

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

CIVIL APPEAL CASE NO. 03 of 2012

BETWEEN: **DAVID LIVINGSTONE**
 Appellant

AND: **JOHN TARI MOLBARAV**
 First Respondent

AND: **DANIEL LOY**
 Second Respondent

AND: **THE REPUBLIC OF VANUATU**
 Third Respondent

Coram: Hon. Chief Justice Vincent Lunabek
 Hon. Justice Bruce Robertson
 Hon. Justice John von Doussa
 Hon. Justice Daniel Fatiaki
 Hon. Justice Robert Spear
 Hon. Justice Dudley Aru

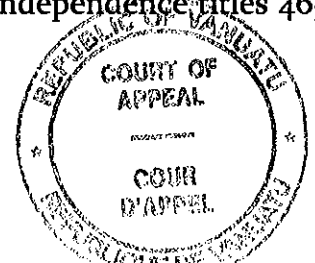
Counsel: Robin Tom Kapapa for the Appellant
 Felix Laumae for the First Respondent
 George Nakou for the Second Respondent
 Frederick Gilu for the Third Respondent

Hearing: 11th July 2012

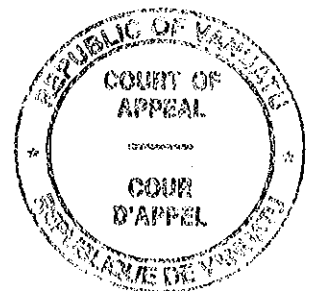
Judgment: 19th July 2012

JUDGMENT

1. This is an appeal against the decision of Saksak J in Civil Case No 34 of 2007 where the court in exercising its powers under Section 100 of the Land Leases Act [CAP 163] ordered rectification of the Lease register by cancelling lease title 04/2641/055 which covers some 19 hectares of land on North East Santo.
2. The appeal is advanced on the basis that his Lordship erred in law and fact in:
 - a) holding that David Livingstone was not an Alienator and had not applied for an administration of estate under the relevant will when he had a valid will declared by Judge Brudo of the Tribunal de Premiere Instance of New Hebrides and was a valid and legally registered alienator of pre independence titles 465 and 466;

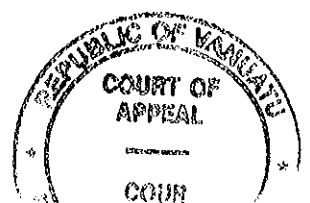


- b) declaring that Mr. Livingstone did not comply with legal procedures in acquiring the lease title 04/264/055, when in fact he was the Alienator of old land titles 465 and 466 and registered the lease with declared custom owners of land at Sarautu area, the deceased Mr Daniel Loy;
 - c) declaring that John Tari Molbarav had succeeded in his claim, when in the Land Appeal Case No 2 of 28 July 1986 the Supreme Court, amongst other things, rejected Timothy's (John Tari Molbarav's father) claim to any land in Sarautu. The Land Appeal Case had declared Daniel Loy as the Custom Owner of certain lands in Sarautu area;
 - d) Holding that the judgment of 28 July 1986 did not cover pre independence title 465. The appellant also sought to rely on new evidence from chief Kavcor Was who was the advisor at that sitting to support this position;
 - e) declaring the survey plan as invalid, and that the registered lease title 04/2641/055 was obtained by fraud and mistake when in fact John Tari Molbarav had no standing to bring his action;
 - f) accepting that lease title 04/2641/055 granted was obtained by fraud and mistake;
 - g) giving so much weight to the interpretation of the Land Committee of 15 April 1982 when in law the Appeal decision of 1986 over ruled all other land decisions and in failing to uphold that the lease he had registered was a genuine lease complying with all the requirements of the Republic of Vanuatu;
 - h) not recognizing the alienator status of David Livingstone which gave him rights including the right to obtain a lease and compensation for all improvements.
3. This Appeal was listed before this Court for the April session this year. It was stood over as first there was difficulty identifying what land was the subject of lease title 04/2641/055. Secondly, some documents were filed very late leaving the court little time to be fully appraised with the case to hear it in the time remaining. The matter in the meantime was returned to the listing Judge to address these concerns with Counsel in readiness for the hearing of the appeal in this session.
4. The facts as established by Saksak J provides a chronology of events which led up to the issuing of lease title 04/2641/055. For the purposes of this appeal it is important to note the following facts:



Chronology

- 15 September 1982- the Minister of Lands issued a certificate of registered negotiator to David Livingstone in respect of land known as titles 465 and 466 for the purposes of negotiating a residential lease with Timothy Molbarav being the representative of family Molbarav who were asserted to be the custom owners.
 - 30 September 1982- David Livingstone was approved by the Director of lands as an Alienator.
 - 12 December 1984- the Santo/Malo Island Court made a decision giving a disputed parcel of land described as part of title 479 called Sarautu to Timothy Molbarav, Paul Livo and Tangis Sisi.
 - 28 July 1986- the Supreme Court in a decision of Cooke CJ found that Daniel Loy was the true custom owner of Sarautu plantation i.e. part of title 479 which was in dispute.
 - 12 April 2007- a Commercial Tourism Lease was registered as lease title 04/2041/055 between Daniel Loy as lessor and David Livingstone as lessee.
 - 3 August 2007- John Tari Molbarav filed his claim seeking rectification of the lease register by cancelling the lease on that title on the basis of fraud and mistake.
5. Despite the multitude of grounds raised by Mr. Livingstone on his appeal, primarily they can be dealt with together under three broad issues:
- i. Was there a valid will under which Mr. Livingstone had rights?
 - ii. Was Mr. Livingstone an alienator for the purposes of the Alienated Land Act [CAP 145]?
 - iii. Was lease title 04/2641/055 properly acquired?
6. Before dealing with these issues, a preliminary matter needs clarification to put into perspective the current proceedings. It is the decision by Cooke CJ of 28 July 1986.
7. It is clear from that decision and the plan attached to it, that the Court was dealing with disputed Land which was part of title 479 called Sarautu. This was the subject of the appeal from the Santo/Malo Island Court, but titles 465 and 466 which were the subject of the lease in dispute were separate title's covering different areas from that in the present case.
8. Saksak J confirmed this in his findings after a site visit to the area concerned and held that it was "*abundantly clear that it (title 479) falls outside of the lands contained in the*



lease title granted to David Livingstone.” This conclusion is inevitable when the Supreme Court judgment is carefully analyzed and the original decision from the Santo/Malo Island Court is assessed alongside the maps which are on the file.

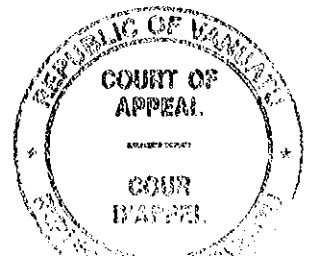
9. This Court therefore need not concern itself further with Cooke CJ’s decision. Mr. Laumae has recently filed a late Notice of Appeal in respect of that decision. We cannot understand why he would want to challenge that decision but all we need to say to that is it is irrelevant to the matter now before us. Mr. Laumae needs to take into account the time factor (26 years) which has lapsed since the handing down of that decision before trying to progress his appeal.

Issue 1- Was there a valid will under which Mr. Livingstone had rights?

10. This question is the starting point for Mr. Livingstone’s appeal as that is the basis upon which he claim’s alienator status.
11. Saksak J found that there was no evidence of any application for the administration of the estate of the late Mr. Leroux under the purported will and accepted the arguments made on behalf of Mr. Molbarav.
12. Mr. Livingstone argues that he has a valid will and referred the Court to a copy of the document at page 204 of the Appeal Book. As the document was in French, an English translation was provided.
13. Having considered both documents two things are clear. The document which Mr. Livingstone is relying on is not a will. It is an affidavit by a witness filed in Court attesting to the fact that there was a will under which the deceased Alexandre Raoul Leroux appointed David Livingstone Malof as his sole legatee. Although not the best evidence, in the absence of any evidence to the contrary we would have been minded to accept it as evidence of the fact attested to.
14. This could be a basis upon which Mr. Livinstone could gain alienator status and be able to apply first to be registered as an alienator and secondly to apply for a lease over the area previously held by Mr. Leroux.

Issue 2- Was Mr. Livingstone an alienator for the purposes of the Alienated Land Act [CAP 145]?

15. Saksak J found that the Appellant had not adhered to legal procedures in acquiring the disputed lease as an alienator.
16. Section 2 of the Alienated Land Act provides for the keeping of a register of alienators; Section 3 provides for applications to be registered as alienators. Section 4 provides for the registration of an alienator and section 5 provides for refusal of Application and referral to Court. Sections 4 and 5 (1) state as follows:-



"4. Registration of alienator

(1) If the Minister is satisfied that an applicant under section 3 is an alienator he shall register him as an alienator.

(2) An alienator issued with a certificate of registered negotiator before the coming into force of this Act shall forthwith after its coming into force be registered as an alienator.

5. Refusal of application and referral to Court

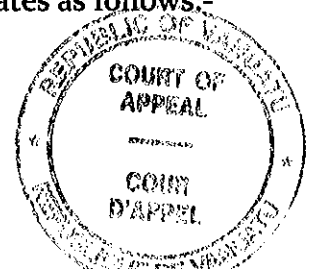
(1) When the Minister is not satisfied that an applicant under section 3 is an alienator, he shall notify the applicant in writing that he refuses to register the applicant as an alienator, and in such notification shall give the reasons for his refusal.

(2) When the Minister has notified an applicant of his refusal in accordance with subsection (1) or failed to register an applicant within 60 days of the receipt of an application, the applicant may within 30 days of the refusal or the expiry of the 60 days as the case may be, refer the matter to the Supreme Court in accordance with section 4 of the Land Reform Act [Cap. 123]."

17. On 30 September 1982, the Director of Rural Lands informed Mr. Livingstone that the Minister had approved his Application as an alienator. Confirmation of the approval on the document is shown by a line crossing out the refusal in section B.
18. For the purposes of the Act, Mr. Livingstone was formally approved as an alienator. The register reflects the Appellant being alienator of lands held by Raoul Alexandre Leroux (deceased) under title 465 for which Timothy Molbarav was the declared custom owner. The certificate for lease was issued on 15th September 1982. We see no reason why this registration cannot be accepted for what it purports to do on its face. But it only leads to the fundamental issue concerning the manner in which the disputed lease was acquired.

Issue 3- Was lease title 04/2641/055 properly acquired?

19. The certificate of registered negotiator was issued to Mr. Livingstone on 15 September 1982 pursuant section 6 of the Land Reform Act [CAP 123] for the purposes of negotiations with custom owners in respect of land titles 465 and 466. Secondly the document clearly specified that the custom owner of the Land was Family Molbarav and that their authorized representative was Timothy Molbarav. Thirdly the object for the negotiation was for a residential lease.
20. This clearly complies with section 6 of the Land reform Act which states as follows:-



“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 –

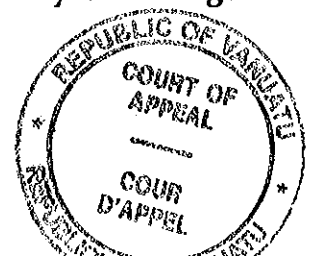
(a) state the names of the applicant and of the custom owners;

(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.”

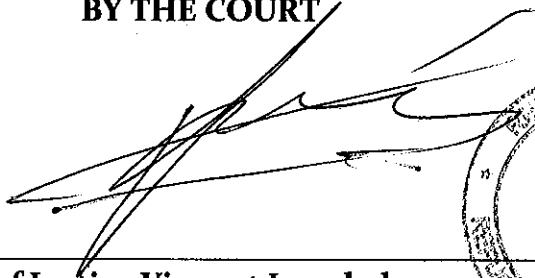
21. Despite the specific terms of the negotiation certificate the lease title 04/2641/055 was registered as a commercial lease. The lessor was shown as Daniel Loy on the basis that he was the custom owner with David Livingstone as lessee. There is no evidence that a negotiator certificate was obtained for negotiations with Daniel Loy as custom owner. This change of approach was apparently predicated on the basis that Daniel Loy was the custom owner under the Cooke CJ decision of 1986 but as noted that case was about other land.
22. Similarly there is no evidence that the negotiator certificate was obtained for negotiations with Daniel Loy for any lease let alone a commercial lease. The only negotiator certificate issued was for negotiations for a residential lease with Timothy Molbarav who was asserted to be the declared custom owner.
23. It is worth noting that the evidence is that Timothy Molbarav specifically refused to grant Mr. Livingstone a lease.
24. We agree with Saksak J that such overwhelming irregularity points to the existence of fraud or mistake in obtaining lease title 04/2641/055 and accordingly the lease had to be set aside.
25. The proposed new evidence from Chief Kavcor Was could not make a difference as the 1986 Judgment is clear and unambiguous on its face.
26. We reject the submission that Mr. Molbarav lacked standing to bring the proceeding. If nothing else he had interests under section 17 (g) of the Land leases Act as a person in occupation. He was also the named custom owner in the application by Mr. Livingstone



when he acquired his status as an alienator. He was clearly a person who had a direct and unquestionable interest in the matter.

27. The challenges about the identity of the surveyor and the substitution of the name Daniel for David at some point are insubstantial. The case turns on much more fundamental matters than those.
28. The appeal must be dismissed. The Respondent is entitled to his costs to be taxed failing agreement.

BY THE COURT



Hon. Chief Justice Vincent Lunabek

