 (The Property).*
- 2. The Plaintiff offered to purchase the Property on or about early September, 1990 and a consent to transfer deed was formally executed in favour of the Plaintiff.*
- 3. The Plaintiff requested possession of the property to enable repayment of his loan by collection of rent from tenants on the property and upon payment of consideration in the amount of One Million Three Hundred Thousand Vatu (1,300,000 VT) on 17 September, 1990 he was allowed immediate possession."*

It was argued that the fact that the purchaser (Mr. Kwari) prepared the agreement for sale rather than the vendor shows that there must have been duress. This is an argument without substance. Any party may draw a contract of sale, and without more, no inference of duress arises against the party who prepared the document.



The agreement of 17th September 1990 was not in accordance with the Land Leases Act as required by Section 22.

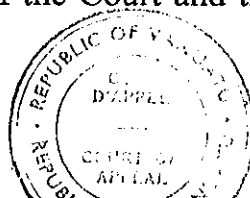
On Mrs. Kalsakau's behalf it is alleged that the terms of the lease for the land expressly required the lessee to apply to the lessor for a consent before actually transferring his title. The lease is not in the evidence, but for the purposes of deciding the argument we accept that the lease contained such a term. Mr. Kalsakau argues that such consent was not given by the lessor before Mrs. Siale entered into the agreement for sale with Mr. Kwari, and therefore a fundamental breach of the obligations of the lessee occurred.

This submission misunderstands the provisions of the Land Leases Act dealing with the requirement of consent. It will be remembered that the agreement for sale date 17th September 1990 was made subject to the consent of the Minister of Lands. A conditional contract of this kind is common place. Far from being contrary to the Act, it acknowledges the requirements of the Act. Sections 35 and 36 deal with the requirement of consent. Those sections provide that an agreement for the disposition of an interest in the land is not to be registered until the relevant consent is given. These sections do not render invalid an agreement entered into before the consent is given. The agreement is valid notwithstanding the lack of consent, but may not be registered until the consent is forthcoming in accordance with Section 77 or 78 of the Land Leases Act, as the case may be.

The late Mr. Kwari made no attempt to stop the registration of the instrument of transfer to Mrs. Kalsakau.

As a matter of fact this argument is not born out by the evidence. Further, Mrs. Kalsakau's case does not show how this fact would be relevant to the issues in the case even if it were correct. Even if Mr. Kwari took no action, no estoppel arises because Mrs. Kalsakau has not shown that she altered her position in any material way in reliance upon Mr. Kwari's inaction.

The submission is wrong in fact as Mr. Kwari lodged a caution on 20th February 1991. Thereafter he was entitled to expect that his interest would be respected in accordance with the requirements of the Land Leases Act. When the caution was warned on 6th December 1993, Court proceedings were commenced on his behalf on 24th December 1993. Thereafter the matter was in the hands of the Court and the law did not



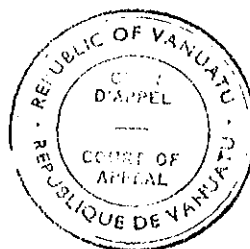
require Mr. Kwari to take any further or other action to protect his interests. The law granted that protection through the continued presence of the caution registered on the title.

As part of this submission it was argued that the evidence of Mrs. Kalsakau and Mrs. Siale to the effect that on 23rd January 1991 Mr. Kwari consented to Mrs. Siale signing a further agreement for sale in favour of Mrs. Kalsakau is a relevant consideration. This evidence was put to Mr. Kwari in the course of his cross-examination. He said he remembered no such event or discussion, and found it difficult to accept that he would have consented to the second agreement for sale as he had not been repaid the VT1,300,000 which he had given to Mrs. Siale. The Chief Justice rejected the evidence of Mrs. Kalsakau and Mrs. Siale, and the improbability of their evidence on this topic amply justified this rejection.

Payment of outgoings by Mrs. Kalsakau.

Since the registration of the instrument of transfer in her favour in 1996 Mrs. Kalsakau has made a number of payments in respect of municipal property taxes and the government land rent, including the payment of certain arrears in respect of the period prior to 12th June 1996. On her behalf it is argued that these payments provide evidence that she is in law the owner.

This submission cannot be accepted. Once the dispute between the parties was placed before the Court, which occurred when Civil Action No. 156 of 1993 and 45 of 1994 were commenced, the resolution of the dispute was a matter for the Court based on the evidence available about the agreements and conduct of the parties up until December 1993. Actions by the parties thereafter, particularly actions which have the colour of an attempt to improve the position of the party, are not relevant to the resolution of the underlying dispute before the Court. Mrs. Kalsakau has apparently chosen to pay the outgoings on the property. The fact that she has done so is a reflection of the fact that the property is now registered in her name. However the payments cannot decide the validity of the registration.

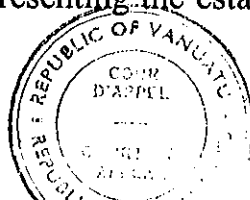


Lunabek ACJ did not investigate relationships.

In final submissions placed before Lunabek ACJ, and before this Court, Mr. Kalsakau has identified numerous relationships between people who have played some part in aspects of the dispute. It is contended that these relationships are so suggestive of collusion between numerous government and court officers, and other people involved, that some sort of fraud should be inferred. By way of example, it has been contended that the fact that court staff refused to accept certain written documents from Mr. Kalsakau is indicative of such a fraud.

The alleged relationships, even if some of them exist in fact, do not give rise without more to an influence of fraud. Moreover, the matters asserted by Mr. Kalsakau are irrelevant to the issues to be decided by the Court. In our opinion the Acting Chief Justice correctly identified the essential matters upon which the proceedings turn. Those matters are the fact that there was an agreement entered into between Mrs. Siale and Mr. Kwari on 17th September 1990 when the consideration for the sale was paid in full. That contract was still on foot when the agreement between Mrs. Siale and Mrs. Kalsakau was signed on 23rd January 1991. The contract between Mrs. Siale and Mr. Kwari was initially conditional but became unconditional on 7th May 1991. The equitable interest passing to Mr. Kwari under that agreement was protected by the caution registered on 23rd February 1991. Finally, the registration of the instrument of transfer in favour of Mrs. Kalsakau was the result of a procedural irregularity which occurred on 12th June 1996. The alleged inferences of fraud or improper association or conduct alleged by Mr. Kalsakau and said to arise from the relationship of various people, do not bear on these essential facts. The assertion of relationships, and, the impropriety said to arise from them, are therefore irrelevant to the essential issues, and cannot assist the case of Mrs. Kalsakau.

The complaint by Mrs. Kalsakau that documents which she considers are important to her case were not received by the Registrar of the Court, or were not received in the course of trial, whatever the reason, raises a question of procedural fairness. To the limited extent that it is possible on the information before this Court to investigate why objection may have been raised to the documents it seems probable that the documents were rejected on the ground of relevance or form, and to that extent we think rejection was justified. However to ensure that Mr. Kalsakau had the information before this Court which he wished to rely upon in support of arguments on his wife's behalf, the Court of Appeal received all the documents proffered by him. Mr. Joel, representing the estate of the late



John Kwari, raised no objection to this course. Accordingly we have had regard to those documents, and to some extent we have taken them into account in giving the history of events recited at the outset of this judgment. Having considered the documents, we do not think that the outcome of the trial was in any respect prejudice by the upholding of objections taken to the admission of various of the documents now in the appeal book.

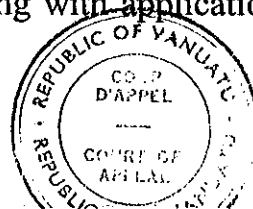
The Minister of Lands could not validly give a consent on 7th May 1991.

It is argued that because the Minister of Lands had granted consent to a proposed transfer of the land to Mrs. Kalsakau on 23rd January 1991, the Minister lacked the power thereafter to grant a consent to a proposed transfer of the same land to any other person. No statutory provision was drawn to our attention which could support this contention. The submission, if correct would have surprising consequences. It is inevitable from time to time that parties will be contemplating a proposed transfer of a leasehold interest, and will seek consent from the Minister. Even if consent is given, there is no guarantee that the transaction will proceed. The purchaser may not be able to raise the finance, or a host of other factors might occur which cause one or other of the parties to renege, or for the parties to agree to cancel their agreement. There is no statutory provision which requires the parties in these event to notify the Minister that the transaction will not proceed.

The purpose of the requirement for consent is to enable the Minister to approve the suitability of the transferee and the purpose of the transfer. That purpose does not suggest any continuing requirement for the parties or the Minister to ensure that such a transfer actually occurs. It may not happen. In that event, if the registered proprietor proposes to effect the transfer to another purchaser, then plainly the purpose of the Act requires that the Minister approve the new purchaser. The Act suggests no reason why the Minister should lack power to again grant consent because an earlier consent has been granted. In our opinion this submission is without substance.

Failure of the Director of Land Records to follow procedures.

It is argued on Mrs. Kalsakau's behalf that Mr. Tamata did not follow normal Land Records Office procedures in dealing with applications by



Mrs. Kalsakau to register transfer instrument and in processing the application made on the 22nd September 1992 by Mrs. Kalsakau to remove Mr. Kwari's caution. Even if there were procedural irregularities by Mr. Tamata of the kind alleged, that would be of no assistance in this case to Mrs. Kalsakau. The single central fact is that a caution was registered on the title before Mrs. Kalsakau's transfer instrument, and that her transfer should not have been registered whilst the caution remained in place, and whilst the dispute remained to be determined in the Supreme Court. Had there been irregularities as alleged, at the time Mrs. Kalsakau may have been able to take action against the Director to compel him to proceed in accordance with law. However, no action was taken, and once the caution was registered, the law required that it be complied with.

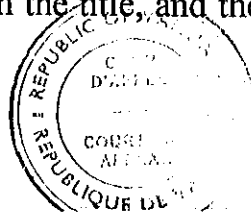
In any event we are not satisfied on the evidence that procedural irregularity by Mr. Tamata occurred. It is argued that Mr. Tamata should not have made the requisitions which he did on 7th February 1991 but should have proceeded immediately to register Mrs. Kalsakau's transfer instrument. The making of requisition at that stage was entirely appropriate. We note that the information placed before this Court from Mr. Tarosa confirms that the request for a copy of Mrs. Siale's power of attorney was a regular request.

It is also argued that Mr. Tamata delayed in processing the application made on 22nd September 1992 to remove the caution. That submission however is contrary to the evidence of Mr. Tamata who explained why the request was rejected. The learned Chief Justice accepted Mr. Tamata's evidence, and no basis has been shown why this Court should depart from that finding of fact.

No evidence to justify rectification under Section 100 (1) of the Land Leases Act.

The ultimate question for the Acting Chief Justice, and for this Court, is whether the evidence before the Court justifies an exercise of power under Section 100 (1) of the Land Leases Act which empowers a Court to order rectification of the register where it is satisfied that any registration has been obtained made or admitted by fraud or mistake.

In our opinion the finding made by the Acting Chief Justice that the procedure followed for the registration of Mrs. Kalsakau's title was irregular was inevitable on the evidence. No other conclusion was possible. Whilst the caution remained on the title, and the proceedings in



the Supreme Court remained to be determined, any registration of an interest inconsistent with the caution was irregular and contrary to law.

This Court in *ANZ (Vanuatu) Limited -v- Gougeon & Others, Civil Appeal Case No. 6 of 1998*, has held that procedural irregularity of this kind empowers a Court to rectify the register under Section 100 (1). In that decision the Court of Appeal reviewed authorities from a number of other jurisdictions, and relied in particular upon statements made in the Supreme Court of Papua New Guinea in *Emas State Pty. Ltd. -v- John Mea (1993) PNGLR 215* by Amet J. (as he then was) at p. 219 and Salika J. at 228. Those statements concern the effect of procedural irregularities in the registration of an interest on a title under legislation similar to that which applies in this Republic. It is worth repeating the observations of the two judges upon which the Court of Appeal relied.

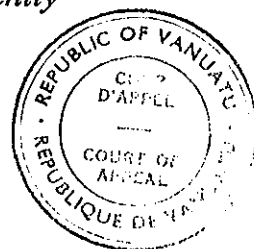
Amet J. at 219 said:

“The issue in this case raise for consideration the principle of indefeasibility of title under the Torrens land registration system that hitherto has been applied in this jurisdiction. I do not believe that the system is necessarily appropriate in circumstances such as this, where an individual land owner is deprived of his title to land by irregular procedure on the part of officials and a department of the State, to the advantage of a private corporation. I do not accept that quite clear irregularities and breaches of the statutory provision should remain indefeasible. I believe that, although those irregularities and illegalities might not amount strictly to fraud, they should, nevertheless, still be good grounds for invalidating subsequent registration, which should not be allowed to stand. To not do so would be harsh and oppressive against the innocent individual leaseholder, such as the first respondent.”

And at p. 228 Salika J. said:

“I agree, in principle, that where a title has been registered under one’s name, it is not capable of being annulled, except where title has been acquired through fraud. I think other exceptions suitable for Papua New Guinea circumstances should be included such as:-

1. where title has been registered fraudulently



2. *where title has been registered while a court or tribunal is deliberating on the subject land*
3. *where title has been registered under influence of position of power or money*
4. *where title has been registered under circumstances giving rise to possible breach of principles of natural justice.*

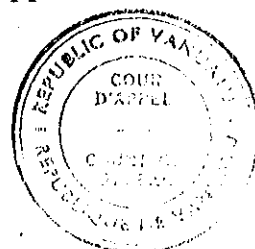
I lay out these conditions because land is a very important commodity in this country. Government land is very scarce in this country, and people or corporations applying for lease of government land must be seen to be allocated such land without any fraud or outside influence, but simply on the merits.”

These statements of principle directly cover irregular procedures on the part of officials and a Department of the State in bringing about a registration that should not have been made. It should be noted that Salika J. also extended correction to a situation where a registration has occurred while a Court is deliberating on the subject land. That principle also applies in this case.

In our opinion no error has been demonstrated in the judgment of the Acting Chief Justice. For the above reasons, this appeal must be dismissed. Mrs. Kalsakau must pay the costs of the third respondent Mr. John Kwari.

This judgment confirms the order of the Acting Chief Justice made on 22nd December 1999 that the Director of Land Records rectify title No. 11/OA22/35, in accordance with Section 100 of the Land Leases Act, and register the land in the name of John Kwari. We direct that the sheriff serve upon the Director of Land Records copy of both the Judgment of the Acting Chief Justice and of this Court.

The orders of this Court mean that Mrs. Kalsakau has no interest in the land, yet she has in recent years paid outgoings on the property. She is entitled to be reimbursed for these expenses by the Estate of John Kwari. We propose to order that within 28 days Mrs. Kalsakau file an Affidavit in Civil Appeal Case No. 02 of 2000 setting out, with supporting receipts or other evidence of payment, all monies paid by her which are reasonable and proper outgoings on the land. These outgoings are to be set off against the order for costs of this appeal to which the Estate of John Kwari is entitled.



In the course of pre-trial procedures, for a time the sheriff of the Supreme Court collected rents for the land, and the rent received is presently in Court. This sum should be paid immediately to the Estate of the late John Kwari.

The formal orders of the Court are:-

1. Appeal dismissed;
2. Direct the Registrar of the Court to pay to the Estate of John Kwari deceased all the monies presently held on account of Civil Case No. 156 of 93.
3. Order that Mrs. Kalsakau pay to the Estate of John Kwari deceased the costs of this appeal.
4. Direct that within 28 days the appellant Betty Kalsakau file in Civil Appeal Case No. 02 of 2000 an affidavit sworn by her setting out, with supporting receipts or other evidence of payment, all monies paid by her which are reasonable and proper outgoings on the land comprised in Title No. 11/OA22/35. The outgoings subject to proper proof, shall be set off against the costs payable by the appellant to the respondent under Order 3 hereof.
5. Liberty to all parties of apply to a single Judge of the Supreme Court of the Republic of Vanuatu.

Dated at Port Vila, this 27th Day of October, 2000.

ON BEHALF OF THE COURT


.....
Daniel FATIAKI, J.

